

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.

Banking Department

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Exempt Organizations; Subsidiaries of Exempt Organizations; Exempt Mortgage Products

I.D. No. BNK-35-11-00001-P

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

Proposed Action: Amendment of Part 39 of Title 3 NYCRR.

Statutory authority: Banking Law, section 14 and art. 12-D

Subject: Exempt Organizations; Subsidiaries of Exempt Organizations; Exempt Mortgage Products.

Purpose: To provide for state licensing and registration for mortgage bankers and brokers that are consolidated subsidiaries of exempt organizations and to eliminate or modify exemptions that apply to mortgage bankers or brokers dealing in certain loan products.

Text of proposed rule: Section 39.1 Purpose.

The purpose of this Part is to define the entities engaged in the business of soliciting, negotiating, placing, processing or making mortgage loans secured by a first or junior lien [which] *that* will be exempt from the registration or licensing requirements of [article] *Article* 12-D of the Banking Law, and to define mortgage loan products, the brokering or funding of which do not require registration or licensing *as a mortgage banker or mortgage broker* under [article] *Article* 12-D.

39.2 Definitions.

As used in this Part:

(a) The term exempt organization shall mean any insurance

company, banking organization, foreign banking corporation licensed by the [superintendent] *Superintendent* or the Comptroller of the Currency to transact business in this State, national bank, Federal savings bank, Federal savings and loan association, Federal credit union, any bank, trust company, savings bank, savings and loan association, and credit union organized under the laws of any other state; any instrumentality created by the United States or any state with the power to make mortgage loans and any entities exempt pursuant to [sections] *Section* 39.4 of this Part. [The term does not include any nonbanking subsidiary of a bank holding company. However, an exempt organization shall not be relieved of the advertising, solicitation, application and commitment procedures and disclosure requirements or penalties set forth in article 12-D of the Banking Law and Part 38 of this Title.]

[(b) The term bank holding company shall mean a business corporation which is deemed to be a bank holding company, savings bank holding company, or savings and loan holding company for purposes of Federal or any State law. The term bank holding company shall not include a bank holding company which is a banking organization.]

[(c) The term consolidated subsidiary shall mean a subsidiary of an insurance company, banking organization, foreign banking corporation licensed by the superintendent or the Comptroller of the Currency to transact business in this State, national bank, Federal savings bank, Federal savings and loan association, Federal credit union, or of any bank, trust company, savings bank, savings and loan association, or credit union organized under the laws of any other state; or any instrumentality created by the United States or any state with the power to make mortgage loans as to which consolidated financial statements are issued with its parent pursuant to title 26 of the United States Code.]

[(d) The term credit line mortgage shall mean any mortgage or deed of trust, other than a mortgage or deed of trust made pursuant to a building loan contract as defined in subdivision 13 of section 2 of the Lien Law, which states that it secures indebtedness under a note, credit agreement or other financing agreement that reflects the fact that the parties reasonably contemplate entering into a series of advances, or advances, payments and readvances, and that limits the aggregate amount at any time outstanding to a maximum amount specified in such mortgage or deed of trust.]

[(e)](b) The term exempt product shall mean any mortgage loan product meeting the requirements of section 39.5 of this Part. The brokering or funding of such products shall not be a business activity requiring registration or licensing pursuant to [article] *Article* 12-D, nor shall such products be subject to the advertising, solicitation, application and commitment procedures, disclosure requirements or penalty provisions set forth in article 12-D of the Banking Law and Part 38 of this Title.

[(f) The term home improvement loan shall mean a loan made pursuant to subdivision 4 of section 108 of the Banking Law.]

[(g) The term installment loan shall mean a loan made pursuant to subdivision 4 of section 108 of the Banking Law.]

[(h)](c) As used in this Part, terms defined in [General Regulation section 38.1 of this Title] *Section 38.1 of the General Regulations of the Banking Board* shall have the same meaning as prescribed therein.

39.3 General provisions.

(a) An entity not exempt by *New York law* [statute] which shall otherwise not establish its exempt status in accordance with this Part

shall become licensed or registered in accordance with the procedures described in Part 410 of this Title prior to April 1, 1988. *Entities exempt under a prior version of this Part that are no longer exempt shall file an application to become licensed or registered prior to {insert date that is 90 days after the effective date of the amendments hereto} and shall become licensed or registered by {insert 180th day after such effective date}, or such later date as the Superintendent may approve for good cause.*

(b) *An exempt organization shall not be relieved of the advertising, solicitation, application and commitment procedures and disclosure requirements set forth in Article 12-D of the Banking Law and Part 38 of this Title or the penalties for violations of such requirements set forth in the Banking Law. An [Entities] entity exempt from [registration or] licensing or registration as a mortgage banker or mortgage broker shall not be subject to periodic examination by the Banking Department but may at any time become subject to special investigation. Accordingly, consistent with section 597 of the Banking Law, each such [entities] entity shall keep [their] its books and records in a manner which will allow the Superintendent to determine whether such [exempt organization] entity is complying with the advertising, solicitation, application and commitment procedures and disclosure requirements prescribed in Part 38 of this Title, except for books and records relating to exempt products. Information and forms regarding recordkeeping can be obtained at: Banking Department, Mortgage Banking Division, at the address set forth in section 1.1 of Supervisory Policy G 1. Books and records shall be available for inspection by the Superintendent in accordance with Superintendent's Regulation Part 410 of this Title.*

39.4 [Exempt organizations] *Organizations Exempt from Licensing or Registration*; conditions precedent to exemptions from registration or licensing requirements of [article] *Article 12-D.*

[(a) Consolidated subsidiaries.]

[(1) Prior to commencing business in this State, a consolidated subsidiary shall file an undertaking to the superintendent containing the following provisions:]

[(i)that the consolidated subsidiary shall maintain its books and records relating to the making of mortgage loans for a three-year period in a manner permitting inspection by the superintendent;]

[(ii)that the superintendent shall be authorized to inspect such books and records upon reasonable notice;]

[(iii)that the consolidated subsidiary shall bear all the costs and expenses relating to the inspection; and]

[(iv)that in the case of a consolidated subsidiary of an out-of-state exempt organization, it designated the superintendent as agent for service of process in connection with any transaction subject to the requirements of the Banking Law and regulations.]

[(2) Prior to commencing business in this State, the consolidated subsidiary shall provide the superintendent with an undertaking affirming that the advertising, solicitation, application and commitment procedures and disclosure requirements of article 12-D of the Banking Law and Part 38 of this Title shall be applied to all mortgage loans secured by real property located in New York State except for exempt products offered by the subsidiary.]

[(3) When so required by the superintendent, the consolidated subsidiary shall furnish copies of its mortgage loan forms and other documents to the Banking Department for review.]

[(4) Only consolidated subsidiaries shall be eligible for exemption from licensing or registration. Wholly owned subsidiaries shall be deemed to be consolidated subsidiaries.]

In addition to the entities defined as exempt organizations in Part 39.2 above, the following are exempt from licensing or registration as a mortgage banker or mortgage broker under Article 12-D of the Banking Law or the rules and regulations promulgated thereunder:

[(b)](a) Loan [servicers and] investors. Persons who [act as servicers for mortgage loans, or persons who] acquire [such] mortgage loans from lenders for investment but who do not make mortgage loans shall not be subject to the registration or licensing requirement of article 12-D of the Banking Law or the rules and regulations promulgated thereunder.

[(c)] (b) Licensed real estate brokers. Licensed real estate brokers who or which do not accept a separate fee (in addition to any earned real estate brokerage fee), directly or indirectly, for services performed in connection with the brokering of a mortgage loan shall not be required to be registered as a mortgage broker.

[(d)](c) Mortgage bankers engaged in mortgage brokerage activities. Section 590 of the Banking Law provides that a license to engage in the business of making mortgage loans shall be deemed to include the authority to engage in the business of soliciting, processing, placing and negotiating mortgage loans. No additional registration with the department shall be required to engage in the mortgage brokerage business, nor shall additional registration fees be required of any mortgage banker. [Nothing in either of this Part or Part 38 of this Title or article 12-D of the Banking Law shall require the employees of an exempt organization to obtain a license or registration certificate when assisting the exempt organization in the performance of business activities of the type described in article 12-D.]

[(e)](d) Entities offering mortgage loan products [which are] exempt under section 39.5 of this Part. Entities offering only mortgage loan products [which] that are exempt products pursuant to section 39.5 of this Part are exempt from the registration and licensing requirements of Article 12-D of the Banking Law and Part 410 of this Title.

[(f)](e) Not-for-profit organizations. Not-for-profit organizations may be eligible for exemption from the registration and licensing requirements of article 12-D of the Banking Law. Such organizations which seek exemption may submit a letter application to the [mortgage banking division] *Mortgage Banking Division* together with such information as may be prescribed by the [superintendents] *Superintendent.*

39.5 Exempt products.

The following loan products are exempt from all of the requirements of [article] *Article 12-D* of the Banking Law and Part 38 of this Title *for the licensing or registration of mortgage bankers and mortgage brokers:*

(a) purchase money mortgages extended by a seller [or an organization controlled by a seller of residential real property] to buyers thereof[.], *where the seller is an individual, estate or trust that sells not more than three properties in any 12-month period, provided that the seller has not constructed or acted as a contractor for the construction of a residence being sold.* [Included within this exemption are loans made by sponsors of cooperative and condominium developments to unit purchasers, and loans made by organizations controlled by sponsors of cooperative and condominium developments to unit purchasers;]

(b) construction loan mortgages;

(c) relocation mortgage loans. A mortgage loan made by an applicant's employer if the purpose of the loan is to assist the employee to relocate;

(d) any product offered as a mortgage loan by an instrumentality created by the United States or any state; *and*

[(e) credit line mortgages, installment loans and home improvement loans; and]

[(f)](e) such other loan products [which] as may be specifically exempted upon application to the [superintendents] *Superintendent.*

Text of proposed rule and any required statements and analyses may be obtained from: Sam L. Abram, Secretary of the Banking Board, New York State Banking Department, One State Street, New York, NY 10004-1417, (212) 709-1658, email: sam.abram@banking.state.ny.us

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

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

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

Regulatory Impact Statement

1. Statutory authority.

Section 14 of the Banking Law, among other things, authorizes the Banking Board to make, alter and amend resolutions, rules and regulations not inconsistent with law.

Article 12-D, Section 590 (3) of the Banking Law authorizes the

Banking Board to promulgate rules and regulations consistent with the purposes of Article 12-D.

Article 12-D, Section 590 (2) of the Banking Law requires mortgage bankers and mortgage brokers to be licensed and registered, respectively, by the Superintendent. It also states that licensing provisions will not apply to exempt organizations, nor to any entity exempted in accordance with regulations promulgated by the Banking Board thereunder.

Article 12-D, Section 590 (1)(e) of the Banking Law authorizes the Banking Board to include subsidiaries of exempt organizations in the definition of exempt organizations.

2. Legislative objectives.

To provide for state licensing and registration of mortgage bankers and mortgage brokers, other than exempt organizations that are subject to other regulatory regimes, and to empower the Banking Board to determine whether the consolidated subsidiaries of exempt organizations that are mortgage bankers and mortgage brokers should also be considered exempt organizations.

3. Needs and benefits.

Under Banking Law Section 590(2)(a) and (b), the registration and licensing provisions of Article 12-D do not apply to any exempt organization, although the Banking Board may adopt regulations applicable to exempt organizations.

Banking Law Section 590 contains a definition of “exempt organization.” After listing the entities that are exempt organizations, the final sentence of the definition provides “Subject to such regulations as may be promulgated by the banking board, ‘exempt organization’ may also include any subsidiary of such entities.” Banking Law § 590(1)(e).

Part 39 currently exempts from licensing or registration consolidated subsidiaries of exempt organizations that comply with the requirements under Section 39.4(a). It also states that the Banking Department will not regularly examine exempt organizations, although examiners may conduct special examinations of such subsidiaries. Since many exempt organizations have mortgage banking or brokerage subsidiaries, this has resulted in exempting many important participants in the mortgage industry.

The purpose of the subject amendments to Part 39 is to update the regulation in two respects. First, they eliminate the exemption from licensing as a mortgage banker or registration as a mortgage broker of consolidated subsidiaries of financial services organizations. In the past few years banks and insurance companies have begun to operate large mortgage banking and mortgage brokerage subsidiaries that engage in arguably predatory practices and the Department believes that the subject amendments are the best means for protecting the citizens of New York from such operations. Second, the amendments eliminate the exemption in Section 39.4(e) for mortgage bankers or mortgage brokers dealing solely in certain loan products, such as credit line mortgages, installment loans, and home improvement loans. Experience has shown that the need for regulation is no less with respect to those products, and Federal regulations now specifically cover them. (Regulation of credit line mortgages are codified at 12 CFR 226, the implementing regulation for the Truth in Lending Act and took effect in 1994. Regulations regarding home improvement mortgages secured by dwellings are codified at 12 C.F.R. § 203, the implementing regulation for the Home Mortgage Disclosure Act, and took effect in 2004.)

The exemption of subsidiaries was consistent with prior case law, including the United States Supreme Court’s decision in *Watters v. Wachovia*, which had held that a state could not require the licensing of an operating subsidiary of a national bank. *Watters v. Wachovia*. 550 U.S. 1 (U.S. 2007). However, Section 1044 of the Dodd-Frank Wall Street Reform and Consumer Protection Act effectively overturned *Watters* by making clear that state laws apply to a subsidiary or affiliate of a national bank to the same extent as other entities subject to state law.

It is a long-standing state policy to regulate the activities of mortgage bankers and mortgage brokers in New York. The recent mortgage crisis highlights the importance of comprehensive and con-

sistent application of this policy and the state’s system of regulating entities in the mortgage business. Now that Congress has effectively overridden contrary judicial interpretations and confirmed that states are free to apply their regulatory system to all mortgage entities, there is no reason of law or policy why New York should not apply the same regulatory system and standards to all mortgage entities in the state, whether or not they are consolidated subsidiaries of exempt organizations. Regulating these entities is not a departure in policy, but instead a continuation of long standing policy that is now supported by the recent Dodd-Frank Act.

4. Costs.

Exempt organizations, including their consolidated subsidiaries, are typically already highly regulated and are generally familiar with government licensing and registration procedures. Additional compliance costs should be modest and will be comparable to the costs presently incurred by mortgage bankers and mortgage brokers that are not subsidiaries of exempt organizations or dealing solely in exempt mortgage products.

The principal additional cost is expected to be the assessment for the expenses of the Department charged to regulated persons and entities pursuant to Section 17 of the Banking Law. The assessment calculation is explained in detail on the Department’s website (www.banking.state.ny.us). As there discussed, the assessment charged to a particular institution includes a supervisory component and a regulatory component.

In the case of mortgage bankers and mortgage brokers, the regulatory component is based in part on the “New York gross income” of the entity. Because that number is not available for newly-licensed or registered entities in their first assessment year, it has been the practice of the Department to set the initial year assessment for such entities based on supervisory charges only. It is anticipated that this assessment methodology will be applied to mortgage bankers and mortgage brokers who will no longer be exempt from licensing or registration as a result of these amendments. In subsequent years, the assessment will be established on the same basis as for all other mortgage bankers and brokers.

5. Local government mandates.

None.

6. Paperwork.

Section 591 of the Banking Law establishes an application process to apply for licensing as a mortgage banker. Section 591-a of the Banking Law establishes an application process to register as a mortgage broker. Section 593 required license provisions for a mortgage banker and Section 593-a establishes required registration provisions for a mortgage broker. Section 597 establishes that licensees and registrants must also file annual reports with the Superintendent concerning the business and operations during the preceding calendar year. The Superintendent may also require such additional reports or special reports as he or she may deem necessary to the proper supervision of licensees and registrants. The application and reporting requirements required for licensing or registration of mortgage bankers and mortgage brokers that are consolidated subsidiaries of exempt organizations and for purveyors of mortgage products formerly deemed exempt are the same as those already applicable to mortgage bankers and mortgage bankers that are not consolidated subsidiaries of exempt organizations and which deal in mortgage products that are not exempt.

7. Duplication.

The proposed regulation does not duplicate, overlap or conflict with any other regulations, rules, or other legal requirements of the state and federal governments.

8. Alternative.

The Department could continue its current regulatory scheme, with the result that consolidated subsidiaries of exempt entities would remain exempt from licensing or registration by the Banking Department and be licensed and regulated, if at all, through the agency that regulated their parent exempt organizations. The Banking Department could also continue to not require licensing or registration for mortgage bankers and mortgage brokers dealing in the currently exempt mortgage products such as credit line mortgages, installment

loans, and home improvement loans. The existing regulations require certain information be available to insure compliance with Banking Department requirements.

However the current regulatory framework limits the Banking Department's information about mortgage bankers and mortgage brokers in the state and thus limits its ability to protect New York residents. The amendments would make the regulatory regime more consistent between independent mortgage bankers and mortgage brokers and those that are consolidated subsidiaries of exempt organizations.

9. Federal standards.

The exemption of subsidiaries was consistent with prior case law, including the United States Supreme Court's decision in *Watters v. Wachovia* which had held that a state could not require the licensing of an operating subsidiary of a national bank. 550 U.S. 1 (U.S. 2007). However, Section 1044 of the Dodd-Frank Wall Street Reform and Consumer Protection Act effectively overturned *Watters* by making clear that state laws apply to a subsidiary or affiliate of a national bank to the same extent as other entities subject to state law.

10. Compliance schedule.

Entities formerly exempt under Part 39 shall file an application to become licensed or registered within 90 days of the amendments to Part 39 being adopted and shall become licensed or registered within 180 days after the date the amendments are adopted, or such later date as the Superintendent may approve for good cause.

Regulatory Flexibility Analysis

1. Effect of the Rule:

The amendments will affect mortgage bankers and mortgage brokers that are consolidated subsidiaries of regulated financial institutions. The amendments will also affect mortgage bankers or mortgage brokers dealing solely in certain loan products that are now deemed exempt products, such as credit line mortgages, installment loans, and home improvement loans. It is believed that few consolidated subsidiaries of exempt organizations are small businesses. It is also believed that few mortgage bankers dealing solely in loan products that will cease to be exempted under the amended regulations are small businesses. Mortgage brokers dealing solely in such loan products often are small businesses. The amendments will have no effect on local governments.

2. Compliance Requirements:

The amendments would require mortgage bankers and mortgage brokers that are consolidated subsidiaries of exempt organizations to file for licensing or registration with the Banking Department. The amendments would also require mortgage bankers and mortgage brokers dealing solely in certain currently exempt loan products, such as credit line mortgages, installment loans, and home improvement loans to now file for licensing or registration.

3. Professional Services:

None.

4. Compliance Costs:

Exempt organizations, including their consolidated subsidiaries, are typically already highly regulated and are generally familiar with government licensing and registration procedures. Additional compliance costs should be modest and will be comparable to the costs presently incurred by mortgage bankers and mortgage brokers that are not subsidiaries of exempt organizations.

Mortgage brokers and mortgage bankers that deal solely in credit line mortgages, installment loans, home improvement loans and other loan products that will no longer be exempted under the amended regulations will be required to become licensed or registered and will be required to comply with laws and regulations applicable to licensed or registered entities. These compliance costs are expected to be moderate and equivalent to those incurred by mortgage entities that do not deal exclusively in formerly exempted products.

The principal additional cost is expected to be the assessment for the expenses of the Department charged to regulated persons and entities pursuant to Section 17 of the Banking Law. The assessment calculation is explained in detail on the Department's website

(www.banking.state.ny.us). As there discussed, the assessment charged to a particular institution includes a supervisory component and a regulatory component.

In the case of mortgage bankers and mortgage brokers, the regulatory component is based in part on the "New York gross income" of the entity. Because that number is not available for newly-licensed or registered entities in their first assessment year, it has been the practice of the Department to set the initial year assessment for such entities based on supervisory charges only. It is anticipated that this assessment methodology will be applied to mortgage bankers and mortgage brokers who will no longer be exempt from licensing or registration as a result of these amendments. In subsequent years, the assessment will be established on the same basis as for all other mortgage bankers and brokers.

This methodology varies institutions' assessments costs based on their New York gross income, and thus has the effect of imposing lower assessments on smaller businesses.

5. Economic and Technological Feasibility:

Mortgage bankers and mortgage brokers who cease to be exempted from the licensing and registration requirements because of the amendments will be required to comply with such requirements and with the ongoing reporting and recordkeeping requirements of the law and regulations. While it is believed that few consolidated subsidiaries of exempt organizations are small businesses, it is believed that compliance with such requirements is in any case economically and technologically feasible, since the same requirements are currently applicable to independent mortgage bankers and mortgage brokers.

6. Minimizing Adverse Impacts:

The amendments are not expected to have a significant adverse impact on mortgage bankers and mortgage brokers who cease to be exempted from licensing or registration. Few consolidated subsidiaries of exempt organizations are believed to be small businesses, and in any case the licensing and registration requirements are currently applicable to independent mortgage bankers and mortgage brokers.

Moreover, while the regulation gives entities required to become licensed or registered as a result of the amendments an adequate period of time to file the necessary application and have it processed, it also empowers the Superintendent to extend the time period for good cause. The amendments also retain the Superintendent's existing authority to determine whether loan products in addition to those specifically enumerated should be exempted.

7. Small Business and Local Government Participation:

The amendments will have no effect on local governments. The Department maintains regular contact with representatives of the financial institutions associations, which include financial institutions that are small businesses. The Department has also maintained regular contact with the mortgage banking and mortgage brokerage industry. The Department has utilized this knowledge base in drafting the instant regulation.

Rural Area Flexibility Analysis

1. Types and Estimated Numbers:

It is believed that few, if any, of the entities affected by the amendments are located in rural areas.

2. Compliance Requirements:

The amendments would require mortgage bankers and mortgage brokers that are consolidated subsidiaries of exempt organizations to be licensed or registered with the Banking Department. The amendments would also require mortgage bankers and mortgage brokers dealing solely in certain currently exempt loan products, such as credit line mortgages, installment loans, and home improvement loans to now be licensed or registered with the Banking Department.

3. Compliance Costs:

Exempt organizations, including their consolidated subsidiaries, are typically already highly regulated and are generally familiar with government licensing and registration procedures. Additional compliance costs should be modest and will be comparable to the costs presently incurred by mortgage bankers and mortgage brokers that are not subsidiaries of exempt organizations or not dealing solely in exempt mortgage products.

4. Minimizing Adverse Impacts:

It is believed that few, if any, of the entities affected by the amendments are located in rural areas.

If entities in rural areas are affected, the effects will be minimal. Additional compliance costs required of them should be modest and will be comparable to the costs presently incurred by mortgage bankers and mortgage brokers that are not subsidiaries of exempt organizations or not dealing solely in exempt mortgage products.

5. Rural Area Participation:

The Department maintains regular contact with representatives of the financial institutions associations, which include financial institutions that are located in rural areas. The Department has also maintained regular contact with the mortgage banking and mortgage brokerage industry. The Department has utilized this knowledge base in drafting the instant regulation.

Job Impact Statement

The requirement to comply with the proposed amendments is not expected to have a significant adverse effect on jobs or employment activities within the mortgage banking and mortgage broker industry.

Education Department

EMERGENCY RULE MAKING

Teachers Performing Instructional Support Services in Boards of Cooperative Educational Services

I.D. No. EDU-23-11-00003-E

Filing No. 730

Filing Date: 2011-08-11

Effective Date: 2011-08-11

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

Action taken: Amendment of sections 30-1.2, 30-1.8, 30-1.9 and 80-1.8 of Title 8 NYCRR.

Statutory authority: Education Law, section 207(not subdivided)

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

Specific reasons underlying the finding of necessity: The purpose of the proposed amendment is to create new tenure areas for teachers performing instructional support services in a BOCES. The Board of Regents promulgated regulations in 2009 to permit teachers employed in instructional support service positions in BOCES and school districts to continue in their existing teacher tenure area or if newly hired, to receive tenure and seniority rights in a tenure area for which they are properly certified.

The Department has now had two years of experience under these 2009 regulations, where many reductions in force have been necessary. The BOCES have experienced many operational problems when teachers hired for their skills in an area of instructional support are bumping a teacher assigned to a classroom. In certain situations the problem is bumping in the reverse direction (from the classroom to instructional support services). These bumping actions have placed teachers into assignments for which they are not prepared. This has resulted in a proposal to create new tenure areas in BOCES to reflect the different nature of instructional support services in a BOCES setting and to adequately provide for instructional support positions on the network teams that many BOCES will provide for component districts to support the Department's Race to the Top Application.

The proposed amendment establishes additional ("new") tenure areas for BOCES that would be appropriate for the most common types of ISS assignments:

- (1) instructional support services in mathematics;
- (2) instructional support services in english language arts and literacy;
- (3) instructional support services in science;
- (4) instructional support services in special education;

(5) instructional support services in curriculum and differentiated instruction, incorporating the analysis of student performance data;

(6) instructional support services in the integration of technology into instructional practices;

(7) instructional support services in technical support for bilingual and English as a second language instruction for English language learners; and

(8) instructional support services in professional development.

The recommended action is proposed as an emergency measure given the current budget difficulties faced by BOCES in New York State and the possibility of impending lay-offs, it is critical that teachers currently serving in instructional support positions have appropriate tenure protection and that their accrued seniority rights be protected.

Emergency action is also needed to ensure that the proposed amendment remains continuously in effect until it can be adopted as a permanent rule at the September Regents meeting.

Subject: Teachers performing instructional support services in boards of cooperative educational services.

Purpose: Create new tenure areas for teachers performing instructional support services in boards of cooperative educational services.

Text of emergency rule: 1. Subdivision (b) of section 30-1.2 of the Rules of the Board of Regents shall be amended, effective August 16, 2011, to read as follows:

(b) [The] *Except as otherwise provided in subdivision (c) of this section, the provisions of this Subpart shall apply to a professional educator appointed by a board of education or board of cooperative educational services for the performance of duties in instructional support services, as defined in subdivision (j) of section 30-1.1 of this Subpart, on or after August 1, 1975 as follows:*

- (1) . . .
- (2) . . .
- (3) . . .
- (4) . . .
- (5) . . .

2. Subdivisions (c) and (d) of section 30-1.2 of the Rules of the Board of Regents shall be renumbered to subdivisions (d) and (e) of section 30-1.2, respectively, effective August 16, 2011.

3. A new subdivision (c) shall be added to section 30-1.2 of the Rules of the Board of Regents, effective August 16, 2011, to read as follows:

(c) *The provisions of this Subpart shall apply to a professional educator employed by a board of cooperative educational services to devote a substantial portion of his time to the provision of instructional support services on or after May 20, 2011 as follows:*

(1) *A professional educator employed by a board of cooperative educational services to devote a substantial portion of his time to the provision of instructional support services on May 20, 2011, who was previously appointed by the board to tenure or a probationary period in a tenure area identified in this Subpart shall either:*

(a) *continue to receive credit toward tenure and/or accrue tenure and seniority rights in his previous tenure area from the initial date of his assignment and continue to receive tenure and/or seniority rights in his previous tenure area while assigned to devote a substantial portion of his time to the provision of instructional support services; or*

(b) *if the professional educator provides knowing consent to the board of cooperative educational services to change his tenure area pursuant to section 30-1.9 of this Subpart by June 20, 2011, he may receive credit toward tenure and/or accrue tenure and seniority rights in one of the special subject tenure areas of instructional support services established in section 30-1.8 of this Subpart, from the date of his initial assignment to a position where he devoted a substantial portion of his time to the provision of such instructional support services and he shall continue to receive tenure and seniority rights in that tenure area while assigned to a position where he devotes a substantial portion of his time to the provision of instructional support services appropriate for such tenure area.*

(2) *Any board of cooperative educational services that appoints or assigns a professional educator on or after May 20, 2011 to devote a substantial portion of his time to the provision of instructional support services shall make probationary appointments and appointments on tenure in accordance with subdivision (e) of section 30-1.8 of this Subpart.*

(3) *Any board of cooperative educational services that appoints a professional educator on or after May 20, 2011 to devote a substantial portion of his time to instructional support services as a result of a board of cooperative educational services taking over a program formerly operated by a school district or a county vocational education and extension board pursuant to section 3014-a of the Education Law, shall credit the professional educator with tenure and seniority rights in the special subject tenure area for instructional support services established in subdivision (e) of section 30-1.8 of this Subpart from the initial date of his assignment to the performance of instructional support services in the school district or county vocational education and extension board and shall continue to credit the professional educator with tenure and/or seniority rights in such tenure area while he is assigned to devote a substantial portion of his time to the performance of instructional support services in such tenure area at the board of cooperative educational services.*

(4) *Any board of education that appoints a professional educator on or after May 20, 2011 to devote a substantial portion of his time to instructional support services as a result of a school district taking over a program formerly operated by a board of cooperative educational services pursuant to section 3014-b, where the professional educator is serving in an instructional support services tenure area pursuant to subdivision of section 30-1.8 of the rules of the Board of Regents, shall credit the professional educator with tenure and seniority rights in a tenure area for which he holds the proper certification as described in Section 30-1.9(b) of this subpart, from the initial date of his assignment to the performance of instructional support services in the board of cooperative educational services and shall continue to credit such professional educator with tenure and/or seniority rights in such tenure area while he is assigned to devote a substantial portion of his time to the performance of instructional support services provided that he holds the proper certification for such tenure area.*

4. Renumbered subdivision (d) of section 30-1.2 of the Rules of the Board of Regents shall be amended, effective August 16, 2011, to read as follows:

(d) Except as otherwise provided in subdivisions (b) and (c) of this section, each board of education or board of cooperative educational services shall on and after the effective date of this Subpart make probationary appointments and appointments on tenure in accordance with the provisions of this Subpart.

5. A new subdivision (e) shall be added to section 30-1.8 of the Rules of the Board of Regents, effective August 16, 2011, to read as follows:

(e) *A professional educator employed by a board of cooperative educational services to devote a substantial portion of his time to the provision of instructional support services in one of the following areas shall be deemed to serve in one of the following special subject tenure areas encompassing the duties of such subject:*

- (1) *instructional support services in mathematics;*
- (2) *instructional support services in English language arts and literacy;*
- (3) *instructional support services in science;*
- (4) *instructional support services in special education;*
- (5) *instructional support services in curriculum and differentiated instruction, incorporating the analysis of student performance data;*
- (6) *instructional support services in the integration of technology into instructional practices;*
- (7) *instructional support services in technical support for bilingual and English as a second language instruction for English language learners; and*
- (8) *instructional support services in professional development.*

6. Subdivision (b) of section 30-1.9 of the Rules of the Board of Regents shall be amended, effective August 16, 2011, to read as follows:

(b) Except as otherwise provided in subdivision (b) of section 30-1.2 of this Subpart, a board of education [or a board of cooperative educational services] shall appoint and assign a professional educator in such a manner that he shall devote a substantial portion of his time in at least one designated tenure area except that a professional educator appointed or assigned on or after May 1, 2009 to duties described in either paragraph (1) or (2) of this subdivision, shall be appointed to a tenure area for which he holds the proper certification.

(1) *A professional educator appointed or assigned to devote a substantial portion of his time to the performance of duties in instructional support services; or*

(2) *A professional educator appointed or assigned to devote a substantial portion of his time to a combination of duties in instructional support services and time in at least one designated tenure area identified in this Subpart.*

7. Subdivision (d) in section 30-1.9 of the Rules of the Board of Regents, is amended, effective August 16, 2011, to read as follows:

(d) If a professional educator possesses certification appropriate to more than a single tenure area and the board of education or board of cooperative educational services proposes at the time of initial appointment to assign such individual in such a manner that he will devote a substantial portion of his time during each of the school years constituting the probationary period in more than one of the tenure areas established by this Subpart, the board shall in its resolution of appointment designate such tenure area and shall thereafter separately confer or deny tenure to such individual in the manner prescribed by statute in each designated tenure area, *except that individuals accruing tenure and/or seniority rights in their previous tenure area for the performance of duties in instructional support services as provided for in subparagraph (a) of paragraph (1) of subdivision (c) of section 30-1.2 of this Subpart shall only accrue tenure and/or seniority rights in their previous tenure area and not in one of the instructional support service tenure areas prescribed in subdivision (e) of section 30-1.8 of this Subpart.*

8. Section 80-1.7 of the Regulations of the Commissioner of Education is amended, effective August 16, 2011, to read as follows:

Section 80-1.7 Renewal of a provisional certificate

(a) . . .

(1) [By] *Except as otherwise provided by subdivision (c) of this section, by application to the commissioner by the holder of the certificate, the commissioner may renew an expired provisional certificate in the administrative and supervisory service or the pupil personnel service on one occasion only for a period of five years from the date the renewed provisional certificate is issued, provided that the candidate has met all requirements for the permanent certificate in the certificate title of the provisional certificate, except the experience requirement. The requirements of this paragraph shall not apply to the renewal of a provisional certificate in the title school counselor. The requirements of paragraph (2) of this subdivision shall apply to the renewal of a provisional certificate in the title school counselor.*

(2) . . .

(b) . . .

(c) The commissioner shall not renew a provisional certificate in the classroom teaching service. The commissioner shall not accept an application for the renewal of a provisional *School Administrator and Supervisor* certificate [in the administrative and supervisory service] submitted to the commissioner after September 1, 2007 *unless the certificate holder has been employed in a school district or BOCES to devote a substantial portion of his time, as defined in section 30-1.1 of the Commissioner's regulations, to instructional support services as defined in section 80-5.21 of this Subpart during three of the past five school years.*

9. Subdivision (a) of section 80-1.8 of the Regulations of the Commissioner of Education, is amended, effective August 16, 2011, to read as follows:

(a) The holder of an initial certificate whose certificate has expired,

and who has not successfully completed three school years of teaching experience, or its equivalent, as is required for a professional certificate, shall be issued an initial certificate on one occasion only, for a period of five years from the date of reissuance, provided that the candidate has met the requirements in subdivision (b) of this section. [The time validity of such reissued initial certificate shall not be extended, pursuant to section 80-1.6 of this Subpart.] Notwithstanding the above, an initial certificate as a school building leader may be re-issued a second time if the certificate holder has met all of the requirements for the professional certificate except the experience requirement and has been employed in a school district or BOCES to provide instructional support services as defined in section 80-5.21 of this Subpart during three of the past five school years.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-23-11-00003-EP, Issue of June 8, 2011. The emergency rule will expire October 9, 2011.

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

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.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment carries out the legislative objectives of the above-referenced statute by creating new tenure areas for teachers performing instructional support services in a BOCES.

3. NEEDS AND BENEFITS:

In 2009, the Board of Regents promulgated regulations to permit teachers employed in instructional support service positions in BOCES TO accrue tenure and seniority rights in their existing teacher tenure area or if newly hired, to receive tenure and seniority rights in a tenure area for which they are properly certified. (The regulations did not impact teachers serving in New York City).

The BOCES have experienced many operational problems since 2009 with the current regulation. As a result of reductions in force, teachers hired for their skills in an area of instructional support services have been bumped by a teacher assigned to a classroom. Reductions in force have also resulted in bumping in the reverse direction (from instructional support services to the classroom). These bumping actions have placed teachers into assignments for which they are not prepared. To address these problems we propose to create new instructional support services tenure areas for BOCES to reflect the unique nature of instructional support services in a BOCES setting and to address the Network Team positions that BOCES will provide for component districts as part of the Race to the Top (RTTT) implementation.

Issue

Historically, BOCES have responded to the needs of component districts for the professional growth of district teachers through instructional support services duties designed to enhance teaching skills, including infusing technology into instruction, providing for differentiated instruction and incorporating the analysis of student performance data, and providing a variety of specialized supports.

The staff hired by a BOCES to provide these instructional support services are, in most cases, hired from outside the BOCES for their particular expertise in subject matter and the education of teachers. School districts, on the other hand, tend to identify individual members of their teaching staff who possess the needed skills to be professional developers, curriculum specialists, or have the knowledge and skills to assist other teachers in using technology as part of their instruction to provide these services. Using existing teachers seems to work effectively in many school districts as the teachers have a desire to retain their existing tenure area and continue to earn seniority while on special assignment.

In the BOCES, the need to provide teacher growth and professional development services to component districts is increasing and the

number of teachers doing instructional support services work in a BOCES will continue to increase as the RTTT initiatives are implemented, particularly with the use of the Network teams.

The regulation adopted by the Regents in 2009 is designed to fit the school district model of providing ISS and the past two years have demonstrated that this model is causing substantial operational problems and disruption for the BOCES that would jeopardize the ability of the BOCES to provide the supports needed to implement RTTT initiatives and maintain capacity to provide high quality professional development for teachers by individuals who are hired because they are particularly adept at adult education and professional development in specific content areas.

Proposal

The problems experienced with reductions in force resulting in teachers being placed into roles for which they do not possess the required knowledge or skills are of great concern for the work of the Network Teams and the BOCES professional development programs. The duties of Network Team members under RTTT are one example of Instructional Support Services work. The careful selection of properly qualified educators to assume Network Team and other Instructional Support Services duties is a critical part of the implementation of SED's RTTT program. These Network Team duties along with other Instructional Support duties are different from classroom teaching duties and BOCES teachers performing Network Team duties should not be in the same tenure areas as individual classroom teachers.

Accordingly, after consultation with all interested parties, staff propose for the Regents consideration, the creation of the following ("new") tenure areas for BOCES that would be appropriate for the most common types of ISS assignments:

- (1) instructional support services in mathematics;
- (2) instructional support services in English language arts and literacy;
- (3) instructional support services in science;
- (4) instructional support services in special education;
- (5) instructional support services in curriculum and differentiated instruction incorporating the analysis of student performance data;
- (6) instructional support services in the integration of technology into instructional practices;
- (7) instructional support services in technical support for bilingual and English as a second language instruction for English language learners; and
- (8) instructional support services in professional development.

Transition for affected teachers

Teachers who are currently performing ISS duties in a BOCES would be able to choose to either: (1) go into a newly created ISS tenure area designated by the BOCES as appropriate for their duties; or (2) stay in their existing tenure area (grandparenting provision). If the teacher chose to go into the new ISS tenure area designated by the BOCES, he or she would be eligible to carry with them the tenure and seniority previously earned for the time they spent performing those ISS duties.

New teachers hired by a BOCES to perform ISS duties after the effective date of this regulation would be appointed to an ISS tenure area as designated by the BOCES consistent with their duties determined by the BOCES.

4. COSTS:

(a) Costs to State government: The proposed amendment will not impose any additional costs on State government, including the State Education Department.

(b) Costs to local governments: The proposed amendment will not impose any additional costs on local governments, including school districts and BOCES.

(c) Costs to private regulated parties: The proposed amendment will not impose any additional costs on private regulated parties.

(d) Costs to regulating agency for implementing and continued administration of the rule: As stated above in "Costs to State Govern-

ment," the amendment will not impose any additional costs on the State Education Department.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment applies to boards of cooperative educational services. Therefore, the mandates in Section 3 apply to BOCES as well. The State Education Department has determined that uniform requirements are necessary to ensure the quality of the State's teaching workforce and consistency in the evaluations of teachers in the classroom teaching service across the State.

6. PAPERWORK:

In general, the amendment does not impose additional paperwork requirements upon school districts or BOCES.

7. DUPLICATION:

The amendment does not duplicate any existing State or Federal requirements.

8. ALTERNATIVES:

No alternatives were considered.

9. FEDERAL STANDARDS:

There are no Federal standards that establish procedures for the evaluation of teachers.

10. COMPLIANCE SCHEDULE:

BOCES will be required to comply with the proposed amendment by its stated effective date.

Regulatory Flexibility Analysis

(a) Small businesses:

The proposed amendment applies to boards of cooperative educational services (BOCES) and creates new tenure areas for teachers performing instructional support services. The proposed amendment does not impose any adverse economic impact, reporting, recordkeeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

(b) Local governments:

The proposed amendment relates to the qualifications of teachers performing instructional support services and tenure and seniority rights for teachers performing such duties in BOCES throughout the State.

1. EFFECT OF RULE:

The proposed amendment applies to BOCES located in New York State and creates new tenure areas for teachers performing instructional support services in a BOCES.

2. COMPLIANCE REQUIREMENTS:

In 2009, the Board of Regents promulgated regulations to permit teachers employed in instructional support service positions in BOCES TO accrue tenure and seniority rights in their existing teacher tenure area or if newly hired, to receive tenure and seniority rights in a tenure area for which they are properly certified. (The regulations did not impact teachers serving in New York City).

The BOCES have experienced many operational problems since 2009 with the current regulation. As a result of reductions in force, teachers hired for their skills in an area of instructional support services have been bumped by a teacher assigned to a classroom. Reductions in force have also resulted in bumping in the reverse direction (from instructional support services to the classroom). These bumping actions have placed teachers into assignments for which they are not prepared. To address these problems we propose to create new instructional support services tenure areas for BOCES to reflect the unique nature of instructional support services in a BOCES setting and to address the Network Team positions that BOCES will provide for component districts as part of the Race to the Top (RTTT) implementation.

Issue

Historically, BOCES have responded to the needs of component districts for the professional growth of district teachers through

instructional support services duties designed to enhance teaching skills, including infusing technology into instruction, providing for differentiated instruction and incorporating the analysis of student performance data, and providing a variety of specialized supports.

The staff hired by a BOCES to provide these instructional support services are, in most cases, hired from outside the BOCES for their particular expertise in subject matter and the education of teachers. School districts, on the other hand, tend to identify individual members of their teaching staff who possess the needed skills to be professional developers, curriculum specialists, or have the knowledge and skills to assist other teachers in using technology as part of their instruction to provide these services. Using existing teachers seems to work effectively in many school districts as the teachers have a desire to retain their existing tenure area and continue to earn seniority while on special assignment.

In the BOCES, the need to provide teacher growth and professional development services to component districts is increasing and the number of teachers doing instructional support services work in a BOCES will continue to increase as the RTTT initiatives are implemented, particularly with the use of the Network teams.

The regulation adopted by the Regents in 2009 is designed to fit the school district model of providing ISS and the past two years have demonstrated that this model is causing substantial operational problems and disruption for the BOCES that would jeopardize the ability of the BOCES to provide the supports needed to implement RTTT initiatives and maintain capacity to provide high quality professional development for teachers by individuals who are hired because they are particularly adept at adult education and professional development in specific content areas.

Proposal

The problems experienced with reductions in force resulting in teachers being placed into roles for which they do not possess the required knowledge or skills are of great concern for the work of the Network Teams and the BOCES professional development programs. The duties of Network Team members under RTTT are one example of Instructional Support Services work. The careful selection of properly qualified educators to assume Network Team and other Instructional Support Services duties is a critical part of the implementation of SED's RTTT program. These Network Team duties along with other Instructional Support duties are different from classroom teaching duties and BOCES teachers performing Network Team duties should not be in the same tenure areas as individual classroom teachers.

Accordingly, after consultation with all interested parties, staff propose for the Regents consideration, the creation of the following ("new") tenure areas for BOCES that would be appropriate for the most common types of ISS assignments:

- (1) instructional support services in mathematics;
- (2) instructional support services in English language arts and literacy;
- (3) instructional support services in science;
- (4) instructional support services in special education;
- (5) instructional support services in curriculum and differentiated instruction incorporating the analysis of student performance data;
- (6) instructional support services in the integration of technology into instructional practices;
- (7) instructional support services in technical support for bilingual and English as a second language instruction for English language learners; and
- (8) instructional support services in professional development.

Transition for affected teachers

Teachers who are currently performing ISS duties in a BOCES would be able to choose to either: (1) go into a newly created ISS tenure area designated by the BOCES as appropriate for their duties; or (2) stay in their existing tenure area (grandparenting provision). If the teacher chose to go into the new ISS tenure area designated by the BOCES, he or she would be eligible to carry with them the tenure and seniority previously earned for the time they spent performing those

ISS duties. New teachers hired by a BOCES to perform ISS duties after the effective date of this regulation would be appointed to an ISS tenure area as designated by the BOCES consistent with their duties determined by the BOCES.

3. PROFESSIONAL SERVICES:

The proposed amendment does not mandate that BOCES contract for additional professional services to comply.

4. COMPLIANCE COSTS:

In general, the proposed amendment does not impose any additional compliance costs on BOCES.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any additional technological requirements. Economic feasibility is addressed under the Compliance Costs section above.

6. MINIMIZING ADVERSE IMPACT:

The proposed amendment establishes the tenure and seniority rights for teachers employed in instructional support service positions in BOCES. Because these requirements apply to teachers and BOCES located in all areas of the State, it is not possible to exempt local governments from the proposed amendment or impose a lesser standard. Moreover, the State Education Department has determined that uniform tenure and seniority rights in such positions at a BOCES are necessary to ensure the quality of the State's teaching workforce and consistency in the application of tenure and seniority rights for such positions.

7. LOCAL GOVERNMENT PARTICIPATION:

Comments on the proposed rule were solicited from the BOCES District Superintendents, New York State Council of School Superintendents, New York State United Teachers, New York State School Boards Association, School Administrators Association of New York State, and New York State Association of School Personnel Administrators.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATE OF THE NUMBER OF RURAL AREAS:

The proposed amendment will affect teachers who perform instructional support services and who are employed in boards of cooperative educational services in all areas of New York State, including the 44 rural counties with fewer than 200,000 inhabitants and the 71 towns and urban counties with a population density of 150 square miles or less.

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

In 2009, the Board of Regents promulgated regulations to permit teachers employed in instructional support service positions in BOCES and school districts to accrue tenure and seniority rights in their existing teacher tenure area or if newly hired, to receive tenure and seniority rights in a tenure area for which they are properly certified. (The regulations did not impact teachers serving in New York City).

The BOCES have experienced many operational problems since 2009 with the current regulation. As a result of reductions in force, teachers hired for their skills in an area of instructional support services have been bumped by a teacher assigned to a classroom. Reductions in force have also resulted in bumping in the reverse direction (from instructional support services to the classroom). These bumping actions have placed teachers into assignments for which they are not prepared. To address these problems we propose to create new instructional support services tenure areas for BOCES to reflect the unique nature of instructional support services in a BOCES setting and to address the Network Team positions that BOCES will provide for component districts as part of the Race to the Top (RTTT) implementation.

Issue

Historically, BOCES have responded to the needs of component districts for the professional growth of district teachers through instructional support services duties designed to enhance teaching skills, including infusing technology into instruction, providing for

differentiated instruction and incorporating the analysis of student performance data, and providing a variety of specialized supports.

The staff hired by a BOCES to provide these instructional support services are, in most cases, hired from outside the BOCES for their particular expertise in subject matter and the education of teachers. School districts, on the other hand, tend to identify individual members of their teaching staff who possess the needed skills to be professional developers, curriculum specialists, or have the knowledge and skills to assist other teachers in using technology as part of their instruction to provide these services. Using existing teachers seems to work effectively in many school districts as the teachers have a desire to retain their existing tenure area and continue to earn seniority while on special assignment.

In the BOCES, the need to provide teacher growth and professional development services to component districts is increasing and the number of teachers doing instructional support services work in a BOCES will continue to increase as the RTTT initiatives are implemented, particularly with the use of the Network teams.

The regulation adopted by the Regents in 2009 is designed to fit the school district model of providing ISS and the past two years have demonstrated that this model is causing substantial operational problems and disruption for the BOCES that would jeopardize the ability of the BOCES to provide the supports needed to implement RTTT initiatives and maintain capacity to provide high quality professional development for teachers by individuals who are hired because they are particularly adept at adult education and professional development in specific content areas.

The 2009 regulation, which leaves a teacher in the tenure area of his or her previous assignment or places a new Instructional Support Services Teacher in a tenure area for which they are certified, results in teachers in ISS assignments bumping into classroom assignments and vice versa. Unfortunately, the classroom teacher who bumps into an ISS position may not have the skills required to perform the ISS assignment. A teacher of English in Grade 8 may be selected to provide guidance to other teachers on the infusion of technology into their instruction, because of her exceptional knowledge of current technologies and related pedagogical issues. If there is a reduction in force in the English 7-12 tenure area and a classroom English teacher "bumps" that ISS teacher, it is quite likely that the classroom English teacher will not possess the technology skills needed for the ISS assignment.

Proposal

The problems experienced with reductions in force resulting in teachers being placed into roles for which they do not possess the required knowledge or skills are of great concern for the work of the Network Teams and the BOCES professional development programs. The duties of Network Team members under RTTT are one example of Instructional Support Services work. The careful selection of properly qualified educators to assume Network Team and other Instructional Support Services duties is a critical part of the implementation of SED's RTTT program. These Network Team duties along with other Instructional Support duties are different from classroom teaching duties and BOCES teachers performing Network Team duties should not be in the same tenure areas as individual classroom teachers.

Accordingly, after consultation with all interested parties, staff propose for the Regents consideration, the creation of the following ("new") tenure areas for BOCES that would be appropriate for the most common types of ISS assignments:

- (1) instructional support services in mathematics;
- (2) instructional support services in English language arts and literacy;
- (3) instructional support services in science;
- (4) instructional support services in special education;
- (5) instructional support services in curriculum and differentiated instruction incorporating the analysis of student performance data;
- (6) instructional support services in the integration of technology into instructional practices;
- (7) instructional support services in technical support for bilingual

and English as a second language instruction for English language learners; and

(8) instructional support services in professional development.

Transition for affected teachers

Teachers who are currently performing ISS duties in a BOCES would be able to choose to either: (1) go into a newly created ISS tenure area designated by the BOCES as appropriate for their duties; or (2) stay in their existing tenure area (grandparenting provision). If the teacher chose to go into the new ISS tenure area designated by the BOCES, he or she would be eligible to carry with them the tenure and seniority previously earned for the time they spent performing those ISS duties.

New teachers hired by a BOCES to perform ISS duties after the effective date of this regulation would be appointed to an ISS tenure area as designated by the BOCES consistent with their duties determined by the BOCES.

3. COSTS:

The proposed amendment will not impose any additional costs on private regulated parties.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment establishes the tenure and seniority rights for teachers employed in instructional support service positions in BOCES. Because these requirements apply to teachers and BOCES located in all areas of the State, including rural areas, it is not possible to exempt those from rural areas from the proposed amendment or impose a lesser standard. Moreover, the State Education Department has determined that uniform tenure and seniority rights in such positions at a BOCES are necessary to ensure the quality of the State's teaching workforce and consistency in the application of tenure and seniority rights for such positions.

5. RURAL AREA PARTICIPATION:

Comments on the proposed rule were also solicited from the District Superintendents, New York State Council of School Superintendents, New York State United Teachers, New York State School Boards Association, School Administrators Association of New York State, and New York State Association of School Personnel Administrators, the constituencies of which include those from rural areas.

Job Impact Statement

The purpose of the proposed amendment is to establish new tenure areas for teachers performing instructional support services who are employed in a board of cooperative educational services. The proposed amendment allows a professional educator assigned by a board of cooperative educational services to devote a substantial portion of their time to the provision of instructional support services to either continue to receive credit toward tenure and/or accrue tenure and seniority rights in their previous tenure area or if the professional educator provides knowing consent to the BOCES to change his tenure area by June 20, 2011, the professional educator may accrue credit toward tenure and/or seniority rights in one of the special subject tenure areas of instructional support services from the date of his initial assignment to a position in instructional support services.

Because it is evident from the nature of this regulation that it will have no impact on the number of jobs or employment opportunities in New York State, 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.

EMERGENCY RULE MAKING

Annual Professional Performance Reviews for Classroom Teachers and Building Principals

I.D. No. EDU-23-11-00006-E

Filing No. 728

Filing Date: 2011-08-11

Effective Date: 2011-08-11

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

Action taken: Amendment of section 100.2(o); and addition of Subpart 30-2 to Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided), 215(not subdivided), 305(1), (2) and 3012-c(1)-(8); as added by L. 2010, ch. 103

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

Specific reasons underlying the finding of necessity: On May 28, 2010, the Governor signed Chapter 103 of the Laws of 2010, which added a new section 3012-c to the Education Law, establishing a comprehensive evaluation system for classroom teachers and building principals. The new law requires each classroom teacher and building principal to receive an annual professional performance review (APPR) resulting in a single composite effectiveness score and a rating of "highly effective," "effective," "developing," or "ineffective." The composite score is determined as follows:

- 20% is based on student growth on State assessments or other comparable measures of student growth (increased to 25% upon implementation of a value-added growth model)
- 20% is based on locally-selected measures of student achievement that are determined to be rigorous and comparable across classrooms as defined by the Commissioner (decreased to 15% upon implementation of value-added growth model)
- The remaining 60% is based on other measures of teacher/principal effectiveness consistent with standards prescribed by the Commissioner in regulation

For the 2011-2012 school year, the law applies to classroom teachers in the common branch subjects, English language arts or mathematics in grades 4-8 and the building principals of schools in which such teachers are employed. In the 2012-2013 school year, the new law applies to all classroom teachers and building principals. However, the Department recommends that, to the extent possible, districts and BOCES begin the process of rolling this system out for evaluation of all classroom teachers and building principals in the 2011-2012 school year so that New York can quickly move to a comprehensive teacher and principal evaluation system.

By law, the APPR is required to be a significant factor in employment decisions such as promotion, retention, tenure determinations, termination, and supplemental compensation, as well as a significant factor in teacher and principal professional development.

If a teacher or principal is rated "developing" or "ineffective," the school district or BOCES is required to develop and implement a teacher or principal improvement plan (TIP or PIP). Tenured teachers and principals with a pattern of ineffective teaching or performance - defined by law as two consecutive annual "ineffective" ratings - may be charged with incompetence and considered for termination through an expedited hearing process.

The law further provides that all evaluators must be appropriately trained consistent with standards prescribed by the Commissioner and that appeals procedures must be locally developed in each school district and BOCES.

Section 3012-c of the Education Law requires that any regulations needed to implement the new evaluation system be implemented no later than July 1, 2011, after consultation with an advisory committee. In September 2010, the Department convened an advisory committee known as the Regents Task Force on Teacher and Principal Effectiveness ("Task Force"), which is comprised of representatives of teachers, principals, superintendents of schools, school boards, school districts and board of cooperative educational services officials, and other interested parties. The Task Force has been meeting since September 2010 and they have been divided into workgroups to provide guidance and consider certain aspects of Education Law 3012-c. Throughout its deliberations, the Task Force has been supported by the active participation of teams of research advisors, and numerous experts have made presentations to the Task Force. Research and best practice examples were disseminated and discussed at length.

After months of discussion and deliberations, the Task Force generated a written report of their recommendations. At the April 2011 Regents meeting, the Task Force presented their recommendations to the Board of Regents. Thereafter, the Department presented their recommendations, which incorporated most of the Task Force's recommendations. At that point, the Regents directed the Department to draft regulations reflecting the Department's recommendations. At its May meeting, the Board of Regents adopted the proposed amendment as an emergency measure.

The proposed regulations implement the new law, by adding a new Subpart 30-2 to the Rules of the Board of Regents to establish the requirements for the new evaluation system.

Section 30-2.1 of the Rules of the Board of Regents explains that during the 2011-12 school year, teachers and principals who are not covered by the new law must still be evaluated under the existing APPR regula-

tions and districts and BOCES must comply with the requirements in Subpart 30-2 for classroom teachers and building principals covered by the new law. It also reiterates the language from the statute that says the regulations do not override any conflicting provisions of any collective bargaining agreement in effect on July 1, 2010 until the agreement expires and a successor agreement is entered into; at that point, however, the new evaluation regulations apply. In response to comments, a revision to this section was also made to clarify that nothing in the regulations shall be construed to affect the statutory right of a school district or BOCES to terminate a probationary teacher or principal or to restrict a school district's or BOCES' discretion in making a tenure determination pursuant to the law.

Section 30-2.2 defines the terms used throughout the regulations. Section 30-2.3 lists the information that every district or BOCES must include in its APPR plan.

Section 30-2.4 lays out all the requirements for evaluating classroom teachers in common branch subjects, English language arts (ELA), and math in grades 4-8 and their building principals for the 2011-12 school year. This section explains that 20 points of the evaluation will be based on student growth on State assessments and 20 points will be based on locally selected measures; explains what types of locally selected measures of student achievement may be used (first for teachers, then for principals); and describes what types of other measures of effectiveness may be used for the remaining 60 points, including observations, surveys, etc. (first for teachers, then for principals).

Section 30-2.5 lays out the requirements for evaluating all classroom teachers and building principals for the 2012-13 school year and thereafter, following the same order as the preceding section. This section explains how the requirements for the State assessment and locally selected measures subcomponents will differ, including the points assigned for each subcomponent, depending on whether the Board of Regents has approved a value-added growth model for particular grades/courses and subjects. The remaining 60 points will be assigned based on the same criteria as the preceding section.

Section 30-2.6 explains how the subcomponents should be scored and provides scoring ranges for the State assessment and locally selected measures subcomponents and the overall rating categories. Sections 30-2.7 and 30-2.8 outline the processes by which the Department will review and approve teacher and principal practice rubrics and student assessments, respectively, for use in districts' and BOCES' teacher and principal evaluation systems. Section 30-2.9 describes the requirements for evaluator training; Section 30-2.10 covers teacher and principal improvement plans; and Section 30-2.11 covers appeal procedures.

The recommended action is proposed as an emergency measure upon a finding by the Board of Regents that such action is necessary for the preservation of the general welfare in order to ensure that the proposed amendment remains continuously in effect until it can be adopted as a permanent rule.

Emergency action is also needed so that school districts and BOCES are given sufficient notice of the new APPR requirements and to provide school districts and BOCES with time to locally negotiate certain provisions in the proposed amendments before the 2011-2012 school year.

Subject: Annual professional performance reviews for classroom teachers and building principals.

Purpose: Establish standards and criteria for conducting annual professional performance reviews of classroom teachers and building principal.

Substance of emergency rule: The Commissioner of Education proposes to amend section 100.2 of the Commissioner's Regulations and add a new Subpart 30-2 to the Rules of the Board of Regents, effective August 16, 2011, to implement Education Law section 3012-c, as added by Chapter 103 of the Laws of 2010, by establishing standards and criteria for conducting annual professional performance reviews of classroom teachers and building principals employed by school districts and boards of cooperative educational services. The following is a summary of the substance of the proposed amendment.

Section 100.2(o) is amended to clarify that classroom teachers who are not subject to the provisions of Education Law section 3012-c in the 2011-2012 school year must still comply with the existing annual professional performance review set forth in section 100.2(o). A new provision was also added to section 100.2(o) to require that beginning July 1, 2011, all building principals that are not required to be evaluated under Education Law § 3012-c must be evaluated on an annual basis based on a plan agreed to by the building principal and the governing body of the school district or BOCES.

A new Subpart 30-2 is added to the Rules of the Board of Regents to establish requirements for the new annual professional performance review (APPR) system established by Education Law section 3012-c.

Section 30-2.1 sets forth applicability provisions. For the 2011-2012 school year, school districts shall ensure that the APPR of all classroom

teachers of common branch subjects or English language arts or mathematics in grades four to eight, and of all building principals of schools in which such teachers are employed, are conducted in accordance with the requirements of section 3012-c and Subpart 30-2; and that reviews of classroom teachers and building principals (other than classroom teachers in the common branch subjects or English language arts (ELA) or mathematics in grades four to eight) are conducted in accordance with section 100.2(o) of the Commissioner's regulations.

For an APPR conducted in the 2012-2013 school year and thereafter, the school district or BOCES shall ensure that the reviews of all classroom teachers and building principals are conducted in accordance with the requirements of section 3012-c and Subpart 30-2. However, nothing shall be construed to preclude a school district or BOCES from adopting an APPR for the 2011-2012 school year that applies to all classroom teachers and building principals in accordance with this Subpart or for BOES, for classroom teachers of common branch subjects or English language arts or mathematics in grades four to eight and all building principals in which such teachers are employed.

The section also provides that nothing in Subpart 30-2 shall abrogate any conflicting provisions of any collective bargaining agreement in effect on July 1, 2010 during the term of such agreement and until the entry into a successor collective bargaining agreement, at which time the provisions in Subpart 30-2 will apply.

This section further provides that nothing in the Subpart shall be construed to affect the statutory rights of a school district or BOCES to terminate a probationary teacher or principal or to restrict a school district's or BOCES' discretion in making a tenure determination pursuant to the new law.

Section 30-2.2 provides definitions for certain terms used in the Subpart.

Section 30-2.3 sets forth the content requirements for APPR plans submitted under Subpart 30-2. By September 1, 2011, each school district shall adopt an APPR plan for its classroom teachers of common branch subjects, ELA or mathematics in grades four to eight and building principals of schools in which such teachers are employed. By September 1, 2012, each school district/BOCES shall adopt an APPR plan, which may be an annual or multi-year plan, for the APPR of all of its classroom teachers and building principals. To the extent that any of the items required to be included in the plan are not finalized by such date, as a result of pending collective bargaining negotiations, the plan shall identify those specific parts of the plan and the school district or BOCES shall file an amended plan upon completion of such negotiations.

Section 30-2.4 sets forth requirements for evaluating classroom teachers of common branch subjects, ELA or mathematics in grades four to eight for the 2011-2012 school year. 20 points of the evaluation will be based on student growth on State assessments or other comparable measures and 20 points will be based on locally selected measures as described in the section. 60 points of the evaluation will be based on multiple measures of teacher and principal effectiveness as described in this section. A teacher's performance must be assessed based on a teacher practice rubric(s) approved by the Department. A principal's performance must be assessed based on an approved principal practice rubric. Provision is made for granting a variance for use of existing rubrics. At least 40 of the 60 points for teachers shall be based on classroom observations. At least 40 of the 60 points for principals shall be based on a broad assessment of the principal's leadership and management actions by the principal's supervisor or a trained independent evaluator.

Section 30-2.5 sets forth requirements for evaluating all classroom teachers and building principals for the 2012-2013 school year and thereafter. The section explains how the requirements for the State assessment and locally selected measures subcomponents will differ, including the points assigned for each subcomponent, depending on whether the Board of Regents has approved a value-added growth model for particular grades, courses. This section also describes the options that may be used for the State assessment subcomponent for non-tested subjects. The choice of locally selected measures and the other measures of teacher and principal effectiveness are based on the same criteria as in 30-2.4.

Section 30-2.6 describes the procedures for scoring and rating the evaluations, including a requirement that the rating category ("Highly Effective", "Effective", "Developing", or "Ineffective") assigned to teacher and building principal is determined by a single composite effectiveness score that is calculated based on the scores received by the teacher or principal in each of the subcomponents. This section prescribes specific scoring ranges for each rating category for the State assessment subcomponent and the locally selected measures subcomponent and the overall rating categories.

Section 30-2.7 describes the criteria and approval process for teacher and principal practice rubrics to be used in the evaluation of teachers and building principals.

Section 30-2.8 describes the criteria and approval process for student

assessments to be used in the evaluation of teachers and building principals.

Section 30-2.9 describes requirements for the training of evaluators and the training and certification of lead evaluators.

Section 30-2.10 describes requirements for teacher and principal improvement plans.

Section 30-2.11 describes requirements for appeals procedures through which an evaluated teacher or principal may challenge their APPR.

Section 30-2.12 provides that the Department will annually monitor and analyze trends and patterns in teacher and principal evaluation results and data to identify districts, BOCES and/or schools where evidence suggests that a more rigorous evaluation system is needed to improve educator effectiveness and student learning outcomes. A school, district or BOCES identified by the Department may be highlighted in public reports and/or the Commissioner may order a corrective action plan, which may include, but not be limited to, a requirement that the school district or BOCES utilize independent trained evaluators, where appropriate.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-23-11-00006-EP, Issue of October 15, 2011. The emergency rule will expire October 9, 2011.

Text of rule and any required statements and analyses may be obtained from: Christine Moore, NYS Education Department, Office of Counsel, 89 Washington Avenue, Room 112, Albany, NY 12234, (518) 473-8296, email: cmoore@mail.nysed.gov

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

Education Law section 101 charges the Department with the general management and supervision of the educational work of the State and establishes the Regents as head of the Department.

Education Law section 207 grants general rule-making authority to the Regents to carry into effect State educational laws and policies.

Education Law section 215 authorizes the Commissioner to require reports from schools under State educational supervision.

Education Law section 305(1) authorizes the Commissioner to enforce laws relating to the State educational system and execute Regents educational policies. Section 305(2) provides the Commissioner with general supervision over schools and authority to advise and guide school district officers in their duties and the general management of their schools.

Education Law section 3012-c, as added by Chapter 103 of the Laws of 2010, establishes requirements for the conduct of annual professional performance reviews (APPR) of classroom teachers and building principals employed by school districts and boards of cooperative educational services (BOCES), including the use of measures of student achievement; differentiation of teacher and principal effectiveness using quality rating categories of "highly effective", "effective", "developing" and "ineffective", with explicit minimum and maximum scoring ranges for each category as prescribed in Commissioner's Regulations; use of a single composite effectiveness score which incorporates multiple measures of effectiveness related to criteria included in Commissioner's Regulations; the training of individuals conducting evaluations in accordance with Commissioner's Regulations; and implementation of improvement plans consistent with Commissioner's regulations.

2. LEGISLATIVE OBJECTIVES:

The proposed rule is consistent with the above authority vested in the Regents and Commissioner to carry into effect State educational laws and policies, and is necessary to implement Education Law section 3012-c by prescribing criteria for APPR of classroom teachers and building principals.

3. NEEDS AND BENEFITS:

Education Law section 3012-c establishes a comprehensive evaluation system for classroom teachers and building principals. This evaluation system is a critical element of the Regents reform agenda—an agenda aimed at improving teaching and learning in New York and increasing the opportunity for all students to graduate from high school ready for college and careers.

A primary objective of the evaluation system is to foster a culture of continuous professional growth. The system's three components are designed to complement one another:

- Statewide student growth measures will identify those educators whose students' progress exceeds that of their peers, as well as those whose students are falling behind compared to similar students.
- Locally selected measures of student achievement will reflect local priorities, needs, and targets.
- Teacher observations, school visits, and other measures will provide educators with detailed, structured feedback on their professional practice.

Together, this information will be used to tailor professional development and support for educators to grow and improve their instructional practices, with the ultimate goal of ensuring an effective teacher in every classroom and an effective leader in every school.

4. COSTS:

a. Costs to State government: The rule implements Education Law section 3012-c and does not impose any costs on State government, including the State Education Department, beyond those costs imposed by the statute.

b. Costs to local government: Education Law section 3012-c, as added by Chapter 103 of the Laws of 2010, establishes requirements for the conduct of annual professional performance reviews (APPR) of classroom teachers and building principals employed by school districts and boards of cooperative educational services (BOCES).

The costs discussed here are based on the following: (1) an estimated hourly rate for teachers of \$46.46 (based on an average annual teacher salary of \$66,902 divided by 1,440 hours per school year); (2) an estimated hourly rate for principals of \$71.90 (based on an average annual principal salary of \$126,544 divided by 1,760 hours per school year); and (3) an estimated hourly rate for superintendents of \$85.71 (based on a median annual superintendent of schools salary of \$150,850 divided by 1,760 hours per school year). The Department anticipates that the proposed rule will impose the following costs on school districts/BOCES. The estimated costs below assume that school districts and BOCES will need to pay for extra time for personnel at current rates. However, most districts and BOCES are or should be performing these activities currently, but the State does not have data on the amount of hours currently dedicated to these activities. Moreover, \$700 million in Race to the Top funds have been or will be made available to school districts and BOCES and portions of those monies will be available to offset some of these costs.

State assessments or Other Comparable Measures

The statute requires that 20% of a teacher or principal's evaluation be based on student growth on State assessments or other comparable measures (increases to 25% upon implementation of a value-added growth model). There are no additional costs beyond those imposed by statute for evaluating a teacher based on State assessments.

For non-tested subjects where there is no approved growth or value-added model for such grade/subject, the proposed amendment requires the district/BOCES to evaluate teachers and principals using a State-determined district- or BOCES-wide student growth goal setting process with an approved student assessment. The Department estimates that for non-tested subjects, a teacher or principal will spend approximately 4 hours to set his/her goals for the year and that a principal/superintendent will take approximately 1 hour per year to work with a teacher/principal on the goal setting process. Based on the estimated hourly rates described above, the Department estimates that the goal-setting process will cost a school district/BOCES \$257.74 per teacher (4 teacher hours to set goals plus 1 principal hour to review goals with teacher) and \$373.31 per principal (4 principal hours to set goals plus 1 superintendent hour to review goals with principal).

The goal-setting process also requires the use of a student assessment. In core subjects where no State assessment or Regents examination exists for such grades/subjects, the district/BOCES must use the goal setting process with an approved third-party assessment (at a cost per student of \$10-\$20 per student) or a Department-approved alternative examination (which the Department expects would have no additional cost). For all other non-tested grades/subjects, districts must use the goal-setting process with either an approved third-party assessment (at a cost of \$10-\$20 per student), a district- or BOCES-created assessment or a teacher-created assessments (which the Department expects would have minimal, if any, costs).

Locally Selected Measures

An additional 20% of the evaluation must be based on locally selected measures. The regulation provides districts/BOCES with several options for this component. For teacher evaluations, the regulation provides the following options: approved third-party assessments; district-, regional- or BOCES-developed assessments; a school-wide, group or team metric based on such assessments; student achievement on State assessments Regents examinations and/or Department approved alternative examinations; and a structured district-wide student growth goal-setting process to be used with any State assessment, an approved student assessment, or other school or teacher-created assessment. If districts/BOCES select the State assessment option or use of the group or team metric, the Department estimates that there are no additional costs. If the district/BOCES uses the goal-setting process, the costs are the same as those described above for a goal-setting process. If the district/BOCES already uses a student assessment from the State's approved list, which the Department expects will be the case in many instances, there will be no additional costs imposed by the proposed amendment. If a district/BOCES does not already use an approved local assessment and does not opt to use a mea-

sure based on a State assessment, the Department estimates the cost of purchasing a third-party student assessment will cost approximately \$10-\$20 per student, depending on the particular assessment selected. If a district/BOCES selects a school or teacher-created assessment, it will need to implement a growth goal setting process at a similar cost to the one described above. The estimated costs for a teacher-created assessment itself are negligible and capable of being absorbed using existing staff and resources.

For principals, the regulation provides many options for the locally selected measures subcomponent, which include, but are not limited to, student achievement on State assessments for certain subgroups, student performance on district-wide locally selected measures approved for use in teacher evaluations, graduation and drop out rates for high school grades, progress toward graduation, etc. As described above, if the district/BOCES selects a locally selected measure based on State assessments, Regents examinations, graduation rates, the percent of students who earn a Regents diploma, Department approved alternative examination or progress toward graduation rates, the Department expects these costs to be negligible and to be absorbed by existing staff. If the district/BOCES selects student performance on any or all of the district-wide locally selected measures for teachers, the Department expects that there will be no additional cost for principals that wasn't already incurred for teachers.

Other Measures

For the remaining 60% of the evaluation, the proposed amendment requires that 40 of the 60 points be based on multiple classroom observations for teachers and at least 40 of the 60 points be based on a broad assessment of the principal's leadership and management actions by the building principal's supervisor or a trained independent evaluator. The proposed amendment requires at least 2 observations for teachers and at least 1 principal assessment. For a teacher observation, the Department estimates the following costs:

Teacher Observations: While the regulation does not specifically prescribe how a district must conduct its observations. Based on a model currently in use, the Department expects a teacher will spend approximately 2 hours per classroom observation for pre- and post-conference meetings with the principal/evaluator, which would equate to 4 hours per year. Based on the same model, the Department expects that a principal/evaluator would spend approximately 1 hour for a teacher classroom observation and 2 additional hours for pre-conference and post-conference meetings associated with the conference, which would equate to 3 hours per observation or 6 hours per teacher per year. Therefore, for each teacher, a school district or BOCES would spend approximately \$617.24 per year on classroom observations, under the proposed rule. The Department believes that many districts currently conduct classroom observations and some districts conduct more than 2 observations per year, so for many districts there will be no additional costs imposed by the regulation.

Principal Assessment: The Department expects that a principal will spend approximately 4 hours preparing for a school visit by a superintendent and that a superintendent will spend approximately 2 school days assessing and observing a principal's practice. Therefore, the cost for a district to assess a principal's performance under the requirements of the proposed amendment are estimated to be \$287.60 for the principal and \$1,371.36 for the superintendent.

The proposed amendment also requires that the 60 points be based on a teacher or principal practice rubric approved by the Department or a rubric approved through a variance process. The Department estimates that more than one rubric on the State's approved list will be available to districts/BOCES at no cost. While some rubrics may offer training for a fee and others may require proprietary training, any costs incurred for training are costs imposed by the statute. Many rubric providers do not require a school district/BOCES to receive training through the provider and some providers even provide free online training. The Department estimates that districts/BOCES can obtain a principal practice in the following range: \$0-\$360 per principal evaluated. Some principal practice rubrics may charge an additional fee for training on the rubric, although most rubric providers do not require a user to receive training through the rubric provider.

Reporting and Data Collection

The proposed amendment requires that school districts or BOCES report information to the Department on enrollment and attendance data and any other student, teacher, school, course and teacher/student linkage data. The majority of this data is required to be reported under the America COMPETES Act (20 U.S.C. 9871). Therefore, no additional costs are imposed by the proposed amendment. To the extent that such information is not required to be reported under federal law, the Department expects that most districts/BOCES already compile this information and, therefore, these reporting requirements are minimal and should be absorbed by existing district or BOCES resources.

The proposed amendment also requires that every teacher and principal be required to verify the subjects and/or student rosters assigned to them.

The Department estimates that it will take a teacher 4 hours to review his/her student roster. This will cost a district or BOCES \$185.84 per teacher. For principals, the Department estimates that it will take a principal 8 hours to review his/her student roster. This will cost a district/BOCES \$575.20 per principal.

As for the additional reporting requirements contained in section 30-2.3 of the Rules of the Board of Regents, school districts or BOCES are required to report many of these requirements under the existing APPR regulations (section 100.2[o])—i.e., explanation of evaluation system used and description of timely and constructive feedback) and the Department expects that most districts or BOCES would put their evaluation process, including appeal procedures in writing and, therefore, reporting of such information would not impose any additional costs on a school district or BOCES.

Vested Interest

The proposed amendment also requires that districts certify that teachers and principals not have a vested interest in the test results of students whose assessments they score. The Department believes that most districts already have this security mechanism in place. However, in the event a district currently allows a teacher to score their own assessment, the Department expects that districts/BOCES can assign other teachers or faculty to score such assessments. Therefore, the Department believes that any costs imposed by this requirement in the regulation are minimal, if any.

Scoring

The statute requires that a teacher receive a teacher or principal composite effectiveness score based on their score on three subcomponents (student growth on State assessments or other comparable measures; locally selected measures of student achievement and other measures of teacher and principal effectiveness). The proposed amendment sets forth the scoring ranges for the rating categories in two of these subcomponents and overall rating categories. The proposed amendment does not impose any additional costs beyond those imposed by statute.

Training

The statute requires that all evaluators be properly trained before conducting an evaluation. The proposed amendment requires that a lead evaluator be certified by the district/BOCES before conducting and/or completing a teacher's or principal's evaluation and that evaluators be properly trained. Since the training is required by statute, the only additional cost imposed are associated with the district or BOCES' certification and recertification of lead evaluators, which costs are expected to be negligible and capable of absorption using existing staff and resources.

Teacher and Principal Improvement Plans and Appeal Procedures

The statute also requires school districts/BOCES to develop teacher and principal improvement plans for teachers rated ineffective or developing and to develop an appeals procedure through which a teacher or principal may challenge their APPR. The proposed amendment reiterates these statutory requirements and does not impose any additional costs on districts/BOCES relating to the development of TIP/PIP's or an appeal procedure, beyond those imposed by statute.

c. Costs to private regulated parties: None. The rule applies to annual professional performance reviews of teachers and building principals that are conducted by school districts/BOCES and does not impose any costs on private parties.

d. Cost to regulatory agency for implementing and continued administration of the rule: See above cost to State government.

5. LOCAL GOVERNMENT MANDATES:

Education Law section 3012-c establishes a comprehensive evaluation system for classroom teachers and building principals. The majority of the requirements in the proposed amendment do not impose any program, service, duty or responsibility on school districts and BOCES beyond those imposed by the statute.

The statute requires each classroom teacher and building principal to receive an APPR resulting in a single composite effectiveness score and rating of "highly effective," "effective," "developing," or "ineffective." The composite score is determined as follows:

- 20% is based on student growth on State assessments or other comparable measures of student growth (increased to 25% upon implementation of a value-added growth model)
- 20% is based on locally-selected measures of student achievement that are determined to be rigorous and comparable across classrooms as defined by the Commissioner (decreased to 15% upon implementation of value-added growth model)
- The remaining 60% is based on other measures of teacher/principal effectiveness consistent with standards prescribed by the Commissioner in regulation.

For the 2011-2012 school year, the new law only applies to classroom teachers in the common branch subjects or English language arts or mathematics in grades 4-8 and the building principals of schools in which such teachers are employed. In the 2012-2013 school year, the new evalu-

ation system will apply to all classroom teachers and building principals. However, the Department recommends that, to the extent possible, districts and BOCES begin the process of rolling this system out for the evaluation of all classroom teachers and building principals in the 2011-2012 school year so that New York can quickly move to a comprehensive teacher and principal evaluation system. By law, the APPR is required to be a significant factor in employment decisions such as promotion, retention, tenure determinations, termination, and supplemental compensation, as well as a significant factor in teacher and principal professional development.

If a teacher or principal is rated “developing” or “ineffective,” the law requires the school district/BOCES to develop and implement a teacher or principal improvement plan (TIP or PIP). Tenured teachers and principals with a pattern of ineffective teaching or performance - defined by law as two consecutive annual ineffective ratings - may be charged with incompetence and considered for termination through an expedited hearing process.

The statute also requires all evaluators to be appropriately trained consistent with standards prescribed by the Commissioner and that appeals procedures be locally developed in each school district/BOCES.

6. PAPERWORK:

In addition to the paperwork requirements described in Section 5 of this document, the proposed amendment contains the following paperwork requirements.

Section 100.2(o) of the Commissioner’s regulations requires that beginning July 1, 2011, each school district evaluate their building principals on an annual basis according to procedures developed by the governing body of each school district. Such procedures shall be filed in the district office and available for review by an individual no later than September 10th of each year.

Section 30-2.3 of the proposed amendment requires that by September 1, 2011, each school district shall adopt an APPR plan for its classroom teachers in the common branch subjects or English language arts or mathematics in grades 4-8 and its building principals of schools in which such teachers are employed. By September 1, 2012, each school district/BOCES shall adopt an APPR plan, which may be an annual or multi-year plan, for all of its classroom teachers and building principals. To the extent that any of the items required to be included in the annual professional performance review plan are not finalized by September 1 of each year as a result of pending collective bargaining negotiations, the plan shall identify those specific parts of the plan and the school district shall file an amended plan upon completion of such negotiations. Such plan shall be filed in the district or BOCES office, as applicable, and made available to the public on its web-site no later than September 10th of each school year, or within ten days after its adoption, whichever shall later occur.

This section requires that the APPR plan describe the school district’s or BOCES’ process for ensuring that the Department receives accurate teacher and student data, including certain identified information; how the district or BOCES will report subcomponent scores and the total composite effectiveness score for each classroom teacher and building principal in the school district or BOCES; the assessment development, security and scoring processes utilized by the school district or BOCES, which includes a requirement that any process and assessment or measures are not disseminated to students before administration and that teachers and principals do not have a vested interest in the outcome of the assessments they score; describe the details of the evaluation system used by the district or BOCES; how the district or BOCES will provide timely and constructive feedback to teachers and building principals and the appeal procedures used by the district or BOCES.

The proposed amendment also requires any school district or BOCES that uses a district, regional or BOCES-developed assessment; a school-wide, group or team metric or a structured district-wide student growth goal setting process to certify, in its annual professional performance review plan, that the measure is rigorous and comparable across classrooms and explain how the locally selected measure meets these requirements. For school districts or BOCES that use more than one locally selected measure for a grade/subject, they must certify in their APPR plan that the measures are comparable, in accordance with the Testing Standards.

If a school district or BOCES seeks to use a teacher or principal practice rubric that is either a close adaptation of a rubric on the approved list, or a rubric that was self-developed or developed by a third-party or a newly developed rubric, the school district or BOCES must seek a variance from the Department for the use of such rubric.

The proposed amendment also requires that the process by which points are assigned in the various subcomponents and the scoring ranges for the subcomponents must be transparent and available to those being rated before the beginning of each school year.

A provider seeking to place a practice rubric in the list of approved rubrics, or an assessment on the list of approved assessments, shall submit

to the Commissioner a written application that meets the requirements of sections 30-2.7 and 30-2.8, respectively. An approved rubric or approved assessment may be withdrawn for good cause. The provider may reply in writing within 10 calendar days of receipt of Commissioner’s notification of intent to terminate approval.

The governing body of each school district is required to ensure that evaluators have appropriate training before conducting an evaluation under this section and the lead evaluator must be appropriately certified and periodically recertified.

If a teacher or principal is rated “developing” or “ineffective,” the school district or BOCES is required to develop and implement a teacher or principal improvement plan (TIP or PIP) that complies with section 30-2.10. Such plan shall be developed locally through negotiations pursuant to Civil Service Law Article 14, and include identification of needed areas of improvement, a timeline for achieving improvement, the manner in which the improvement will be assessed and, where appropriate, differentiated activities to support improvement in those areas.

In accordance with the requirements of the statute, the proposed amendment also requires a school district or BOCES to develop an appeals procedure through which a teacher or principal may challenge their annual professional performance review.

7. DUPLICATION:

The rule is necessary to implement Education Law section 3012-c and does not duplicate existing State or Federal requirements.

8. ALTERNATIVES:

In September 2010, the Department convened an advisory committee known as the Regents Task Force on Teacher and Principal Effectiveness (“Task Force”), which is comprised of representatives of teachers, principals, superintendents of schools, school boards, school districts and board of cooperative educational services officials, and other interested parties. The Task Force has been meeting since September 2010 and they have been divided into workgroups to provide guidance and consider certain aspects of Education Law 3012-c.

After months of discussion and deliberations, the Task Force generated a written report of their recommendations. At the April 2011 Regents meeting, the Task Force presented their recommendations to the Board of Regents. Thereafter, the Department presented their recommendations, which incorporated most of the Task Force’s recommendations. At that point, the Regents directed the Department to draft regulations reflecting the Department’s recommendations.

On April 15, 2010, the Department posted draft regulatory language on our website for the public to review and provide informal comment. The Department received and reviewed over 250 comments on the proposed amendment, including comments from district superintendents, the Council of School Superintendents, the School Boards Association, the Governor’s Office, NYSUT, SAANYS and teachers and administrators across the State. Many of these comments have been incorporated in the proposed amendment or will be addressed in guidance.

9. FEDERAL STANDARDS:

The rule is necessary to implement Education Law section 3012-c. There are no applicable Federal standards concerning the APPR for classroom teachers and building principals as established in Education Law section 3012-c.

10. COMPLIANCE SCHEDULE:

The proposed amendment will become effective on its stated effective date. No further time is needed to comply. By 9/01/11, each school district shall adopt a plan for the APPR of its classroom teachers in the common branch subjects or English language arts or mathematics in grades 4-8 and its building principals of schools in which such teachers are employed, and by 9/01/12, each school district and BOCES shall adopt a plan, which may be an annual or multi-year plan, for the APPR of all classroom teachers and building principals.

Regulatory Flexibility Analysis

(a) Small businesses:

The purpose of the proposed rule is to implement Education Law section 3012-c, as added by Chapter 103 of the Laws of 2010, by establishing standards and criteria for conducting annual professional performance reviews of classroom teachers and building principals employed by school districts and boards of cooperative educational services. The proposed rule does not impose any reporting, recordkeeping or other compliance requirements, and will not have an adverse economic impact, on small business. Because it is evident from the nature of the amendment that it does not affect small businesses, no further steps were needed to ascertain that fact and one were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

(b) Local governments:

1. EFFECT OF RULE:

The rule applies to all school districts and boards of cooperative educational services (“BOCES”) in the State.

2. COMPLIANCE REQUIREMENTS:

Education Law section 3012-c establishes a comprehensive evaluation system for classroom teachers and building principals. The majority of the requirements in the proposed amendment do not impose any program, service, duty or responsibility on school districts and BOCES beyond those imposed by the statute.

The statute requires each classroom teacher and building principal to receive an APPR resulting in a single composite effectiveness score and rating of “highly effective,” “effective,” “developing,” or “ineffective.” The composite score is determined as follows:

- 20% is based on student growth on State assessments or other comparable measures of student growth (increased to 25% upon implementation of a value-added growth model)
- 20% is based on locally-selected measures of student achievement that are determined to be rigorous and comparable across classrooms as defined by the Commissioner (decreased to 15% upon implementation of value-added growth model). The rule provides a list of local options/measures for the evaluation of teachers and principals under this subcomponent
- The remaining 60% is based on other measures of teacher/principal effectiveness consistent with standards prescribed by the Commissioner in regulation. The rule requires that, for teachers, at least 40 of the 60 points be based on multiple classroom observations, including at least one observation by a principal or other trained administrator and, for principals, at least 40 of the 60 points be based on a broad assessment of leadership and management actions by the supervisor or a trained independent evaluator, including one or more school visits by a supervisor.

For the 2011-2012 school year, the new law only applies to classroom teachers in the common branch subjects or English language arts or mathematics in grades 4-8 and the building principals of schools in which such teachers are employed. In the 2012-2013 school year, the new evaluation system will apply to all classroom teachers and building principals. However, the Department recommends that, to the extent possible, districts and BOCES begin the process of rolling this system out for the evaluation of all classroom teachers and building principals in the 2011-2012 school year so that New York can quickly move to a comprehensive teacher and principal evaluation system. By law, the APPR is required to be a significant factor in employment decisions such as promotion, retention, tenure determinations, termination, and supplemental compensation, as well as a significant factor in teacher and principal professional development.

The proposed amendment also prescribes the following requirements:

The amendments to section 100.2(o) of the Commissioner’s regulations require that beginning July 1, 2011, each school district evaluate their building principals on an annual basis according to procedures developed by the governing body of each school district. Such procedures shall be filed in the district office and available for review by an individual no later than September 10th of each year.

Section 30-2.3 of the proposed amendment requires that by September 1, 2011, each school district shall adopt an APPR plan for its classroom teachers in the common branch subjects or English language arts or mathematics in grades 4-8 and its building principals of schools in which such teachers are employed. By September 1, 2012, each school district/BOCES shall adopt an APPR plan, which may be an annual or multi-year plan, for all of its classroom teachers and building principals. To the extent that any of the items required to be included in the annual professional performance review plan are not finalized by September 1 of each year as a result of pending collective bargaining negotiations, the plan shall identify those specific parts of the plan and the school district shall file an amended plan upon completion of such negotiations. Such plan shall be filed in the district or BOCES office, as applicable, and made available to the public on its web-site no later than September 10th of each school year, or within ten days after its adoption, whichever shall later occur.

This section also requires that the APPR plan describe the school district’s or BOCES’ process for ensuring that the Department receives accurate teacher and student data, including certain identified information; how the teacher or BOCES will report subcomponent scores and the total composite effectiveness score for each classroom teacher and building principal in the school district or BOCES; the assessment development, security and scoring processes utilized by the school district or BOCES, which includes a requirement that any process and assessment or measures are not disseminated to students before administration and that teachers and principals do not have a vested interest in the outcome of the assessments they score; describe the details of the evaluation system used by the district or BOCES; how the district or BOCES will provide timely and constructive feedback to teachers and building principals and the appeal procedures used by the district or BOCES.

The proposed amendment also requires a school district or BOCES that uses a district, regional or BOCES-developed assessment; a school-wide, group or team metric or a structured district-wide student growth goal set-

ting process to certify, in its annual professional performance review plan, that the measure is rigorous and comparable across classrooms and explain how the locally selected measure meets these requirements. For school districts or BOCES that use more than one locally selected measure for a grade/subject, they must certify in their APPR plan that the measures are comparable, in accordance with the Testing Standards.

If a school district or BOCES seeks to use a teacher or principal practice rubric that is either a close adaptation of a rubric on the approved list, or a rubric that was self-developed or developed by a third-party or a newly developed rubric, the school district or BOCES must seek a variance from the Department for the use of such rubric.

The proposed amendment also requires that the process by which points are assigned in the various subcomponents and the scoring ranges for the subcomponents must be transparent and available to those being rated before the beginning of each school year.

A provider seeking to place a practice rubric in the list of approved rubrics, or an assessment on the list of approved assessments, shall submit to the Commissioner a written application that meets the requirements of sections 30-2.7 and 30-2.8, respectively. An approved rubric or approved assessment may be withdrawn for good cause. The provider may reply in writing within 10 calendar days of receipt of Commissioner’s notification of intent to terminate approval.

The governing body of each school district is required to ensure that evaluators have appropriate training before conducting an evaluation under this section and the lead evaluator must be appropriately certified and periodically recertified.

If a teacher or principal is rated “developing” or “ineffective,” the school district or BOCES is required to develop and implement a teacher or principal improvement plan (TIP or PIP) that complies with section 30-2.10. Such plan shall be developed locally through negotiations pursuant to Civil Service Law Article 14, and include identification of needed areas of improvement, a timeline for achieving improvement, the manner in which the improvement will be assessed and, where appropriate, differentiated activities to support improvement in those areas.

In accordance with the requirements of the statute, the proposed amendment also requires a school district or BOCES to develop an appeals procedure through which a teacher or principal may challenge their annual professional performance review.

3. COMPLIANCE COSTS:

See the Costs Section of the Regulatory Impact Statement that is published in the State Register on this publication date for an analysis of the costs of the proposed rule.

4. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The rule does not impose any additional technological requirements on school districts or BOCES. Economic feasibility is addressed above under Compliance Costs.

5. MINIMIZING ADVERSE IMPACT:

The rule is necessary to implement Education Law section 3012-c. The rule has been carefully drafted to meet statutory requirements while providing flexibility to school districts and BOCES.

Regarding how student growth should be measured in non-tested subjects, the rule strikes a balance between prescriptiveness and choice by requiring, for teachers in grades 6-11 core subjects where there is no State assessment used as part of a growth or value-added growth model, use of a State-determined, district-wide growth goal-setting process with standardized student assessments chosen from a State-approved list; and, in other grades/subjects where there is no State assessment used as part of a growth or value-added growth model, requiring use of a State-determined, district-wide growth goal-setting process with an assessment selected by districts from a range of choices (including State-approved commercially available assessments, district or BOCES developed assessments, school-wide, group, or team results based on State assessments, and teacher-created assessments).

The rule also provides flexibility in the allocating the 20 points assigned to locally selected measures. The Department has provided a list of local options for the evaluation of teachers and principals for the 20 points of the teacher or principal composite effectiveness score attributed to this subcomponent (15 points once value-added model is implemented).

Consistent with providing flexibility, the rule does not set scoring ranges for the rating categories within the 60 point other measures subcomponent and the rule provides for a variance process for school districts or BOCES that wish to use an existing rubric or a new innovative rubric.

6. LOCAL GOVERNMENT PARTICIPATION:

In September 2010, the Department convened an advisory committee known as the Regents Task Force on Teacher and Principal Effectiveness (“Task Force”), which is comprised of representatives of teachers, principals, superintendents of schools, school boards, school districts and board of cooperative educational services officials, and other interested parties. The Task Force has been meeting since September 2010 and they

have been divided into workgroups to provide guidance and consider certain aspects of Education Law 3012-c.

After months of discussion and deliberations, the Task Force generated a written report of their recommendations. At the April 2011 Regents meeting, the Task Force presented their recommendations to the Board of Regents. Thereafter, the Department presented their recommendations, which incorporated most of the Task Force's recommendations. At that point, the Regents directed the Department to draft regulations reflecting the Department's recommendations.

On April 15, 2010, the Department posted draft regulatory language on our website for the public to review and provide informal comment. The Department received and reviewed over 250 comments on the proposed amendment, including comments from district superintendents, the Council of School Superintendents, the School Boards Association, the Governor's Office, the Council of School Supervisor & Administrators, New York City, the Conference of Big 5 School Districts NYSUT, SAANYS and teachers and administrators and public interest groups across the State. Many of these comments have been incorporated in the proposed amendment or will be addressed in guidance.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment applies to all school districts and boards of cooperative educational services (BOCES) in the State, including those located in the 44 rural counties with fewer than 200,000 inhabitants and the 71 towns and urban counties with a population density of 150 square miles or less.

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

Education Law section 3012-c establishes a comprehensive evaluation system for classroom teachers and building principals. The majority of the requirements in the proposed amendment do not impose any program, service, duty or responsibility on school districts and BOCES beyond those imposed by the statute.

The statute requires each classroom teacher and building principal to receive an APPR resulting in a single composite effectiveness score and rating of "highly effective," "effective," "developing," or "ineffective." The composite score is determined as follows:

- 20% is based on student growth on State assessments or other comparable measures of student growth (increased to 25% upon implementation of a value-added growth model)
- 20% is based on locally-selected measures of student achievement that are determined to be rigorous and comparable across classrooms as defined by the Commissioner (decreased to 15% upon implementation of value-added growth model). The rule provides a list of local options/measures for the evaluation of teachers and principals under this subcomponent
- The remaining 60% is based on other measures of teacher/principal effectiveness consistent with standards prescribed by the Commissioner in regulation. The rule requires that, for teachers, at least 40 of the 60 points be based on multiple classroom observations, including at least one observation by a principal or other trained administrator and, for principals, at least 40 of the 60 points be based on a broad assessment of leadership and management actions by the supervisor or a trained independent evaluator, including one or more school visits by a supervisor.

For the 2011-2012 school year, the new law only applies to classroom teachers in the common branch subjects or English language arts or mathematics in grades 4-8 and the building principals of schools in which such teachers are employed. In the 2012-2013 school year, the new evaluation system will apply to all classroom teachers and building principals. However, the Department recommends that, to the extent possible, districts and BOCES begin the process of rolling this system out for the evaluation of all classroom teachers and building principals in the 2011-2012 school year so that New York can quickly move to a comprehensive teacher and principal evaluation system. By law, the APPR is required to be a significant factor in employment decisions such as promotion, retention, tenure determinations, termination, and supplemental compensation, as well as a significant factor in teacher and principal professional development.

The proposed amendment also prescribes the following requirements:

The amendment to section 100.2(o) of the Commissioner's regulations requires that beginning July 1, 2011, each school district evaluate their building principals on an annual basis according to procedures developed by the governing body of each school district. Such procedures shall be filed in the district office and available for review by an individual no later than September 10th of each year.

Section 30-2.3 of the proposed amendment requires that by September 1, 2011, each school district shall adopt an APPR plan for its classroom teachers in the common branch subjects or English language arts or mathematics in grades 4-8 and its building principals of schools in which

such teachers are employed. By September 1, 2012, each school district/BOCES shall adopt an APPR plan, which may be an annual or multi-year plan, for all of its classroom teachers and building principals. To the extent that any of the items required to be included in the annual professional performance review plan are not finalized by September 1 of each year as a result of pending collective bargaining negotiations, the plan shall identify those specific parts of the plan and the school district shall file an amended plan upon completion of such negotiations. Such plan shall be filed in the district or BOCES office, as applicable, and made available to the public on its web-site no later than September 10th of each school year, or within ten days after its adoption, whichever shall later occur.

This section also requires that the APPR plan describe the school district's or BOCES' process for ensuring that the Department receives accurate teacher and student data, including certain identified information; how the district or BOCES will report subcomponent scores and the total composite effectiveness score for each classroom teacher and building principal in the school district or BOCES; the assessment development, security and scoring processes utilized by the school district or BOCES, which includes a requirement that any process and assessment or measures are not disseminated to students before administration and that teachers and principals do not have a vested interest in the outcome of the assessments they score; describe the details of the evaluation system used by the district or BOCES; how the district or BOCES will provide timely and constructive feedback to teachers and building principals and the appeal procedures used by the district or BOCES.

The proposed amendment also requires a school district or BOCES that uses a district, regional or BOCES-developed assessment; a school-wide, group or team metric or a structured district-wide student growth goal setting process to certify, in its annual professional performance review plan, that the measure is rigorous and comparable across classrooms and explain how the locally selected measure meets these requirements. For school districts or BOCES that use more than one locally selected measure for a grade/subject, they must certify in their APPR plan that the measures are comparable, in accordance with the Testing Standards.

If a school district or BOCES seeks to use a teacher or principal practice rubric that is either a close adaptation of a rubric on the approved list, or a rubric that was self-developed or developed by a third-party or a newly developed rubric, the school district or BOCES must seek a variance from the Department for the use of such rubric.

The proposed amendment also requires that the process by which points are assigned in the various subcomponents and the scoring ranges for the subcomponents must be transparent and available to those being rated before the beginning of each school year.

A provider seeking to place a practice rubric in the list of approved rubrics, or an assessment on the list of approved assessments, shall submit to the Commissioner a written application that meets the requirements of sections 30-2.7 and 30-2.8, respectively. An approved rubric or approved assessment may be withdrawn for good cause. The provider may reply in writing within 10 calendar days of receipt of Commissioner's notification of intent to terminate approval.

The governing body of each school district is required to ensure that evaluators have appropriate training before conducting an evaluation under this section and the lead evaluator must be appropriately certified and periodically recertified.

If a teacher or principal is rated "developing" or "ineffective," the school district or BOCES is required to develop and implement a teacher or principal improvement plan (TIP or PIP) that complies with section 30-2.10. Such plan shall be developed locally through negotiations pursuant to Civil Service Law Article 14, and include identification of needed areas of improvement, a timeline for achieving improvement, the manner in which the improvement will be assessed and, where appropriate, differentiated activities to support improvement in those areas.

In accordance with the requirements of the statute, the proposed amendment also requires a school district or BOCES to develop an appeals procedure through which a teacher or principal may challenge their annual professional performance review.

3. COSTS:

See the Costs Section of the Regulatory Impact Statement that is published in the State Register on this publication date for an analysis of the costs of the proposed rule, which include costs for school districts and BOCES across the State, including those located in rural areas.

4. MINIMIZING ADVERSE IMPACT:

The rule is necessary to implement Education Law section 3012-c. The rule has been carefully drafted to meet statutory requirements while providing flexibility to school districts and BOCES. Since the statute applies to all school districts and BOCES throughout the State, it was not possible to establish different compliance and reporting requirements for regulated parties in rural areas, or to exempt them from the rule's provisions.

Regarding how student growth should be measured in non-tested

subjects, the rule strikes a balance between prescriptiveness and choice by requiring, for teachers in grades 6-11 core subjects where there is no State assessment used as part of a growth or value-added growth model, use of a State-determined, district-wide growth goal-setting process with standardized student assessments chosen from a State-approved list; and, in other grades/subjects where there is no State assessment used as part of a growth or value-added growth model, requiring use of a State-determined, district-wide growth goal-setting process with an assessment selected by districts from a range of choices (including State-approved commercially available assessments, district or BOCES developed assessments, school-wide, group, or team results based on State assessments, and teacher-created assessments).

The rule also provides flexibility in the allocating the 20 points assigned to locally selected measures. The Department has provided a list of local options for the evaluation of teachers and principals for the 20 points of the teacher or principal composite effectiveness score attributed to this subcomponent (15 points once value-added model is implemented).

Consistent with providing flexibility, the rule does not set scoring ranges for the rating categories within the 60 point other measures subcomponent and the rule provides for a variance process for school districts or BOCES that wish to use an existing rubric or a new innovative rubric.

5. RURAL AREA PARTICIPATION:

In September 2010, the Department convened an advisory committee known as the Regents Task Force on Teacher and Principal Effectiveness ("Task Force"), which is comprised of representatives of teachers, principals, superintendents of schools, school boards, school districts and board of cooperative educational services officials, and other interested parties. The Task Force has been meeting since September 2010 and they have been divided into workgroups to provide guidance and consider certain aspects of Education Law 3012-c.

After months of discussion and deliberations, the Task Force generated a written report of their recommendations. At the April 2011 Regents meeting, the Task Force presented their recommendations to the Board of Regents. Thereafter, the Department presented their recommendations, which incorporated most of the Task Force's recommendations. At that point, the Regents directed the Department to draft regulations reflecting the Department's recommendations.

On April 15, 2010, the Department posted draft regulatory language on our website for the public to review and provide informal comment. The Department received and reviewed over 250 comments on the proposed amendment, including comments from district superintendents, the Council of School Superintendents, the School Boards Association, the Governor's Office, the Council of School Supervisor & Administrators, New York City, the Conference of Big 5 School Districts NYSUT, SAANYS and teachers and administrators and public interest groups across the State. Many of these comments have been incorporated in the proposed amendment or will be addressed in guidance.

Job Impact Statement

The purpose of the proposed rule is to implement Education Law section 3012-c, as added by Chapter 103 of the Laws of 2010, by establishing standards and criteria for conducting annual professional performance reviews of classroom teachers and building principals employed by school districts and boards of cooperative educational services. Because it is evident from the nature of the proposed rule that it will have no impact on the number of jobs or employment opportunities in New York State, 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.

REVISED RULE MAKING NO HEARING(S) SCHEDULED

Customized Packaging of Prescription Drugs

I.D. No. EDU-22-11-00005-RP

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

Proposed Action: Amendment of section 29.7 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207, 6504, 6506(1), 6508(1), 6509(9) and 6510(1)

Subject: Customized packaging of Prescription Drugs.

Purpose: Authorizes pharmacists to repack drugs in customized patient packaging provided that certain requirements are met.

Text of revised rule: Paragraph (15) of subdivision (a) of section 29.7 of the Rules of the Board of Regents is amended, effective November 9, 2011, as follows:

(15)(i) Repacking of drugs in a pharmacy, except by a pharmacist or under his/her immediate and personal supervision. Labels on repacked drugs shall bear sufficient information for proper identification and safety. A repacking record shall be maintained, including the name, strength, lot number, quantity and name of the manufacturer and/or distributor of the drug repacked, the date of the repacking, the number of packages prepared, the number of dosage units in each package, the signature of the person performing the packaging operation, the signature of the pharmacist who supervised the repacking, and such other identifying marks added by the pharmacy for internal recordkeeping purposes. Drugs repacked for in-house use only shall have an expiration date of 12 months, or 50 percent of the time remaining to the manufacturer's expiration date, whichever is less, from the date of repacking. For the repacking of drugs by manufacturers and wholesalers, the provisions of parts 210 and 211 of title 21, Code of Federal Regulations (1984 edition, Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402: 1984, available at New York State Board of Pharmacy, [Room 3035, Cultural Education Center, Albany, NY 12230] 89 Washington Avenue, 2nd Floor, Albany, NY 12234), shall apply. Repacking records shall be maintained for five years and shall be made available to the department for review and copying.

(ii) Repacking drugs in customized patient medication packages (patient med-pak or patient medication package) unless the following conditions are complied with:

(a) medications are packaged in moisture-proof containers that are either non-reclosable or are designed to show evidence of having been opened;

(b) medications are dispensed in containers that bear a label affixed to the immediate container in which the medications are dispensed in accordance with section 6810(1) of the Education Law. Such label shall include:

(1) all information required by Education Law section 6810(1);

(2) the name, strength, physical description or identification, and quantity of each medication;

(3) the address and telephone number of the dispenser;

(4) an expiration date for the customized patient medication package, which shall not be longer than the shortest recommended expiration date of the medications included therein, provided that in no event shall the expiration date be more than 60 days from the date of preparation of the package and shall not exceed the shortest expiration date on the original manufacturer's bulk containers for the dosage forms included therein;

(5) a separate identifying serial number for each of the prescription orders for each of the drug products contained in the customized patient medication package and, unless such number provides complete information about the customized patient medication package, a serial number for the customized patient medication package itself; and

(6) any other information, including storage instructions or any statements, or warnings required for the medications contained in the package.

(c) medications shall not be repackaged for or reissued to any patient other than to the patient for whom they are originally dispensed;

(d) medications shall not be dispensed in customized patient medication packages, without the consent of the patient, the patient's caregiver, or the prescriber, and the patient or caregiver shall be properly instructed in the use of such packages, in how to identify each medication, and in the steps to be taken in the event one of the medications is discontinued or the therapy otherwise altered;

(e) controlled substances shall not be dispensed in customized patient medication packages;

(f) medications that are unstable or therapeutically incompatible shall not be dispensed in customized patient medication packages; and

(g) a record of each customized patient medication package shall be maintained by the pharmacist. Each record shall contain:

(1) the name and address of the patient;

(2) the serial number of the prescription order for each medication contained therein, or other means of individualized tracking system acceptable to the Department;

(3) the name of the manufacturer or labeler and the lot number for each medication contained therein;

(4) information identifying or describing the design, characteristics, or specifications of the customized patient medication package sufficient to allow subsequent preparation of an identical customized patient medication package for the patient;

(5) the date of preparation of the customized patient medication package and the expiration date that was assigned;

(6) any special labeling instructions; and

(7) the name or initials of the pharmacist who prepared the customized patient medication package.

Revised rule compared with proposed rule: Substantial revisions were made in section 29.7(a)(15)(ii).

Text of revised proposed rule and any required statements and analyses may be obtained from Chris Moore, State Education Department, Office of Counsel, State Education Building Room 146, 89 Washington Ave., Albany, NY 12234, (518) 473-8296, email: legal@mail.nysed.gov

Data, views or arguments may be submitted to: Douglas Lentivech, Deputy Commissioner for the Professions, State Education Department, State Education Building, 2M, 89 Washington Ave., Albany, NY 12234, (518) 474-1941, email: opdepcor@mail.nysed.gov

Public comment will be received until: 30 days after publication of this notice.

Revised Regulatory Impact Statement

Since publication of a Notice of Proposed Rule Making in the State Register on June 1, 2011, the proposed amendment has been substantially revised as follows.

Section 29.2(a)(15)(ii)(g)(3) has been revised to require that pharmacists maintain a record of the lot number for each medication contained in a customized patient medication package.

The above change requires that the Paperwork section of the previously published Regulatory Impact Statement be revised to read as follows:

6. PAPERWORK:

The proposed amendment requires that medications in customized patient medication packages be dispensed in containers that bear a label affixed to the immediate container in accordance with section Education Law section 6810(1). The label shall include the following information:

(1) all information required by Education Law section 6810(1);

(2) the name, strength, physical description or identification, and quantity of each medication;

(3) the address and telephone number of the dispenser;

(4) an expiration date for the customized patient medication package, which shall not be longer than the shortest recommended expiration date of the medications included therein, provided that in no event shall the expiration date be more than 60 days from the date of preparation of the package and shall not exceed the shortest expiration date on the original manufacturer's bulk containers for the dosage forms included therein;

(5) a separate identifying serial number for each of the prescription orders for each of the drug products contained in the customized patient medication package and, unless such number provides complete information about the customized patient medication package, a serial number for the customized patient medication package itself; and

(6) any other information, including storage instructions or any statements, or warnings required for the medications contained in the package.

A record of each customized patient medication package shall also be maintained by the pharmacist. The record must contain the following information:

(1) the name and address of the patient;

(2) the serial number of the prescription order for each medication

contained therein, or other means of individualized tracking system acceptable to the Department;

(3) the name of the manufacturer or labeler and the lot number for each medication contained therein;

(4) information identifying or describing the design, characteristics, or specifications of the customized patient medication package sufficient to allow subsequent preparation of an identical customized patient medication package for the patient;

(5) the date of preparation of the customized patient medication package and the expiration date that was assigned;

(6) any special labeling instructions; and

(7) the name or initials of the pharmacist who prepared the customized patient medication package.

The patient or caregiver must be properly instructed in the use of such packages, in how to identify each medication, and in the steps to be taken in the event one of the medications is discontinued or the therapy otherwise altered.

Revised Regulatory Flexibility Analysis

Since publication of a Notice of Proposed Rule Making in the State Register on June 1, 2011, the proposed amendment has been substantially revised as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

The aforesaid revision requires that the Compliance section of the previously published Regulatory Flexibility Analysis for Small Businesses and Local Government be revised to read as follows:

2. COMPLIANCE REQUIREMENTS:

The proposed amendment requires that medications in customized patient medication packages be dispensed in containers that bear a label affixed to the immediate container in accordance with section Education Law section 6810(1). The label shall include the following information:

(1) all information required by Education Law section 6810(1);

(2) the name, strength, physical description or identification, and quantity of each medication;

(3) the address and telephone number of the dispenser;

(4) an expiration date for the customized patient medication package, which shall not be longer than the shortest recommended expiration date of the medications included therein, provided that in no event shall the expiration date be more than 60 days from the date of preparation of the package and shall not exceed the shortest expiration date on the original manufacturer's bulk containers for the dosage forms included therein;

(5) a separate identifying serial number for each of the prescription orders for each of the drug products contained in the customized patient medication package and, unless such number provides complete information about the customized patient medication package, a serial number for the customized patient medication package itself; and

(6) any other information, including storage instructions or any statements, or warnings required for the medications contained in the package.

A record of each customized patient medication package shall also be maintained by the pharmacist. The record must contain the following information:

(1) the name and address of the patient;

(2) the serial number of the prescription order for each medication contained therein, or other means of individualized tracking system acceptable to the Department;

(3) the name of the manufacturer or labeler and the lot number for each medication contained therein;

(4) information identifying or describing the design, characteristics, or specifications of the customized patient medication package sufficient to allow subsequent preparation of an identical customized patient medication package for the patient;

(5) the date of preparation of the customized patient medication package and the expiration date that was assigned;

(6) any special labeling instructions; and

(7) the name or initials of the pharmacist who prepared the customized patient medication package.

The patient or caregiver must be properly instructed in the use of such packages, in how to identify each medication, and in the steps to be taken in the event one of the medications is discontinued or the therapy otherwise altered.

Revised Rural Area Flexibility Analysis

Since publication of a Notice of Proposed Rulemaking in the State Register on June 1, 2011, the proposed amendment has been substantially revised as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

The aforesaid revisions requires the Reporting, Recordkeeping and Other Compliance Requirements; and Professional Services section in the previously published Rural Area Flexibility Analysis be revised to read as follows:

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

The proposed amendment requires that medications in customized patient medication packages be dispensed in containers that bear a label affixed to the immediate container in accordance with section Education Law section 6810(1). The label shall include the following information:

- (1) all information required by Education Law section 6810(1);
- (2) the name, strength, physical description or identification, and quantity of each medication;
- (3) the address and telephone number of the dispenser;
- (4) an expiration date for the customized patient medication package, which shall not be longer than the shortest recommended expiration date of the medications included therein, provided that in no event shall the expiration date be more than 60 days from the date of preparation of the package and shall not exceed the shortest expiration date on the original manufacturer's bulk containers for the dosage forms included therein;
- (5) a separate identifying serial number for each of the prescription orders for each of the drug products contained in the customized patient medication package and, unless such number provides complete information about the customized patient medication package, a serial number for the customized patient medication package itself; and
- (6) any other information, including storage instructions or any statements, or warnings required for the medications contained in the package.

A record of each customized patient medication package shall also be maintained by the pharmacist. The record must contain the following information:

- (1) the name and address of the patient;
- (2) the serial number of the prescription order for each medication contained therein, or other means of individualized tracking system acceptable to the Department;
- (3) the name of the manufacturer or labeler and the lot number for each medication contained therein;
- (4) information identifying or describing the design, characteristics, or specifications of the customized patient medication package sufficient to allow subsequent preparation of an identical customized patient medication package for the patient;
- (5) the date of preparation of the customized patient medication package and the expiration date that was assigned;
- (6) any special labeling instructions; and
- (7) the name or initials of the pharmacist who prepared the customized patient medication package.

The patient or caregiver must be properly instructed in the use of such packages, in how to identify each medication, and in the steps to be taken in the event one of the medications is discontinued or the therapy otherwise altered.

Revised Job Impact Statement

Since publication of a Notice of Proposed Rule Making in the State Register on June 1, 2011, the proposed amendment has been substan-

tially revised as set forth in the Statement Concerning the Regulatory Impact Statement.

The proposed amendment relates to the definition of unprofessional conduct in the practice of the profession of pharmacy and will not adversely impact jobs and employment opportunities. The proposed amendment, as so revised, will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the revised proposed amendment that it will have a positive impact, or no impact, on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Assessment of Public Comment

Since publication of a Notice of Proposed Rule making in the June 1, 2011 State Register, the State Education Department received the following comments:

1. COMMENT:

Support was expressed for the proposed rule as a means to ensure that patients are able to adhere to their prescribed medication schedules and thereby improve their health outcomes and lower overall health care costs. Medication adherence is of utmost importance when trying to treat and monitor a patient's drug therapy and overall health. Many patients, especially those with chronic disease such as hypertension, diabetes and asthma (and others) do not take their medications on schedule. This is compounded in patients who have multiple diseases/conditions and patients who are elderly, debilitated or have critically important conditions such as HIV/AIDS. Many of these patients are treated with several medications creating a monumental task for some patients to stay on schedule. The costs to the health care system for this rule are minimal and are far outweighed by the improved benefits to patients and the health care system.

DEPARTMENT RESPONSE:

The Department concurs with the comment.

2. COMMENT:

While generally supporting the proposal to authorize the use of customized patient medication packages, one comment urged the Department to include in the records a pharmacist must maintain the lot number of each medication contained in each such package. The comment indicates that "ready access to this product information can literally be a life-saver in the event of a recall of contaminated or mislabeled medications."

DEPARTMENT RESPONSE:

The Department concurs that requiring pharmacists to maintain records of the lot numbers of medications contained in customized patient packages will enhance public safety. The proposed rule has been revised accordingly.

Insurance Department

EMERGENCY RULE MAKING

Standards for the Management of the New York State Retirement Systems

I.D. No. INS-35-11-00005-E

Filing No. 752

Filing Date: 2011-08-16

Effective Date: 2011-08-16

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

Action taken: Amendment of Part 136 (Regulation 85) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 314, 7401(a) and 7402(n)

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

Specific reasons underlying the finding of necessity: The Second Amendment to Regulation 85 (11 NYCRR 136), effective November 19, 2008, established new standards of behavior with regard to investment of the Common Retirement Fund's assets, conflicts of interest, and procurement. In addition, it created new audit and actuarial committees, and greatly strengthened the investment advisory committee. The Second Amendment also set high ethical standards, strengthened internal controls and governance, enhanced the operational transparency of the Fund, and strengthened supervision by the Insurance Department.

Nevertheless, recent events surrounding how placement agents conduct business on behalf of their clients with regard to the Fund compel the Superintendent to conclude that the mere strengthening of the Fund's control environment is insufficient to protect the integrity of the state employees' retirement system. Rather, only an immediate ban on the use of placement agents will ensure sufficient protection of the Fund's members and beneficiaries and safeguard the integrity of the Fund's investments.

This regulation was previously promulgated on an emergency basis on June 18, 2009, September 16, 2009, January 5, 2010, April 2, 2010, May 28, 2010, July 29, 2010, September 23, 2010, November 19, 2010, January 18, 2011, March 21, 2011, and May 19, 2011. The Department is currently working the Governor's Office to make additional revisions to the regulation.

In the interim, this version of Regulation No. 85 needs to remain effective for the general welfare.

Subject: Standards for the management of the New York State Retirement Systems.

Purpose: To ban the use of placement agents by investment advisors engaged by the state employees retirement system.

Text of emergency rule: Section 136-2.2 is amended to read as follows:

§ 136-2.2 Definitions.

The following words and phrases, as used in this Subpart, unless a different meaning is plainly required by the context, shall have the following meanings:

[(a) Retirement system shall mean the New York State and Local Employees' Retirement System and the New York State and Local Police and Fire Retirement System.]

[(b) Fund shall mean the New York State Common Retirement Fund, a fund in the custody of the Comptroller as trustee, established pursuant to Section 422 of the Retirement and Social Security Law, which holds the assets of the retirement system.]

[(c)](a) Comptroller shall mean the Comptroller of the State of New York in his capacity as administrative head of the Retirement System and the sole trustee of the [fund] Fund

[(d) OSC shall mean the Office of the State Comptroller.]

[(e)](b) Consultant or advisor shall mean any person (other than an OSC employee) or entity retained by the [fund] Fund to provide technical or professional services to the [fund] Fund relating to investments by the [fund] Fund, including outside investment counsel and litigation counsel, custodians, administrators, broker-dealers, and persons or entities that identify investment objectives and risks, assist in the selection of [money] investment managers, securities, or other investments, or monitor investment performance.

(c) Family member shall mean any person living in the same household as the Comptroller, and any person related to the Comptroller within the third degree of consanguinity or affinity.

(d) Fund shall mean the New York State Common Retirement Fund, a fund in the custody of the Comptroller as trustee, established pursuant to Section 422 of the Retirement and Social Security Law ("RSSL"), which holds the assets of the Retirement System.

[f] (e) Investment manager shall mean any person (other than an OSC employee) or entity engaged by the Fund in the management of part or all of an investment portfolio of the [fund] Fund. "Management" shall include, but is not limited to, analysis of portfolio holdings, and the purchase, sale, and lending thereof. For the purposes hereof, any investment made by the Fund pursuant to RSSL § 177(7) shall be deemed to be the investment of the Fund in such investment entity (rather than in the assets of such investment entity).

(f) Investment policy statement shall mean a written document that, consistent with law, sets forth a framework for the investment program of the Fund.

(g) OSC shall mean the Office of the State Comptroller.

[(g)] (h) Placement agent or intermediary shall mean any person or entity, including registered lobbyists, directly or indirectly engaged and compensated by an investment manager (other than [an] a regular employee of the investment manager) to promote investments to or solicit investment by [assist the investment manager in obtaining investments by the fund, or otherwise doing business with] the [fund] Fund, whether compensated on a flat fee, a contingent fee, or any other basis. Regular employees of an investment manager are excluded from this definition unless they are employed principally for the purpose of securing or influencing the decision to secure a particular transaction or investment by the Fund. [obtaining investments or providing other intermediary services with respect to the fund.] For purpose of this paragraph, the term "employee" shall include any person who would qualify as an employee under the federal Internal Revenue Code of 1986, as amended, but shall not include a person hired, retained or engaged by an investment manager to secure or influence the decision to secure a particular transaction or investment by the Fund.

[(h) Investment policy statement shall mean a written document that, consistent with law, sets forth a framework for the investment program of the fund.]

[(i) Third party administrator shall mean any person or entity that contractually provides administrative services to the retirement system, including receiving and recording employer and employee contributions, maintaining eligibility rosters, verifying eligibility for benefits or paying benefits and maintaining any other retirement system records. Administrative services do not include services provided to the fund relating to fund investments.]

(i) Retirement System shall mean the New York State and Local Employees' Retirement System and the New York State and Local Police and Fire Retirement System.

(j) Third party administrator shall mean any person or entity that contractually provides administrative services to the Retirement System, including receiving and recording employer and employee contributions, maintaining eligibility rosters, verifying eligibility for benefits, paying benefits or maintaining any other Retirement System records. "Administrative services" do not include services provided to the Fund relating to Fund investments.

[(j)] (k) Unaffiliated Person shall mean any person other than: (1) the Comptroller or a family member of the Comptroller, (2) an officer or employee of OSC, (3) an individual or entity doing business with OSC or the [fund] Fund, or (4) an individual or entity that has a substantial financial interest in an entity doing business with OSC or the [fund] Fund. For the purpose of this paragraph, the term "substantial financial interest" shall mean the control of the entity, whereby "control" means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of the entity, whether through the ownership of voting securities, by contract (except a commercial contract for goods or non-management services) or otherwise; but no individual shall be deemed to control an entity solely by reason of his being an officer or director of such entity. Control shall be presumed to exist if any individual directly or indirectly owns, controls or holds with the power to vote ten percent or more of the voting securities of such entity.

[(k) Family member shall mean any person living in the same household as the Comptroller, and any person related to the Comptroller within the third degree of consanguinity or affinity.]

Section 136-2.4(d) is amended to read as follows:

(d) Placement agents or intermediaries: In order to preserve the independence and integrity of the [fund] Fund, to [address] preclude potential conflicts of interest, and to assist the Comptroller in fulfilling his or her duties as a fiduciary to the [fund] Fund, [the Comptroller shall maintain a reporting and review system that must be followed whenever the fund] the Fund shall not [engages, hires, invests with, or commits] engage, hire, invest with or commit to[,] an outside investment manager who is using the services of a placement agent or intermediary to assist the investment manager in obtaining investments by the [fund] Fund. [, or otherwise doing business with the fund. The Comptroller shall require investment managers to disclose

to the Comptroller and to his or her designee payments made to any such placement agent or intermediary. The reporting and review system shall be set forth in written guidelines and such guidelines shall be published on the OSC public website.]

Section 136-2.5(g) is amended to read as follows:

(g) The Comptroller shall:

(1) file with the superintendent an annual statement in the format prescribed by Section 307 of the Insurance Law, including the [retirement system's] *Retirement System's* financial statement, together with an opinion of an independent certified public accountant on the financial statement;

(2) file with the superintendent the Comprehensive Annual Financial Report within the time prescribed by law, but no later than the time it is published on the OSC public website;

(3) disclose on the OSC public website, on at least an annual basis, all fees paid by the [fund] *Fund* to investment managers, consultants or advisors, and third party administrators;

[(4) disclose on the OSC public website, on at least an annual basis, instances where an investment manager has paid a fee to a placement agent or intermediary;]

[(5)](4) disclose on the OSC public website the [fund's] *Fund's* investment policies and procedures; and

[(6)](5) require fiduciary and conflict of interest reviews of the [fund] *Fund* every three years by a qualified unaffiliated person.

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 November 13, 2011.

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

Regulatory Impact Statement

1. Statutory authority: The Superintendent's authority for promulgation of this rule derives from sections 201, 301, 314, 7401(a), and 7402(n) of the Insurance Law.

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

Section 314 vests the Superintendent with the authority to promulgate standards with respect to administrative efficiency, discharge of fiduciary responsibilities, investment policies and financial soundness of the public retirement and pension systems of the State of New York, and to make an examination into the affairs of every system at least once every five years in accordance with sections 310, 311 and 312 of the Insurance Law. The implementation of the standards is necessarily through the promulgation of regulations.

As confirmed by the Court of Appeals in *Matter of Dinallo v. DiNapoli*, 9 N.Y. 3d 94 (2007), the Superintendent functions in two distinct capacities. The first is as regulator of the insurance industry. The second is as a statutory receiver of financially distressed insurance entities. Article 74 of the Insurance Law sets forth the Superintendent's role and responsibilities in this latter capacity.

Section 7401(a) sets forth the entities, including the public retirement systems, to which Article 74 applies. Section 7402(n) provides that it is a ground for rehabilitation if an entity subject to Article 74 has failed or refused to take such steps as may be necessary to remove from office any officer or director whom the Superintendent has found, after appropriate notice and hearing, to be a dishonest or untrustworthy person.

2. Legislative objectives: Section 314 of the Insurance Law authorizes the Superintendent to promulgate and amend, after consultation with the respective administrative heads of public retirement and pension systems and after a public hearing, standards with respect to the public retirement and pension systems of the State of New York.

This amendment, which in effect bans the use of an investment tool that has been found to be untrustworthy, is consistent with the public policy objectives that the Legislature sought to advance in enacting Section 314, which provides the Superintendent with the powers to

promulgate standards to protect the New York State Common Retirement Fund (the "Fund").

3. Needs and benefits: The Second Amendment to Regulation 85 (11 NYCRR 136), effective November 19, 2008, established new standards with regard to investment of the assets of the New York State Common Retirement Fund ("the Fund"), conflicts of interest and procurement. In addition, the Second Amendment created new audit and actuarial committees, and greatly strengthened the investment advisory committee. The Second Amendment also set high ethical standards, strengthened internal controls and governance, enhanced the operational transparency of the Fund, and strengthened supervision by the Insurance Department.

Nevertheless, recent allegations regarding "pay to play" practices, whereby politically connected individuals reportedly sold access to investment opportunities with the Fund, compel the Superintendent to conclude that the mere strengthening of the Fund's control environment is insufficient to protect the integrity of the state employees' retirement systems. The Third Amendment to Regulation 85 will adopt an immediate ban on the use of placement agents to ensure sufficient protection of the Fund's members and beneficiaries, and safeguard the integrity of the Fund's investments. Further, the amendment defines "placement agent or intermediary" in a manner that both thwarts evasion of the ban while ensuring that such ban not extend to persons otherwise acting lawfully on behalf of investment managers.

4. Costs: The rule does not impose any additional requirements on the Comptroller, and no additional costs are expected to result from the implementation of the ban imposed by this amendment. There are no costs to the Insurance Department or other state government agencies or local governments. Investment managers, consultants and advisors who provide services to the Fund, which are required to discontinue the use of placement agents in connection with investment services they provide to the Fund, may lose opportunities to do business with the Fund.

5. Local government mandates: The amendment 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 prohibition imposed by the amendment.

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

8. Alternatives: The Superintendent considered other ways to limit the influence of placement agents, including a partial ban, increased disclosure requirements, and adopting alternative definitions of placement agent or intermediary. The Department considered limiting the ban to include intent on the part of the party using placement agents, or defining "placement agent" in more general terms.

In developing the rule, the Superintendent and State Comptroller not only consulted with one another, but also briefed representatives of: (1) New York State and New York City Public Employee Unions; (2) New York City Retirement and Pension Funds; (3) the Borough Presidents of the five counties of New York City; and (4) officials of the New York City Mayor's Office, Comptroller's Office and Finance Department. These entities agreed with the concerns expressed by the Department and intend to explore remedies most appropriate to the pension funds that they represent.

Initially, the Superintendent concluded that only an immediate total ban on the use of placement agents could provide sufficient protection of the Fund's members and beneficiaries and safeguard the integrity of the Fund's investments. A Public Hearing was held on April 28, 2010. The following comments were received:

Blackstone Group, a global investment manager and financial advisor, wrote to oppose the proposed ban on the use of placement agents by investment advisors engaged by the New York State Common Retirement Fund ("The Fund"). It stated that the rule would lessen the number of investment opportunities brought before the Fund, adversely affect small, medium-sized and women- and minority-owned investment firms seeking to do business with the Fund, and adversely affect a number of New York-headquartered financial institutions doing business as placement agents.

Blackstone suggested the inclusion of the following provisions in the rule instead:

- A ban on political contributions by any employee of any placement agent seeking to do business with the fund;
- A requirement that any placement agent seeking to do business with the Fund be registered as a broker dealer with the SEC and ensure that its professionals have passed the appropriate Series qualifications administered by Financial Industry Regulatory Authority ("FINRA");
- A requirement that any placement agent seeking to do business in New York register with the Insurance Department; and
- A requirement that any placement agent representing an investment manager before the Fund fully disclose the contractual arrangement between it and the manager, including the fee arrangement and the scope of services to be provided.

The Securities Industry and Financial Markets Association ("SIFMA"), representing hundreds of securities firms, banks, and asset managers, commented that the proposed rule (1) inadvertently limits the access of smaller fund managers to the Fund; (2) restricts the number and types of advisers that could be utilized by the Fund; (3) creates an inherent conflict between federal and state law that would make it impossible to do business with the Fund while complying with both; and (4) adds duplicative regulation in an area already substantially regulated at the state level and that is primed for further federal regulation through the imminent imposition of a federal pay-to-play regime on all registered broker-dealers acting as placement agents. In addition, SIFMA provided language that it believes would be consistent with the existing federal requirements on the use of placement agents. SIFMA requested that the Department either exclude from the proposed rule those placement agents who are registered as broker-dealers under the Securities Exchange Act of 1934 or delay the enactment of the proposed rule until the federal and state placement agent initiatives are finalized.

The Department does not have jurisdiction over placement agents, which makes it difficult to implement and enforce requirements on them. The Superintendent did consider other ways to limit the influence of placement agents, including a partial ban, increased disclosure requirements, and adopting alternative definitions of placement agent or intermediary. The Department considered limiting the ban to include intent on the part of the party using placement agents, or defining "placement agent" in more general terms. At the time, the Superintendent concluded that only an immediate, total ban on the use of placement agents could provide sufficient protection of the Fund's members and beneficiaries and safeguard the integrity of the Fund's investments.

9. Federal standards: The Securities and Exchange Commission issued a "Pay-To-Play" regulation for financial advisors on July 1, 2010, which may have an impact on the issues addressed in the proposed rule.

10. Compliance schedule: The emergency adoption of this regulation on June 18, 2009 ensured that the ban would become enforceable immediately. The ban needs to remain in effect on an emergency basis until such time as an amended regulation can be made permanent.

Regulatory Flexibility Analysis

1. Effect of the rule: This amendment strengthens standards for the management of the New York State and Local Employees' Retirement System and New York State and Local Police and Fire Retirement System (collectively, "the Retirement System"), and the New York State Common Retirement Fund ("the Fund").

The Second Amendment to Regulation 85 (11 NYCRR 136), effective November 19, 2008, established new standards with regard to investment of the assets of the New York State Common Retirement Fund ("the Fund"), conflicts of interest and procurement. In addition, the Second Amendment created new audit and actuarial committees, and greatly strengthened the investment advisory committee. The Second Amendment also set high ethical standards, strengthened internal controls and governance, enhanced the operational transparency of the Fund, and strengthened supervision by the Insurance Department.

Nevertheless, recent allegations regarding "pay to play" practices, whereby politically connected individuals reportedly sold access to investment opportunities with the Fund, compel the Superintendent to

conclude that the mere strengthening of the Fund's control environment is insufficient to protect the integrity of the state employees' retirement systems. The Third Amendment to Regulation 85 will adopt an immediate ban on the use of placement agents to ensure sufficient protection of the Fund's members and beneficiaries, and safeguard the integrity of the Fund's investments. Further, the amendment defines "placement agent or intermediary" in a manner that both thwarts evasion of the ban while ensuring that such ban not extend to persons otherwise acting lawfully on behalf of investment managers.

These standards are intended to assure that the conduct of the business of the Retirement System and the Fund, and of the State Comptroller (as administrative head of the Retirement System and as sole trustee of the Fund), are consistent with the principles specified in the rule. Most among all affected parties, the State Comptroller, as a fiduciary whose responsibilities are clarified and broadened, is impacted by the amendment. The State Comptroller is not a "small business" as defined in section 102(8) of the State Administrative Procedure Act.

This amendment will affect investment managers and other intermediaries (other than OSC employees) who provide technical or professional services to the Fund related to Fund investments. The proposal will prohibit investment managers from using the services of a placement agent unless such agent is a regular employee of the investment manager and is acting in a broader capacity than just providing specific investment advice to the Fund. In addition, the amendment is also directed to placement agents, who as a result of this proposal, will no longer be engaged directly or indirectly by investment managers that do business with the Fund. Some investment managers and placement agents 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.

The amendment bans the use of placement agents in connection with investments by the Fund. This may adversely affect the business of placement agents, who will lose opportunities to earn profits in connection with investments by the Fund. Nevertheless, as a result of recent allegations regarding "pay to play" practices, whereby politically connected individuals reportedly sold access to investment opportunities with the Fund, the Superintendent has concluded that an immediate ban on the use of placement agents is necessary to protect the Fund's members and beneficiaries and to safeguard the integrity of the Fund's investments.

This amendment will not impose any adverse compliance requirements or result in any adverse impacts on local governments. The basis for this finding is that this amendment is directed at the State Comptroller; employees of the Office of State Comptroller; and investment managers, placement agents, consultant or advisors - none of which are local governments.

2. Compliance requirements: None.

3. Professional services: Investment managers, consultants and advisors who provide services to the fund, and are required to discontinue the use of placement agents in connection with investment services they provide to the Fund, may need to employ other professional services.

4. Compliance costs: The rule does not impose any additional requirements on the Comptroller, and no additional costs are expected to result from the implementation of the ban imposed by this amendment. There are no costs to the Insurance Department or other state government agencies or local governments. However, investment managers, consultants and advisors who provide services to the fund, which are required to discontinue the use of placement agents in connection with investment services they provide to the Fund, may lose opportunities to do business with the Fund.

5. Economic and technological feasibility: The rule does not impose any economic and technological requirements on affected parties, except for placement agents who will lose the opportunity to earn profits in connection with investments by the Fund.

6. Minimizing adverse impact: The costs to placement agents are lost opportunities to earn profits in connection with investments by the Fund. The Superintendent considered other ways to limit the influ-

ence of placement agents, including a partial ban, increased disclosure requirements, and adopting alternative definitions of placement agent or intermediary. But in the end, the Superintendent concluded that only an immediate total ban on the use of placement agents could provide sufficient protection of the Fund's members and beneficiaries and safeguard the integrity of the Fund's investments.

7. Small business and local government participation: In developing the rule, the Superintendent and State Comptroller not only consulted with one another, but also briefed representatives of: (1) New York State and New York City Public Employee Unions; (2) New York City Retirement and Pension Funds; (3) the Borough Presidents of the five counties of New York City; and (4) officials of the New York City Mayor's Office, Comptroller's Office and Finance Department.

A public hearing was held on April 28, 2010. Comments were received from two entities recommending that the total ban on the use of placement agents be modified. The Department will continue to assess the comments that have been received and any others that may be submitted.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: Investment managers, placement agents, consultants or advisors that do business in rural areas as defined under State Administrative Procedure Act Section 102(13) will be affected by this proposal. The amendment bans the use of placement agents in connection with investments by the New York State Common Retirement Fund ("the Fund"), which may adversely affect the business of placement agents and of other entities that utilize placement agents and are involved in Fund investments.

2. Reporting, recordkeeping and other compliance requirements, and professional services: This amendment will not impose any reporting, recordkeeping or other compliance requirements on public or private entities in rural areas, with the exception of requiring investment managers, consultants and advisors who provide services to the fund to discontinue the use of placement agents.

3. Costs: The costs to placement agents are lost opportunities to earn profits in connection with investments by the Fund.

4. Minimizing adverse impact: The amendment does not adversely impact rural areas.

5. Rural area participation: A public hearing was held on April 28, 2010. Comments were received from two entities recommending that the total ban on the use of placement agents be modified. The Department will continue to assess the comments that have been received and any others that may be submitted.

Job Impact Statement

The Insurance Department finds that this rule will have little or no impact on jobs and employment opportunities. The amendment bans investment managers from using placement agents in connection with investments by the New York State Common Retirement Fund ("the Fund"). The amendment may adversely affect the business of placement agents, who could lose the opportunity to earn profits in connection with investments by the Fund. Nevertheless, in view of recent events about how placement agents conduct business on behalf of their clients with regard to the Fund, the Superintendent has concluded that an immediate ban on the use of placement agents is necessary to protect the Fund's members and beneficiaries, and to safeguard the integrity of the Fund's investments.

Commission on Public Integrity

NOTICE OF EXPIRATION

The following notices have expired and cannot be reconsidered unless the Commission on Public Integrity publishes new notices of proposed rule making in the *NYS Register*.

Limitations on the Offering and Receipt of Gifts

I.D. No.	Proposed	Expiration Date
CPI-32-10-00005-P	August 11, 2010	August 11, 2011

Limitations on the Receipt of Gifts

I.D. No.	Proposed	Expiration Date
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CPI-32-10-00006-P

August 11, 2010

August 11, 2011

Public Service Commission

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Rate Making Treatment

I.D. No. PSC-35-11-00009-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 petition by Consolidated Edison Company of New York, Inc. to approve the Company's proposed ratemaking treatment for expenditures to be made by adding gas burning capability at 59th and 74th St. generating station.

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

Subject: Rate making treatment.

Purpose: For approval of accelerated recovery of its capital costs for adding gas burning capability at 59th and 74th St.

Substance of proposed rule: The Commission is considering a petition filed by Consolidated Edison Company of New York, Inc. (Con Edison or the Company) for accelerated recovery from steam customers through the monthly steam Fuel Adjustment Clause ("FAC") the net capital costs of the gas conversion projects at 59th and 74th Street generation stations. These projects are currently estimated to be approximately \$109 million. Specifically, the Company proposes that until it recovers the full cost of the project that, one-half of the savings associated with burning natural gas at the stations' converted boilers instead of fuel oil, be allocated on a monthly basis towards the recovery of the costs of these projects; and, one-half of the savings associated with burning natural gas at the stations' converted boilers instead of fuel oil be allocated on a monthly basis to the Company's steam customers. The Commission may adopt in whole or in part, modify or reject Con Edison's proposal. The Commission may apply aspects of its decision here to the requirements for tariffs of 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

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.

(09-S-0794SP4)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Interruptible Base Rate Priorities

I.D. No. PSC-35-11-00010-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 Consolidated Edison Company of New York, Inc. (ConEd) to make various changes in the rates, charges, rules and regulations contained in its Schedule for Gas Service, PSC No. 9.

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

Subject: Interruptible Base Rate Priorities.

Purpose: To implement revisions to alter and clarify tariff provisions applicable to Interruptible Base Rate Priorities.

Substance of proposed rule: The Commission is considering a proposal filed by Consolidated Edison Company of New York, Inc. (Con Ed) that it shall: (1) revise the criteria for eligibility for the rate categories within each Priority of service in order to clarify to whom they apply; (2) make the application of the percentage increase in rates and charges applicable to interruptible customers the same as for firm and off-peak firm customers; and (3) clarify the eligibility criteria for Priority D service. Currently there are three categories of Priority service which include the residential, non-residential, and non-residential exempt from Petroleum Business Tax (PBT). The purpose of modifying how the percentage increase in rates and charges is applied to interruptible customers is to make that treatment consistent with the proposed definitions of each category of service. Thus customers taking interruptible service will not be treated the same as customers taking firm or off-peak firm service. The Commission may apply aspects of its decision here to the requirements for tariffs of 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

Data, views or arguments may be submitted to: Jaelyn 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-G-0054SP2)

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

Whether to Permit Consolidated Edison a Waiver to Commission Regulations Part 226.8

I.D. No. PSC-35-11-00011-P

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

Proposed Action: The PSC is considering whether to approve, deny or modify, in whole or in part, a petition filed by Consolidated Edison Company of New York, Inc. for a waiver to 16 NYCRR Part 226.8 test schedule for Category C meters.

Statutory authority: Public Service Law, section 67(1)

Subject: Whether to permit Consolidated Edison a waiver to commission regulations Part 226.8.

Purpose: Permit Consolidated Edison to conduct a inspection program in lieu of testing the accuracy of Category C meters.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Consolidated Edison Company of New York, Inc. for a waiver to the Category C test schedule, in 16 NYCRR Part 226.8.

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, New York 10007, (518) 486-2655, email: leann_ayer@dps.state.ny.us

Data, views or arguments may be submitted to: Jaelyn A. Brilling, Secretary, Public Service Commission, Three Empire State Plaza, Albany, NY 10007, (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-G-0386SP1)

Racing and Wagering Board

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

Inspection of Harness Racing Sulkies

I.D. No. RWB-35-11-00002-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 4116.10 of Title 9 NYCRR.

Statutory authority: Racing, Pari-Mutuel Wagering and Breeding Law, sections 101(1) and 301(1)

Subject: Inspection of harness racing sulkies.

Purpose: This rule require that sulkies involved in an accident during a race are removed from service and inspected by the manufacturer.

Text of proposed rule: Section 4116.10 is amended to designate the existing section as subdivision (a) and add new subdivisions (b) and (c) as follows:

4116.10. Sulkies

(a) Every sulky used in a race at a licensed harness racing meeting shall be equipped with such special equipment as the commission shall order. The obtaining and installation of special equipment are the responsibility of each owner. A driver shall not drive a sulky not equipped with special equipment as so ordered. Mud fenders must be available and must be used whenever ordered by the presiding judge. Every sulky shall be equipped with wheel discs of a type approved by the commission, which shall be of a solid color or transparent; no stripes or designs upon wheel discs shall be permitted.

(b) If a sulky is involved in an accident, the Paddock Judge will affix a tag to the sulky that says "Do Not Use." An accident is any unintended event or occurrence during a race or exercise run where a sulky is operated in a manner in which it was not designed, including collision with any fixed or moveable object other than brief contact made between the wheel hubs of sulkies travelling in the same direction, locking of wheels with another sulky where a wheel loses contact with the ground, or an ejection of the driver from the sulky. The owner of the sulky that receives the "Do Not Use" tag must then have the sulky inspected by its manufacturer or an authorized representative. The "Do Not Use" tag may be removed by the manufacturer or authorized representative only after inspecting the sulky and making any necessary repairs. Only the manufacturer or authorized representative is approved to remove the "Do Not Use" tag. Documentation identifying the sulky and repairs made must be filed by the trainer with the Paddock Judge prior to its introduction back into use.

(c) The owner of a sulky is responsible for the overall integrity and soundness of his or her sulky used during training, qualifying or racing.

Text of proposed rule and any required statements and analyses may be obtained from: Kristen M. Buckley, Acting Secretary to the Board, New York State Racing & Wagering Board, One Broadway Center, Suite 600, Schenectady, New York 12305-2553, (518) 395-5400, email: info@racing.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 and Legislative Objectives of Such Authority: The Board is authorized to promulgate these rules pursuant to Racing Pari-Mutuel Wagering and Breeding Law ("RPMWBL") sections 101 and 301. Under section 101, the Board has general jurisdiction over all horse racing activities and all pari-mutuel racing activities. Section 301 of the RPMWBL authorizes the Board to supervise generally all harness race meetings in New York at which pari-mutuel betting is conducted, and to adopt rules and regulations to carry into effect the provisions of sections 222 through 705 of the RPMWBL.

2. Legislative Objectives: To enable the New York State Racing

and Wagering Board to preserve the integrity of pari-mutuel racing, while generating reasonable revenue for the support of government.

3. Needs and Benefits: This rule is necessary for the health and safety of the drivers in harness racing.

This rule would require that when a sulky is involved in an accident during a race or in training, the sulky is taken out of service by the Presiding Judge pending inspection by the manufacturer of the sulky or a designated representative of the manufacturer. If the sulky is damaged, the rule requires that the sulky be repaired before being used in a race, qualifier or training at a licensed harness track. This rule is necessary to ensure the safety of both the drivers and the horses, and to ensure that all equipment used in a pari-mutuel wagering horse race is in good working condition.

Adoption of this rule was requested by the Standardbred Owners Association, Inc. The post-accident inspection provision of this rule is similar to the New Jersey Rule regarding sulkies [New Jersey Athletic Commission 13:71-29.2 Certification]. This rule will ensure that all sulkies are safe for the purpose that they were designed, which is to travel behind a standardbred horse at approximately 35 miles per hour carrying a driver while negotiating through a competitive field of other horses and drivers. Failure of any one part of the defective sulky could result in a catastrophe. Harness horses and their drivers remain close to each other throughout a race. If a sulky at the front of the racing pack fails, the result could include a pileup of every horse and driver behind it.

This rule is intended to make sure that all sulkies are fit for use and that there are no defects in the sulky as a result of an accident. This rule also clearly states that the owner of the sulky is responsible for the integrity and soundness of a sulky whether the sulky is used in racing, qualifiers, or training. This is necessary because the owner of the sulky is the person who exercises control over the equipment and therefore is the proper party to assign such responsibility.

The rule is also necessary to make clear that the responsibility for ensuring the integrity of a safe sulky is not just limited to races, but also includes the use of sulkies in qualifier runs and training.

If a sulky is removed from service as a result of an accident, the estimated time of repair or replacement varies based on circumstances. According to information provided by the tack shop owners at various New York State harness tracks, the total time for replacement of a sulky is 14 days at all harness tracks throughout New York State. If damage affects the intrinsic integrity of the one-piece frame itself, which is usually caused by shock or twisting the frame, then the sulky must be replaced. If the damage is less than major, involving wheel repair or welding new shafts or forks, then the repairs can be made at the track itself within a matter of a day or two. According to tack shop owners at Vernon Downs, Monticello and Saratoga harness tracks, it is customary that drivers typically own more than one sulky and allow other drivers to borrow their sulkies while awaiting repair or replacement.

4. Costs:

(a) Costs to regulated parties for the implementation of and continuing compliance with the rule: Owners of sulkies will be required to pay for the inspection and repair of any sulky involved in an accident, which can be covered by insurance. The cost of a sulky ranges between \$2,000 for a metal-frame sulky and as high as \$6,000 for a state-of-the-art carbon fiber sulky. In New York, members of the respective Harness Horsemen's Associations are eligible for sulky insurance as part of their membership dues. A driver will bring his damaged sulky to a tack shop for an estimate, at which time a decision will be made whether to scrap the sulky or make repairs. At that point, the driver submits a claim to the harness horsemen's association. According to Oliver Peterson from Peterson's Harness at Vernon Downs, there only 1 accident this year due to a horse running away with a sulky without a driver. He said there were no accidents in 2009. At Saratoga, Adam Murray of the Pacesetter tack shop said there were only 3 sulkies that had to be replaced last year. He said in previous years, the average was about 5 or 6 per year based on the age of sulky frames, rather than the fact they were involved in an accident. In New Jersey, where a similar rule is already in effect, the Standardbred Breeders and Owners Association of New Jersey (SOBANJ) offers such insurance as a

membership benefit. According to Leo McNamara, Executive Administrator of the SOBANJ, the total amount paid for all claims in any year due to sulky accidents in New Jersey could range between \$10,000 and \$12,000. Mr. McNamara characterized those amounts as something that would only occur in "a bad year" and said the annual amounts are much lower. Under the NJSOA membership benefit, the sulky owner pays a \$50 deductible and insurance pays up to \$2,500. It should be noted that while drivers at Yonkers Raceway typically own several sulkies, some trainers and drivers at upstate race tracks may own only one sulky. If their sulky is taken out of service for purposes of inspection as a result of an accident, the loss of the sulky is due to the accident and not this rule. This rule does not impose additional costs on those upstate owners. If a trainer or driver only owns one sulky and is unable to compete because of the inspection, it should be considered a loss due to the accident and not this rule.

(b) Costs to the agency, the state and local governments for the implementation and continuation of the rule: There will be minimal costs to the Board for the purchase of tags to be affixed to sulkies involved in accidents. Paddock judges can use tags (Form RC-30) that are currently used for identifying laboratory samples, and affix self-sticking, laser-printed labels to the back of tags that identify the tag as a "Do Not Use" tag. Currently, the Board has over 200,000 such tags in stock. There will be no costs to state and local governments.

(c) The information, including the source(s) of such information and the methodology upon which the cost analysis is based: The cost analysis was obtained from Leo McNamara, Executive Administrator for the Standardbred Owners and Breeders Association of New Jersey. The manufacturer's inspection rule contained in this amendment mirrors the New Jersey sulky inspection rule and costs are expected to be similar here in New York.

(d) Where an agency finds that it cannot provide a statement of costs, a statement setting forth the agency's best estimate, which shall indicate the information and methodology upon which the estimate is based and the reason(s) why a complete cost statement cannot be provided. There will be no cost to the agency.

5. Local Government Mandates: None. See above.

6. Paperwork: The New York State Racing and Wagering Board will provide "Do Not Use" tags. After inspection, manufacturers will need to provide documentation stating that a sulky is sound and fit for service, if that is the case. Otherwise, there are no paperwork requirements.

7. Duplication: None.

8. Alternatives: The Board considered allowing the Horsemen's Association or the Presiding Judge to inspect the sulkies. Given the technical nature of metallurgical inspection, identification of structural flaws in carbon fibre, the inability to detect latent defects in the sulky frame and axle system, it was determined that the best qualified individuals for inspecting a sulky would be the actual manufacturer of the sulky, who would be most knowledgeable of the engineering tolerances and safe performance parameters of the specific sulky model. In light of this fact, and the fact that both the horsemen's associations and the Board could face possible liability for structural failure of a sulky that was previously cleared by either entity, it was determined to require post-accident inspections be conducted by the sulky manufacturer.

9. Federal Standards: None.

10. Compliance Schedule: Once adopted and published, the rule can be implemented immediately.

Regulatory Flexibility Analysis

1. Effect of Rule: This rule will affect small businesses that employ harness drivers.

2. Compliance Requirements: Harness drivers whose sulkies have been involved in an accident will need to have the sulkies inspected prior to being used again. Drivers who own their own sulkies will need to have a contingency plan in the event of an accident, which would involve making sure that a second sulky is available for them to continue competing. This should not be burdensome because drivers currently need to have such plans if they are involved in an accident. This rule will merely prescribe the process for ensuring that their sulkies

ies are safe for use. In doing so, this rulemaking ensures the health, safety or general welfare of participants in harness racing. It also ensures that the equipment used in racing events where pari-mutuel wagering is conducted is serviceable and reliable, and the outcome of the competition is dependant upon the skill and ability of the competitors and not the frailty of their equipment. The only recordkeeping that is required on behalf of small business is that the owner of the sulky must provide satisfactory documentation that the sulky was inspected and/or repaired prior to be allowed in competition.

3. Professional Services: Manufacturers and distributors of sulkies used in harness racing will be needed to inspect sulkies that have been involved in an accident. Drivers will likely go to the vendor from whom they purchased the sulky.

4. Compliance Costs: There are no initial capital costs for this rule. Cost of complying with this rule is dependant on the cost of inspection, repairs and/or replacement of the sulky, which can range from as low as no cost to as much as \$6,000 for total replacement of the sulky. If total replacement of the sulky is required, it's likely that the damage would be so apparent that expert inspection and any associated costs would not be needed.

5. Economic and Technological Feasibility: The Board could not identify or estimate the number drivers who are limited to only one sulky. It is difficult to determine this because drivers may make informal arrangements with other drivers on a day-by-day to provide backup sulkies. This rule is technologically feasible because it relies on current inspection techniques and practices for sulkies and harness racing equipment.

6. Minimizing Adverse Impact: The rule is designed to minimize any adverse economic impact on small businesses by mirroring a rule that is currently in effect in New Jersey and by allowing small businesses to deal with manufacturers directly, rather than have Board officials serve as the sulky inspectors.

7. Small Business and Local Government Participation: The Board assured that small businesses had the opportunity to participate in the rulemaking process. On May 19, 2010, the proposed rule was sent out to industry participants in New York State harness racing, including the Harness Horse Association of Central New York, the Standardbred Owners Association, Inc., and the Saratoga Harness Horsepersons Association Inc. This rule will not affect local government. Harness racing is regulated entirely by the State of New York. Local governments are not involved in harness racing activities.

Rural Area Flexibility Analysis

This rule will not have an adverse impact on public entities in rural areas because no public entity is involved as a driver or competitor in harness racing.

This rule will not have an adverse impact on owners of sulkies and drivers at harness tracks located in rural areas, which includes Saratoga, Vernon Downs, Tioga Downs, Monticello and Batavia. The minimal impact will involve recordkeeping, which requires that an owner of a sulky that was involved in an accident provide satisfactory documentation of inspection prior to it being used in harness racing activities.

The Board determined that this recordkeeping was the least burdensome approach based upon discussions with harness horsepersons' groups in New York State and New Jersey.

Job Impact Statement

This rule will not adversely impact jobs or employment opportunities. In fact, the rule may enhance job opportunities for manufacturers or their representatives who will be required to inspect, repair or replace sulkies that have been involved in accidents. This will not adversely impact drivers who own and race their sulkies. Most drivers have more than one sulky. If a driver owns only one sulky, the driver can make prior arrangements to ensure the manufacturer has a replacement sulky available. In some cases, repairs may be made right at the track and there may be no loss of employment opportunities for the driver. By requiring such inspections, this rule creates an incentive for manufacturers and their representatives to be available at the harness track and provide timely on-track inspections, repairs or replacement. It is important to note that if a sulky is taken out of service due to an accident, and a driver is unable to race due to a lack of a sulky, such a loss is the result of an accident and not this rule. No prudent driver

should be driving a sulky that is involved in an accident without conducting a thorough examination of their equipment.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Jurisdiction of Licenses

I.D. No. RWB-35-11-00003-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 5603.11 of Title 9 NYCRR.

Statutory authority: General Municipal Law, section 188-a

Subject: Jurisdiction of Licenses.

Purpose: Allows municipalities to issue licenses for the conduct of games of chance to organizations domiciled outside its jurisdiction.

Text of proposed rule: Section 5603.11 of 9 NYCRR is amended to read as follows:

(a) The municipal governing body shall, prior to the issuance of any license, make a finding that the applicant organization is domiciled within the territorial limits of the municipality and shall not issue a license to an organization domiciled beyond such territorial limits. *A municipal governing body may, upon a finding that an applicant organization is domiciled beyond the territorial limits of such municipality, issue a license to such applicant organization only in cases where:*

(1) *the governing body of the municipality in which the applicant organization is seeking licensure and the board determine that, due to some condition of hardship or necessity, the conduct of games of chance in the municipality in which the applicant organization is seeking licensure is warranted;*

(2) *the municipality in which the applicant authorized organization is seeking licensure submits to the board a Letter of Consent expressing its willingness to license the applicant authorized organization;*

(3) *the premises for which the authorized organization is seeking its license to conduct games of chance is within the territorial limits of the municipality wherein licensure is being sought and such premises is that of a an authorized organization or an authorized games of chance lessor; and*

(4) *the board has issued the applicant authorized organization a games of chance identification number bearing the municipal code of the licensing municipality.*

Text of proposed rule and any required statements and analyses may be obtained from: Stacy Harvey, Assistant Counsel, Racing and Wagering Board, 1 Broadway Center, Suite 600, Schenectady, NY 12305, (518) 395-5400, email: sharvey@racing.state.ny.us

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

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

Regulatory Impact Statement

1. Statutory authority: Section 188-a of the General Municipal Law grants the Board power and makes it a duty to adopt, amend and repeal rules and regulations governing the issuance and amendment of licenses for games of chance, thereunder, and the conduct of games of chance, to be fairly and properly conducted in the manner prescribed by the Games of Chance Licensing Law.

Additionally, Section 187 of the General Municipal Law grants to every municipality, the right, power and authority to authorize the conduct of games of chance by authorized organizations within the territorial limits of such municipality. Section 188 of the General Municipal Law provides that it shall be lawful for any authorized organization upon obtaining a license from a municipality that has authorized the conduct games of chance by local law or ordinance, to conduct games of chance within the territorial limits of such municipality, subject to the provisions of local law or ordinance, the provisions of the Games of Chance Licensing Law, and the provisions set forth by the Racing and Wagering Board.

2. Legislative intent: Section 185 of the General Municipal Law states that "the legislature hereby declares that the raising of funds for

the promotion of bona fide charitable, educational, scientific, health, religious, and patriotic causes and undertakings, where the beneficiaries are undetermined, is in the public interest". Consistent with this declaration, the Board has proposed rules to ensure that games of chance are fairly and properly conducted and that the proceeds derived from such games for worthy causes, be maximized.

3. Needs and benefits: This rule amendment is necessary in order for the Board to implement regulations that would allow municipalities to issue licenses to authorized organizations domiciled beyond its territorial limits to conduct games of chance within the licensing municipality's limits, due to a hardship or exigent circumstance preventing the authorized organization from conducting games of chance in its own municipality. In 2004, the Board amended bingo rule 5812.9 and outlined similar procedures in accordance with a decades old policy directive followed by the Board. Since most authorized organizations that conduct bingo in a municipality other than their own, also conduct games of chance such as raffles and bell jar games during their bingo occasions in order to increase much needed proceeds, an amendment to the games of chance rule, mirroring the procedures contained in bingo rule 5812.9 is required.

4. Costs:

a. Costs to regulated parties for the implementation of and continuing compliance with the rule: There are no added costs to regulated parties for the implementation and continuing compliance with the rule.

b. Costs to the agency, the state and local governments for the implementation and continuation of the rule: The New York State Racing and Wagering Board will have the same oversight responsibilities that it previously had for games of chance. With the increased oversight and licensure, some local governments could see more revenue because of the license fees authorized organizations are already required to pay in order to obtain licensure.

c. The information, including the source of such information and the methodology upon which the cost analysis is based: Cost analysis is based upon a review by the Office of the Counsel of the New York State Racing and Wagering Board.

5. Local government mandates: The proposed rule will not impose any mandates on local governments since municipalities will have the option of issuing or denying an application for licensure to an authorized organization domiciled beyond its territorial limits.

6. Paperwork: None.

7. Duplication: None.

8. Alternatives: None.

9. Federal standards: None.

10. Compliance schedule: Once adopted, the rule can be implemented immediately upon publication in the State Register.

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

This proposal does not require a Regulatory Flexibility Statement, Rural Area Flexibility Statement or Job Impact Statement as is apparent from the nature of the amendment, which authorizes the conduct of games of chance for authorized organizations that would otherwise be unable to raise funds in the municipality within which they are domiciled. Consequently, the rule does not negatively affect small businesses, local governments, jobs nor rural areas. Further, this proposal will not impose an adverse economic impact on reporting, record keeping or other compliance requirements on small businesses in rural or urban areas nor on employment opportunities. Due to the straightforward nature of the rulemaking, there is no need for the development of a small business regulation guide to assist in compliance. These provisions are clear as to how a municipality will go about licensing authorized organizations domiciled beyond the municipality's territorial limits to conduct games of chance.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Free Unlicensed Bingo

I.D. No. RWB-35-11-00004-P

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

Proposed Action: Amendment of sections 5815.14 and 5820.55 of Title 9 NYCRR.

Statutory authority: Executive Law, section 435(a)

Subject: Free unlicensed bingo.

Purpose: To allow for the conduct of free bingo by more players for entertainment or recreational purposes without a license.

Text of proposed rule: Section 5815.14 of 9 NYCRR is amended to read as follows:

(a) No licensed bingo supplier, its duly authorized agents, salesmen or representatives shall, during the term of such license, sell or distribute bingo supplies or equipment in the state of New York to other than:

(1) an authorized organization which is licensed to conduct bingo;

(2) a hotel which possesses a hotel bingo identification number issued by the Board,

(3) a bona fide organization of persons 55 years of age or over, commonly referred to as senior citizens, which possesses an identification number issued by the Racing and Wagering Board, or

(4) a licensed commercial lessor that has received written approval from the board to purchase or lease bingo blowers, receptacles, display boards, electronic bingo aids or similar supplies or equipment integral to the operation of a licensed commercial lessor, excluding bingo opportunities.]

(2) any apartment, condominium or cooperative complex, retirement community, or other group residential complex or facility located within a municipality that has authorized the conduct of bingo games by authorized organizations where:

(i) such games are sponsored by the operator of or an association related to such complex, community or facility;

(ii) such games are conducted solely for the purpose of amusement and recreation of its residents;

(iii) no player or other person furnishes anything of value for the opportunity to participate;

(iv) the value of the prizes shall not exceed ten dollars for any one game or a total of one hundred fifty dollars in any calendar day;

(v) such games are not conducted on more than fifteen days during any calendar year; and

(vi) no person other than an employee or volunteer of such complex, community or facility conducts or assists in conducting the game or games.

(3) Any bona fide social, charitable, educational, recreational, fraternal or age group organization, club or association located within a municipality that has authorized the conduct of bingo games by authorized organizations solely for the purpose of amusement and recreation of its members or beneficiaries where:

(i) no player or other person furnishes anything of value for the opportunity to participate;

(ii) the value of the prizes shall not exceed ten dollars for any one game or a total of one hundred fifty dollars in any calendar day;

(iii) such games are not conducted on more than fifteen days during any calendar year;

(iv) no person other than a bona fide active member of the organization, club or association participates in the conduct of the games; and

(v) no person is paid for conducting or assisting in the conduct of the game or games.

(4) A hotel, motel, recreational or entertainment facility or common carrier where bingo games are played as a social activity solely for the purpose of amusement and recreation of its patrons within a municipality that has authorized the conduct of bingo games by authorized organizations where:

(i) no player or other person furnishes anything of value for the opportunity to participate;

(ii) the value of the prizes shall not exceed ten dollars for any one game or a total of one hundred fifty dollars in any calendar day;

(iii) such games are not conducted on more than fifteen days during any calendar year;

(iv) no person other than an employee or volunteer conducts or assists in conducting the game or games; and

(v) the game or games are not conducted in the same room where alcoholic beverages are sold.

(b) A licensed commercial lessor shall not buy, sell, or provide any bingo opportunities or, except as reflected in its board-approved lease agreement(s), any other bingo supplies or equipment.

Section 5820.55 of 9 NYCRR is amended to read as follows:

Manufacturers and suppliers licensed by the board may lease bingo blowers, receptacles, display boards, face-card verifiers and other equipment integral to the operation of bingo to:

(a) an authorized organization that is licensed to conduct bingo;

[(b) a bona fide organization of persons 55 years of age and older, commonly referred to as senior citizens, which possesses an identification number issued by the board;

(c) a hotel which possesses an identification number issued by the board; and]

(b) any apartment, condominium or cooperative complex, retirement community, or other group residential complex or facility located within a municipality that has authorized the conduct of bingo games by authorized organizations where:

(1) such games are sponsored by the operator of or an association related to such complex, community or facility;

(2) such games are conducted solely for the purpose of amusement and recreation of its residents;

(3) no player or other person furnishes anything of value for the opportunity to participate;

(4) the value of the prizes shall not exceed ten dollars for any one game or a total of one hundred fifty dollars in any calendar day;

(5) such games are not conducted on more than fifteen days during any calendar year; and

(6) no person other than an employee or volunteer of such complex, community or facility conducts or assists in conducting the game or games.

(c) Any bona fide social, charitable, educational, recreational, fraternal or age group organization, club or association located within a municipality that has authorized the conduct of bingo games by authorized organizations solely for the purpose of amusement and recreation of its members or beneficiaries where:

(1) no player or other person furnishes anything of value for the opportunity to participate;

(2) the value of the prizes shall not exceed ten dollars for any one game or a total of one hundred fifty dollars in any calendar day;

(3) such games are not conducted on more than fifteen days during any calendar year;

(4) no person other than a bona fide active member of the organization, club or association participates in the conduct of the games; and

(5) no person is paid for conducting or assisting in the conduct of the game or games.

(d) A hotel, motel, recreational or entertainment facility or common carrier where such game is played as a social activity solely for the purpose of amusement and recreation of its patrons within a municipality that has authorized the conduct of bingo games by authorized organizations where:

(1) no player or other person furnishes anything of value for the opportunity to participate;

(2) the value of the prizes shall not exceed ten dollars for any one game or a total of one hundred fifty dollars in any calendar day;

(3) such games are not conducted on more than fifteen days during any calendar year;

(4) no person other than an employee or volunteer conducts or assists in conducting the game or games; and

(5) the game or games are not conducted in the same room where alcoholic beverages are sold.

[(d)](e) a licensed commercial lessor that has received written ap-

proval from the board to purchase or lease bingo blowers, receptacles, display boards and other supplies or equipment integral to the operation of a licensed commercial lessor. The provisions of this Subtitle shall not be construed so as to authorize or permit a licensed commercial lessor to sell, loan or act as a lessor of any bingo supplies or equipment.

Text of proposed rule and any required statements and analyses may be obtained from: Stacy Harvey, Assistant Counsel, Racing and Wagering Board, 1 Broadway Center, Suite 600, Schenectady, NY 12305, (518) 395-5400, email: sharvey@racing.state.ny.us

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

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

Regulatory Impact Statement

1. Statutory authority: Section 435(1)a of the Executive Law grants the Board power and makes it a duty to adopt, amend and repeal rules and regulations governing the issuance and amendment of licenses for bingo, thereunder, and the conduct of games of bingo, to be fairly and properly conducted in the manner prescribed by the Bingo Licensing Law. General Municipal Law Section 495(a) as amended by Chapter 441 of the Laws of 2007 enumerates entities that are allowed to offer bingo.

2. Legislative intent: Prior to the enactment of Chapter 441 of the Laws of 2007 which amended Section 495-a of the General Municipal Law, there were basic provisions prohibiting bingo games from being played unless a license or an identification number is obtained. This prohibition essentially made the conduct of bingo games without approval from the Board an illegal activity even if there is no consideration remitted and the games are played solely for recreational and entertainment purposes. The sale or lease of bingo supplies and equipment by licensed bingo suppliers were limited to authorized organizations licensed to conduct bingo and a select few who obtained an identification number from the Board. By engaging in the conduct of free bingo, individuals ran the risk of being charged with a misdemeanor and suppliers faced Board sanctions that vary from the imposition of fines to loss of licensure.

3. Needs and benefits: This rule amendment is necessary in order for the Board to implement regulations that would allow licensed distributors to sell bingo supplies and equipment to entities other than licensed authorized organizations in accordance with the requirements of Chapter 441 of the Laws of 2007. By amending Section 495-a of the Bingo Licensing Law, the Legislature eliminated the need for hotels and senior citizens organizations to register with the Board and obtain Bingo Identification Numbers and, at the same time, widely broadened the scope of entities qualified to conduct free bingo games in which there is no fee to participate. A Bingo Identification number is issued by the Board identifying each applicant as an authorized organization as a prerequisite to applying to the local municipality for a Bingo License. There is no cost to obtain an Identification Number. A Bingo License is issued by a municipality after it makes an independent determination that the entity is qualified by law to conduct bingo. Board rules currently restrict Board licensed suppliers of bingo supplies and equipment from providing such supplies and equipment for use in unlicensed bingo games to only hotels and senior citizens organizations that have obtained Bingo Identification Numbers from the Board. Currently, Board rules contradict the statutory amendment qualifying "any apartment, condominium or cooperative complex, retirement community, or other group residential complex social, charitable, educational, recreational, fraternal or age group organization, club, motel, recreational or entertainment facility or common carrier" as entities eligible to conduct free bingo. The Legislature also restricted the value of the prizes that can be awarded and limited the number of days per year that an entity can operate free bingo.

4. Costs:

a. Costs to regulated parties for the implementation of and continuing compliance with the rule: There are no added costs to regulated parties for the implementation and continuing compliance with the rule. Manufacturers and suppliers licensed by the board may see increased revenue based on increased sales and leases of bingo supplies and equipment to previously prohibited groups.

b. Costs to the agency, the state and local governments for the

implementation and continuation of the rule: None. The New York State Racing and Wagering Board will have the same oversight responsibilities that it previously had for bingo games, and local governments will continue to have the same licensing and oversight responsibilities as they previously had for bingo games. However, it is anticipated that there will be minor savings based on fewer applications to the Racing and Wagering Board for Bingo Identification Numbers.

c. The information, including the sources of such information and the methodology upon which the cost analysis is based: Cost analysis is based upon a review by the Office of the Counsel of the New York State Racing and Wagering Board. The methodology is based upon a review of Section 495-a of the General Municipal Law and the practical impact of the law on licensing and reporting.

5. Local government mandates: None.

6. Paperwork: Cuts down the amount of paperwork involved in applying for an identification number, verifying the information provided and eliminates the need to apply for a bingo license.

7. Duplication: None.

8. Alternatives: The regulation merely implements changes to 495-a. The alternative would have been non-action which would have kept the law out of regulatory compliance.

9. Federal standards: None.

10. Compliance schedule: The rule will become effective upon adoption in the State Register.

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

This proposal does not require a Regulatory Flexibility Statement, Rural Area Flexibility Statement or Job Impact Statement as is apparent from the nature of the amendment, which authorizes unlicensed bingo so long as there is no cost to participate, and prizes are limited to ten dollars per game or a total of one hundred fifty dollars in any calendar day. Consequently, the rule neither affects small businesses, local governments, jobs nor rural areas. Further, this proposal will not impose an adverse economic impact on reporting, record keeping or other compliance requirements on small businesses in rural or urban areas nor on employment opportunities. Due to the straightforward nature of the rulemaking, there is no need for the development of a small business regulation guide to assist in compliance. These provisions are clear as to how often free bingo can be played during a calendar year and the maximum value of the prizes to be awarded in order to comply with the rule.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Timeframe for the Submission of Audited Financial Statements of Thoroughbred Horsemen's Organizations

I.D. No. RWB-35-11-00006-P

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

Proposed Action: Amendment of section 4003.51(e) of Title 9 NYCRR.

Statutory authority: Racing, Pari-Mutuel Wagering and Breeding Law, sections 101, 228 and 231

Subject: Timeframe for the submission of audited financial statements of thoroughbred horsemen's organizations.

Purpose: To change the financial report filing date from April 15 to 105 days following the end of the organization's fiscal year.

Text of proposed rule: Section 4003.51(e) is hereby amended to read:

(e) No later than one hundred five days after the close of the organization's fiscal year, [On or before April 15th of each year], any organization which has received monies pursuant to this rule during that [the] prior [calendar] year shall file with the board and the track a statement verified by a certified public accountant which shows the financial condition of such organization and contains an itemized statement of the receipts and disbursements of such organization for such prior year.

Text of proposed rule and any required statements and analyses may be obtained from: John J. Googas, Racing and Wagering Board, 1 Broadway Center, Suite 600, Schenectady, NY 12305, (518) 395-5400, email: info@racing.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: Racing, Pari-Mutuel Wagering and Breeding Law, § § 101, 228, and 231. Section 101.1 vests the Racing and Wagering Board with general jurisdiction over all horse racing activities and over the corporations, persons, and associations engaged in pari-mutuel horse racing. Section 231 authorizes the conduct of pari-mutuel betting on horse races if conducted in the manner and subject to supervision provided by law and rules. Section 228.2 provides for payment of funds to representative horsemen's organizations to be used for specified purposes.

2. Legislative objectives: To enable the Board to monitor the expenditure of statutorily directed funds by representative thoroughbred horsemen's association in order to assure compliance with statutory requirements.

3. Needs and benefits: This rulemaking is necessary to address situations where a representative horsemen's association does not use the calendar year for financial reporting purposes. The existing rule requires that an audited financial statement be filed on or before April 15 of the year following the end of the calendar year. The amendment being considered would change the reference language for the report filing date from April 15 of the year following the end of the calendar year to 105 days following the close of the organization's fiscal year. This would preserve the existing 3.5 months for filing while reflecting the fact that all organizations do not use the calendar year for financial reporting purposes.

4. Costs:

(a) Costs to regulated parties for the implementation of and continuing compliance with the rule: None.

(b) Costs to the agency, the state and local governments for the implementation and continuation of the rule: None.

(c) The information, including the source(s) of such information and the methodology upon which the cost analysis is based: This amendment merely changes the reference date for filing; no additional requirements would be imposed.

5. Local government mandates: None.

6. Paperwork: None. There are no new requirements.

7. Duplication: None.

8. Alternatives: The Board did not consider any significant alternatives. The existing reference date for filing (April 15) is based on a faulty presumption that all subject organizations operate on a calendar year fiscal basis. This has resulted in confusion as to when the filing is required when the fiscal year ends after April 15 and has resulted in a substantial gap between the close of a fiscal year and filing. Failure to amend the Rule will continue this confusion and gap. No adverse comments were received based on pre-proposal solicitation from the industry.

9. Federal standards: None.

10. Compliance schedule: Once adopted, the rule can be implemented as soon as it is published in the State Register.

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

This proposal does not require a Regulatory Flexibility Statement, Rural Area Flexibility Statement or Job Impact Statement since the amendment continues the Board's current rule on financial statements and merely re-establishes in other reference language the same timeframe applicable to the due date for these submissions. In addition, this rule does not affect small business, local governments, jobs or rural areas. Further, this proposal will not impose an adverse economic impact on reporting, record keeping or other compliance requirements on small businesses in rural or urban areas nor on employment opportunities. Due to the straightforward nature of the rulemaking, there is no need for the development of a small business regulation guide to assist in compliance. These provisions are clear as to what the timeframes for the submission are and what is necessary to comply with the rule.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Electronic Application Procedure to Open an Advanced Deposit Wagering Account

I.D. No. RWB-35-11-00008-P

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

Proposed Action: Amendment of section 5300.4(a)(4)-(5) of Title 9 NYCRR.

Statutory authority: Racing, Pari-Mutuel Wagering and Breeding Law, sections 101, 227, 301, 305, 401, 405, 520 and 1002

Subject: Electronic application procedure to open an advanced deposit wagering account.

Purpose: To provide guidelines and procedures for online applications for advanced deposit wagering accounts.

Text of proposed rule: Paragraphs (4) and (5) of subdivision (a) of Section 5300.4 of 9 NYCRR are amended to read as follows:

(4) Application shall be signed attesting to its accuracy. *In the case of an online application, the applicant shall provide an electronic signature to attest to the accuracy of the information provided. "Electronic signature" shall mean an electronic sound, symbol, or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record.*

(5) *Except in the case of an online application, [T]he name of each new account holder will be confirmed in accordance with the Federal Government's standards for evaluating and confirming government issued identification and credentials (U.S. Department of [Justice]Homeland Security Employment Verification Form I9[, which can be obtained online at <http://www.usdoj.gov/usao/nh/pdfreleases/Forms/i9.pdf>].) A copy of each properly validated credential will be maintained with the appropriate account application. A copy of a social security card is not required to be maintained at the time of the application if the number is verified with a credit reporting agency and such report is maintained with the account application. In the case of an online application, the pari-mutuel wagering entity shall verify the applicant's identity using, at a minimum, the name, address, social security number and date of birth of the applicant through a credit reporting agency, public database, or similarly reliable sources as provided for in the plan of operation. If there is a discrepancy between the minimum information submitted and the information provided by the electronic verification described above or if no information on the applicant is available from such electronic verification, then the pari-mutuel wagering entity shall not open the account and shall require verification through the Federal Government's standards for evaluating and confirming government issued identification and credentials (U.S. Department of Homeland Security Employment Verification Form I9).*

Text of proposed rule and any required statements and analyses may be obtained from: John Googas, New York State Racing & Wagering Board, One Broadway Center, Suite 600, Schenectady, New York 12305-2553, (518) 395-5400, email: info@racing.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: Racing, Pari-Mutuel Wagering and Breeding Law Sections 101, 227, 301, 305, 401, 405, 520, and 1002. Section 101 vests the Board with general jurisdiction over all horse racing and all pari-mutuel wagering activities in New York State. Section 227 grants the Board the authority to make rules regarding the conduct of pari-mutuel wagering activities associated with thoroughbred horse racing events. Section 301 grants the Board the authority to supervise generally all harness race meetings in New York State at which pari-mutuel betting is conducted and the authority to adopt rules accordingly. Section 305 grants the Board the authority to make rules regarding the conduct of pari-mutuel wagering activities associated with harness horse racing events. Section 401 grants the Board the authority to supervise generally all quarterhorse race meetings in New

York State at which pari-mutuel betting is conducted and the authority to adopt rules accordingly. Section 405 grants the Board the authority to make rules regarding the conduct of pari-mutuel wagering activities associated with quarter horse racing events. Section 520 grants the Board general jurisdiction over the operation of off-track betting facilities within the state and the authority to adopt rules accordingly. Section 1002 grants the Board general jurisdiction over the simulcasting of horse races within the state and the authority to adopt rules accordingly.

2. Legislative Objectives: This proposed amendment advances the legislative objective of regulating the conduct of pari-mutuel wagering activity in a manner designed to maintain the integrity of racing while generating a reasonable revenue for the support of government.

3. Needs and Benefits: This rule is necessary to allow persons to apply on-line to wager through advanced deposit wagering (ADW). Pari-mutuel operators, such as Nassau Downs OTB, Catskill OTB, and Yonkers Raceway will be able to process electronic application for telephone and internet accounts on the same day without having to appear in person to submit an application.

The Board adopted its Internet and Telephone Wagering Rules (Part 5300 of 9 NYCRR) in January 2009. This rulemaking will amend those rules to expressly authorize the online applications for opening an internet or telephone wagering account.

This rule is needed to compete with various internet wagering sites located off-shore and out-of-state. The Board has received concerns from pari-mutuel wagering entities in New York State that they may be losing customers to these competing internet wagering sites. This rulemaking is necessary for New York State OTBs and racetracks to remain competitive in the realm of internet and telephone wagering.

4. Costs:

(a) Costs to regulated parties for the implementation of and continuing compliance with the rule: None. This rule is permissive in nature and doesn't impose costs on pari-mutuel wagering entities with internet and telephone wagering systems.

(b) Costs to the agency, the state and local governments for the implementation and continuation of the rule: None. Local governments would bear no costs because the regulation of pari-mutuel wagering is exclusively regulated by the New York State Racing and Wagering Board. This rule would not impose costs upon the New York State Racing and Wagering Board because the amendments would not alter the regulatory practices employed by the Board.

(c) The information related to costs was obtained by the New York State Racing and Wagering Board based upon analysis of current practices by authorized pari-mutuel wagering entities in the State of New York.

5. Paperwork: This rule will not require any additional paperwork. In fact, by authorizing the electronic submission of applications, pari-mutuel wagering companies should experience a decrease in paperwork compared to the current application submission requirements.

6. Local Government Mandates: Since the New York State Racing & Wagering Board is solely responsible for the regulations of pari-mutuel wagering activities in the State of New York, there is no program, service, duty or responsibility imposed by the rule upon any county, city, town, village, school district, fire district or other special district.

7. Duplication: There are no relevant rules or legal requirements of the state and federal governments that duplicate, overlap or conflict with the rule.

8. Alternative Approaches: This Board considered various requirements for proof of identification. It considered a number of various sources that could be utilized to verify a person's identity electronically, and whether those sources should be expressly identified in the rule. Ultimately, the Board determined that the language in the current text is general enough to provide practical implementation of the rule, and specific enough to be enforceable.

9. Federal Standards: There are no federal standards for pari-mutuel wagering. The New York State Racing and Wagering Board is solely responsible for regulating pari-mutuel wagering activity in New York State.

10. Compliance Schedule: This rule will go into effect on the day that it is published in the State Register under a Notice of Adoption.

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

As is evident by the nature of this rulemaking, this proposal affects the procedures for same-day electronic enrollment for advanced deposit wagering and does not require a Regulatory Flexibility Statement, Rural Area Flexibility Statement or Job Impact Statement because it will not impose an adverse impact on rural areas, nor will it affect jobs. A Regulatory Flexibility Statement and a Rural Area Flexibility Statement are not required because the rule does not adversely affect small business, local governments, public entities, private entities, or jobs in rural areas. The rule will have a positive impact on local governments by facilitating the enrollment of former New York City Off-Track Betting customers with other OTBs that support local government through surcharges and dividend payments. There will be no impact for reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. There will also be no adverse impact on small businesses and jobs in rural areas. A Jobs Impact Statement is not required because this rule amendment will not adversely impact jobs. This rulemaking may help preserve government service jobs. This rulemaking does not impact upon a small business pursuant to such definition in the State Administrative Procedure Act § 102 (8) nor does it negatively affect employment. The proposal will not impose adverse economic impact on reporting, recordkeeping or other compliance requirements on small businesses in rural or urban areas nor on employment opportunities. The rule does not impose any technological changes on the industry either. This rulemaking merely explains the procedures for processing an application using technology adopted by the pari-mutuel wagering entities.