

# RULE MAKING ACTIVITIES

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

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

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

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## Department of Agriculture and Markets

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### EMERGENCY RULE MAKING

#### Firewood (All Hardwood Species) and Other Host Tree Materials Susceptible to the Asian Long Horned Beetle

**I.D. No.** AAM-51-11-00004-E

**Filing No.** 1320

**Filing Date:** 2011-12-06

**Effective Date:** 2011-12-06

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

**Action taken:** Amendment of section 139.2(c) of Title 1 NYCRR.

**Statutory authority:** Agriculture and Markets Law, sections 18, 164 and 167

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

**Specific reasons underlying the finding of necessity:** The rule, which will lift the Asian Long Horned Beetle (ALB) quarantine in the Town of Islip in Suffolk County, is being adopted as an emergency measure because after three comprehensive ALB surveys over various periods, the pest has not been detected in the Town since June 2002. The lifting of the quarantine at this time is consistent with existing scientific protocols, and will coincide with USDA's lifting of its quarantine in the Town of Islip. The Town includes the Villages of Bayshore, East Islip, Islip and Islip Terrace.

The Asian Long Horned Beetle, *Anoplophora glabripennis*, an insect species non-indigenous to the United States, can cause serious damage to

healthy trees by boring into their heartwood and eventually killing them. Nursery stock, logs, green lumber, firewood, stumps, roots, branches and debris of a half inch or more in diameter are subject to infestation. Host hardwood materials at risk to attack and infestation include species of the following: maple; horse chestnut; silk tree or mimosa; birch; poplar; willow; elm; hackberry, ash; katsura; plane tree, sycamore; and mountain ash. The pest was initially detected in the Greenpoint section of Brooklyn in August of 1996. Subsequent survey activities delineated other locations in Brooklyn as well as locations in and about Amityville, the Town of Islip, Queens, Manhattan and Staten Island. As a result, 1 NYCRR Part 139 was adopted, establishing a quarantine of the areas in which the Asian Long Horned Beetle had been observed. The boundaries of those areas are described in 1 NYCRR section 139.2. The lifting of the quarantine in the Town of Islip will ease regulatory burdens on nursery dealers, nursery growers, landscaping companies, transfer stations, compost facilities and general contractors as well as private citizens within that area, by allowing them to move ALB host materials from the Town, without the need for compliance agreements or phytosanitary certificates and incurring costs incident thereto. By lifting the quarantine in an area where ALB has not been detected since June 2002, the rule will ease burdens on regulated parties without compromising plant health, thereby preserving the general welfare. It will also conform the State quarantine to the federal quarantine, which was lifted in the Town of Islip on August 23rd.

Based on the facts and circumstances set forth above, the Department has determined that the immediate adoption of this amendment is necessary for the preservation of the general welfare and that compliance with subdivision one of section 202 of the State Administrative Procedure Act would be contrary to the public interest.

**Subject:** Firewood (all hardwood species) and other host tree materials susceptible to the Asian Long Horned Beetle.

**Purpose:** To lift the Asian Long Horned Beetle quarantine in the Town of Islip, since the pest has not been found since 2002.

**Text of emergency rule:** Subdivision (c) of section 139.2 of 1 NYCRR is repealed, and subdivision (d) of section 139.2 of 1 NYCRR is re-lettered subdivision (c).

**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. AAM-51-11-00004-P, Issue of December 21, 2011. The emergency rule will expire March 4, 2012.

**Text of rule and any required statements and analyses may be obtained from:** Kevin S. King, NYS Department of Agriculture and Markets, 10B Airline Drive, Albany, New York 12235, (518) 457-2087

#### Regulatory Impact Statement

##### 1. Statutory authority:

Section 18 of the Agriculture and Markets Law provides, in part, that the Commissioner may enact, amend and repeal necessary rules which shall provide generally for the exercise of the powers and performance of the duties of the Department as prescribed in the Agriculture and Markets Law and the laws of the State and for the enforcement of their provisions and the provisions of the rules that have been enacted.

Section 164 of the Agriculture and Markets Law provides, in part, that the Commissioner shall take such action as he may deem necessary to control or eradicate any injurious insects, noxious weeds, or plant diseases existing within the State.

Section 167 of the Agriculture and Markets Law provides, in part, that the Commissioner is authorized to make, issue, promulgate and enforce such order, by way of quarantines or otherwise, as he may deem necessary or fitting to carry out the purposes of Article 14 of said Law. Section 167 also provides that the Commissioner may adopt and promulgate such rules and regulations to supplement and give full effect to the provisions of Article 14 of the Agriculture and Markets Law as he may deem necessary.

##### 2. Legislative objectives:

The quarantine accords with the public policy objectives the Legislature sought to advance by enacting the statutory authority in that it will help to prevent the spread within the State of an injurious insect, the Asian Long Horned Beetle.

### 3. Needs and benefits:

The Asian Long Horned Beetle, *Anoplophora glabripennis*, an insect species non-indigenous to the United States, can cause serious damage to healthy trees by boring into their heartwood and eventually killing them. Nursery stock, logs, green lumber, firewood, stumps, roots, branches and debris of a half inch or more in diameter are subject to infestation. Host hardwood materials at risk to attack and infestation include species of the following: *Acer* (Maple); *Aesculus* (Horse Chestnut), *Albizia* (Silk Tree or Mimosa); *Betula* (Birch); *Populus* (Poplar); *Salix* (Willow); *Ulmus* (Elm); *Celtis* (Hackberry); *Fraxinus* (Ash); *Cercidiphyllum japonicum* (Katsura); *Platanus* (Plane tree, Sycamore) and *Sorbus* (Mountain Ash). The pest was initially detected in the Greenpoint section of Brooklyn in August of 1996. Subsequent survey activities delineated other locations in Brooklyn as well as locations in and about Amityville, the Town of Islip, Queens, Manhattan and Staten Island. As a result, 1 NYCRR Part 139 was adopted, establishing a quarantine of the areas in which the Asian Long Horned Beetle had been observed. The boundaries of those areas are described in 1 NYCRR section 139.2.

The lifting of the quarantine in the Town of Islip will ease regulatory burdens on nursery dealers, nursery growers, landscaping companies, transfer stations, compost facilities and general contractors as well as private citizens within that area, by allowing them to move ALB host materials from the Town, without the need for compliance agreements or phytosanitary certificates and incurring expenses incident thereto. By lifting the quarantine after three comprehensive surveys over various periods in an area where ALB has not been detected since June 2002, the rule will ease burdens on regulated parties without compromising plant health, thereby promoting the general welfare. It will also conform the State quarantine to the federal quarantine, which was lifted in the Town of Islip on August 23rd.

### 4. Costs:

(a) Costs to the State government: None. The Department may realize cost savings by no longer issuing phytosanitary certificates or compliance agreements.

(b) Costs to local government: The proposed amendment will not result in costs to local governments. In fact, there will be lower costs to the Town of Islip and the municipalities within the Town, since they will no longer incur expenses incident to obtaining phytosanitary certificates or compliance agreements in order to move host materials.

(c) Costs to private regulated parties: The rule will not result in costs to private regulated parties. In fact, there will be lower costs to private regulated parties, since they will no longer incur expenses incident to obtaining phytosanitary certificates or compliance agreements in order to move host materials.

(d) Costs to the regulatory agency:

(i) The initial expenses: None.

(ii) The ongoing expenses: None. The Department may realize cost savings by no longer issuing phytosanitary certificates or compliance agreements.

### 5. Local government mandate:

None. In fact, the Town of Islip and the villages located therein will no longer have to engage in the disposal of host materials. The Town of Islip currently maintains a waste wood disposal program at a cost of \$200,000 per year.

### 6. Paperwork:

None.

### 7. Duplication:

None.

### 8. Alternatives:

The only alternative considered was to leave the quarantine in place in the Town of Islip. This alternative was rejected, since leaving the Asian Long Horned Beetle quarantine in place where the pest has not been observed for three comprehensive surveys since June 2002, is inconsistent with existing scientific protocols and imposes an unnecessary burden on regulated parties. In light of this, the only viable alternative is to lift the quarantine in the Town of Islip. Additionally, lifting of the quarantine will conform the State quarantine to the federal quarantine, which was lifted in the Town of Islip on August 23rd.

### 9. Federal standards:

The USDA has a parallel Asian Long Horned Beetle quarantine in the Town of Islip, which was lifted on August 23rd.

### 10. Compliance schedule:

It is anticipated that regulated parties would be able to comply with the rule immediately.

### Regulatory Flexibility Analysis

#### 1. Effect on small business:

There are approximately 467 nursery dealers, nursery growers, land-

scaping companies, transfer stations, compost facilities and general contractors located within Suffolk County and potentially affected by the quarantine which would be lifted under this rule. Most of these entities are small businesses. Since the rule will lift the Asian Long Horned Beetle (ALB) quarantine in the Town of Islip, regulated businesses in the Town will be able to freely move regulated materials without the need for compliance agreements and phytosanitary certificates and without incurring costs incident thereto.

#### 2. Compliance requirements:

None.

#### 3. Professional services:

None.

#### 4. Compliance costs:

(a) Initial capital costs that will be incurred by a regulated business or industry or local government in order to comply with the proposed rule: None.

(b) Annual cost for continuing compliance with the proposed rule: None. In fact, there will be lower costs to private regulated parties, since they will no longer incur expenses incident to obtaining phytosanitary certificates or compliance agreements in order to move host materials.

#### 5. Minimizing adverse impact:

Since the rule will lift the ALB quarantine in the Town of Islip, the rule minimizes adverse impact since regulated parties in the Town of Islip will no longer be subject to the quarantine and the requirements incident thereto.

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

None.

7. Assessment of the economic and technological feasibility of compliance with the rule by small businesses and local governments:

The economic and technological feasibility of compliance with the rule by small businesses and local governments has been addressed and such compliance has been determined to be feasible. The basis for this determination is that by lifting the ALB quarantine, the rule actually eliminates a regulatory burden on small businesses and local governments in the Town of Islip.

### Rural Area Flexibility Analysis

The rule will not impose any adverse impact or reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. This finding is based upon the fact that the quarantine areas to which the amendments apply are not situated in "rural areas," as defined in section 481(7) of the Executive Law.

### Job Impact Statement

It is anticipated that the rule will not have a substantial adverse impact on jobs and employment opportunities. In fact, by easing regulatory burdens and costs incident thereto, the lifting the Asian Long Horned Beetle quarantine in the Town of Islip may have a positive impact on jobs within the Town.

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Firewood (All Hardwood Species) and Other Host Tree Materials Susceptible to the Asian Long Horned Beetle

I.D. No. AAM-51-11-00004-P

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

**Proposed Action:** Amendment of section 139.2 of Title 1 NYCRR.

**Statutory authority:** Agriculture and Markets Law, sections 18, 164 and 167

**Subject:** Firewood (all hardwood species) and other host tree materials susceptible to the Asian Long Horned Beetle.

**Purpose:** To lift the Asian Long Horned Beetle quarantine in the Town of Islip, since the pest has not been found there since 2002.

**Text of proposed rule:** Subdivision (c) of section 139.2 of 1 NYCRR is repealed, and subdivision (d) of section 139.2 of 1 NYCRR is re-lettered subdivision (c).

**Text of proposed rule and any required statements and analyses may be obtained from:** Kevin S. King, Director, Division of Plant Industry, New York State Department of Agriculture and Markets, 10B Airline Drive, Albany, New York 12235, (518) 457-2087

**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 18 of the Agriculture and Markets Law provides, in part, that the Commissioner may enact, amend and repeal necessary rules which shall provide generally for the exercise of the powers and performance of the duties of the Department as prescribed in the Agriculture and Markets Law and the laws of the State and for the enforcement of their provisions and the provisions of the rules that have been enacted.

Section 164 of the Agriculture and Markets Law provides, in part, that the Commissioner shall take such action as he may deem necessary to control or eradicate any injurious insects, noxious weeds, or plant diseases existing within the State.

Section 167 of the Agriculture and Markets Law provides, in part, that the Commissioner is authorized to make, issue, promulgate and enforce such order, by way of quarantines or otherwise, as he may deem necessary or fitting to carry out the purposes of Article 14 of said Law. Section 167 also provides that the Commissioner may adopt and promulgate such rules and regulations to supplement and give full effect to the provisions of Article 14 of the Agriculture and Markets Law as he may deem necessary.

##### **2. Legislative objectives:**

The quarantine accords with the public policy objectives the Legislature sought to advance by enacting the statutory authority in that it will help to prevent the spread within the State of an injurious insect, the Asian Long Horned Beetle.

##### **3. Needs and benefits:**

The Asian Long Horned Beetle (ALB), *Anoplophora glabripennis*, an insect species non-indigenous to the United States, can cause serious damage to healthy trees by boring into their heartwood and eventually killing them. Nursery stock, logs, green lumber, firewood, stumps, roots, branches and debris of a half inch or more in diameter are subject to infestation. Host hardwood materials at risk to attack and infestation include species of the following: Acer (Maple); Aesculus (Horse Chestnut); Albizzia (Silk Tree or Mimosa); Betula (Birch); Populus (Poplar); Salix (Willow); Ulmus (Elm); Celtis (Hackberry); Fraxinus (Ash); *Cercidiphyllum japonicum* (Katsura); Platanus (Plane tree, Sycamore) and Sorbus (Mountain Ash). The pest was initially detected in the Greenpoint section of Brooklyn in August of 1996. Subsequent survey activities delineated other locations in Brooklyn as well as locations in and about Amityville, the Town of Islip, Queens, Manhattan and Staten Island. As a result, 1 NYCRR Part 139 was adopted, establishing a quarantine of the areas in which the Asian Long Horned Beetle had been observed. The boundaries of those areas are described in 1 NYCRR section 139.2.

The proposed lifting of the quarantine in the Town of Islip will ease regulatory burdens on nursery dealers, nursery growers, landscaping companies, transfer stations, compost facilities and general contractors as well as private citizens within that area, by allowing them to move ALB host materials from the Town, without the need for compliance agreements or phytosanitary certificates and incurring expenses incident thereto. By lifting the quarantine after three comprehensive surveys over various periods in an area where ALB has not been detected since June 2002, the proposed rule will ease burdens on regulated parties without compromising plant health, thereby promoting the general welfare. It will also conform the State quarantine to the federal quarantine, which was lifted in the Town of Islip on August 23rd.

##### **4. Costs:**

(a) Costs to the State government: None. The Department may realize cost savings by no longer issuing phytosanitary certificates or compliance agreements.

(b) Costs to local government: The proposed amendment will not result in costs to local governments. There will be lower costs to the Town of Islip and the municipalities within the Town, since they will no longer incur expenses incident to obtaining phytosanitary certificates or compliance agreements in order to move host materials.

(c) Costs to private regulated parties: The proposal will not result in costs to private regulated parties. There will be lower costs to private regulated parties, since they will no longer incur expenses incident to obtaining phytosanitary certificates or compliance agreements in order to move host materials.

(d) Costs to the regulatory agency:

(i) The initial expenses: None.

(ii) The ongoing expenses: None. The Department may realize cost savings by no longer issuing phytosanitary certificates or compliance agreements.

##### **5. Local government mandate:**

None. The Town of Islip and the villages located therein will no longer need to engage in the disposal of host materials. The Town of Islip currently maintains a waste wood disposal program at a cost of \$200,000 per year.

6. Paperwork:

None.

7. Duplication:

None.

8. Alternatives:

The only alternative considered was to leave the quarantine in place in the Town of Islip. This alternative was rejected, since leaving the Asian Long Horned Beetle quarantine in place where the pest has not been observed for three comprehensive surveys since June 2002, is inconsistent with existing scientific protocols and imposes an unnecessary burden on regulated parties. In light of this, the only viable alternative is to lift the quarantine in the Town of Islip. Additionally, lifting of the quarantine will conform the State quarantine to the federal quarantine, which was lifted in the Town of Islip on August 23rd.

9. Federal standards:

The USDA had a parallel Asian Long Horned Beetle quarantine in the Town of Islip, which was lifted on August 23rd.

10. Compliance schedule:

It is anticipated that regulated parties would be able to comply with the proposed rule immediately.

#### **Regulatory Flexibility Analysis**

##### **1. Effect on small business.**

There are approximately 467 nursery dealers, nursery growers, landscaping companies, transfer stations, compost facilities and general contractors located within Suffolk County and potentially affected by the quarantine which would be lifted under this proposed rule. Most of these entities are small businesses. Since the proposed rule will lift the Asian Long Horned Beetle (ALB) quarantine in the Town of Islip, regulated businesses in the Town will be able to freely move regulated materials without the need for compliance agreements and phytosanitary certificates and without incurring costs incident thereto.

##### **2. Compliance requirements.**

None.

##### **3. Professional services:**

None.

##### **4. Compliance costs:**

(a) Initial capital costs that will be incurred by a regulated business or industry or local government in order to comply with the proposed rule: None.

(b) Annual cost for continuing compliance with the proposed rule: None. In fact, there will be lower costs to private regulated parties, since they will no longer incur expenses incident to obtaining phytosanitary certificates or compliance agreements in order to move host materials.

##### **5. Minimizing adverse impact:**

Since the rule will lift the ALB quarantine in the Town of Islip, the rule minimizes adverse impact since regulated parties in the Town of Islip will no longer be subject to the quarantine and the requirements incident thereto.

##### **6. Small business and local government participation:**

None.

7. Assessment of the economic and technological feasibility of compliance with the rule by small businesses and local governments:

The economic and technological feasibility of compliance with the proposed rule by small businesses and local governments has been addressed and such compliance has been determined to be feasible. The basis for this determination is that by lifting the ALB quarantine, the proposed rule actually eliminates a regulatory burden on small businesses and local governments in the Town of Islip.

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

The proposed rule will not impose any adverse impact or reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. This finding is based upon the fact that the quarantine areas to which the amendments apply are not situated in "rural areas," as defined in section 481(7) of the Executive Law.

#### **Job Impact Statement**

It is anticipated that the proposed amendment will not have a substantial adverse impact on jobs and employment opportunities. By easing regulatory burdens and costs incident thereto, the lifting the Asian Long Horned Beetle quarantine in the Town of Islip may have a positive impact on jobs within the Town.



## Office of Alcoholism and Substance Abuse Services

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

#### Repeal of 14 NYCRR Parts 1010, 1020, 1035, 1060 and 1061

I.D. No. ASA-51-11-00001-P

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

**Proposed Action:** This is a consensus rule making to repeal Parts 1010, 1020, 1035, 1060 and 1061 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 19.09(b), 19.15(a), 19.40, 32.01 and 32.07(a)

**Subject:** Repeal of 14 NYCRR Parts 1010, 1020, 1035, 1060 and 1061.

**Purpose:** This repeal is necessary in that it will remove obsolete regulations that are no longer applicable to OASAS certified programs.

**Text of proposed rule:** Parts 1010, 1020, 1035, 1060 and 1061 of Title 14 NYCRR are repealed.

**Text of proposed rule and any required statements and analyses may be obtained from:** Sara Osborne, Senior Attorney, NYS Office of Alcoholism and Substance Abuse Services, 1450 Western Ave., Albany, NY 12203, (518) 485-2317, email: SaraOsborne@oasas.state.ny.us

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

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

#### Consensus Rule Making Determination

14 NYCRR 1010, 1020, 1035, 1060 and 1061 were promulgated by the Division of Substance Abuse Services. As a result of the consolidation of the Division of Alcoholism and Alcohol Abuse (DAAA) and the Division of Substance Abuse Services (DSAS) into the Office of Alcoholism and Substance Abuse Services (OASAS) and the passage of Chapter 558 of the Laws of 1999 which requires the promulgation of rules and regulations to regulate and assure the consistent high quality of services provided within the state to persons suffering from chemical abuse or dependence, their families and significant others, and those who are at risk of becoming chemical abusers, OASAS has consolidated and promulgated regulations under Part 800, et seq. of Title 14 of the New York Codes, Rules and Regulations.

These rules have been promulgated into Part 800, et seq. as follows:

Part 1010-Approval of Substance Abuse Services has been replaced by Part 810;

Part 1020-Requirements for the Operation of all Substance Abuse Programs have been replaced by Parts 822, 823, 818 and 819;

Part 1035-Requirements for the Operation of Medically Supervised Ambulatory Substance Abuse Programs have been replaced by Parts 822 and 823;

Part 1060-Public Access to Records has been replaced by Part 803;

Part 1061-Access to Personal Information has been replaced by Part 803.

This rule making is filed as a Consensus rule on the grounds that its purpose is to repeal obsolete regulations and that no person is likely to object.

This proposal by Consensus rulemaking has been widely circulated within the provider community and received no objections.

#### Job Impact Statement

No change -- increase or decrease -- in the number of jobs and employment opportunities is anticipated as a result of the proposed amendments because the repeal of this Part does not apply to any existing programs. The proposed repeal will not result in the loss of any jobs within New York State.

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

#### Chemical Dependence Programs for Youth; Additional Locations Operated by OASAS Certified Providers

I.D. No. ASA-51-11-00002-P

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

**Proposed Action:** This is a consensus rule making to repeal Part 820 and amend section 810.13(c)(2) of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 19.07(c), 19.09(b), 19.40, 32.02 and 32.07(a)

**Subject:** Chemical Dependence Programs for Youth; Additional locations operated by OASAS certified providers.

**Purpose:** Repeal an obsolete rule; amend a regulation to conform provisions to a more recently promulgated regulation.

**Text of proposed rule:** Section 1.

Part 820 of Title 14 NYCRR is REPEALED.

Section 2.

Paragraph (2) of subdivision (c) of 14 NYCRR Part 810.13 is amended to read as follows:

(2) For purposes of this section, an additional location is a place open to the public for the provision of chemical dependence outpatient services which is dependent upon and subordinate to the main location of the provider of services for operation, administration and supervisory activities. The additional location must be operated in the same county or in a county contiguous to the main location[, it must provide no more than two thousand five hundred units of service per year, and it must be open for business fifteen to eighteen hours or fewer per week].

**Text of proposed rule and any required statements and analyses may be obtained from:** Sara Osborne, NYS Office of Alcoholism and Substance Abuse Services, 1450 Western Ave., Albany, NY 12203, (518) 485-2317, email: SaraOsborne@oasas.ny.gov

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

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

#### Consensus Rule Making Determination

14 NYCRR 1010, 1020, 1035, 1060 and 1061 were promulgated by the Division of Substance Abuse Services. As a result of the consolidation of the Division of Alcoholism and Alcohol Abuse (DAAA) and the Division of Substance Abuse Services (DSAS) into the Office of Alcoholism and Substance Abuse Services (OASAS) and the passage of Chapter 558 of the Laws of 1999 which requires the promulgation of rules and regulations to regulate and assure the consistent high quality of services provided within the state to persons suffering from chemical abuse or dependence, their families and significant others, and those who are at risk of becoming chemical abusers, OASAS has consolidated and promulgated regulations under Part 800, et seq. of Title 14 of the New York Codes, Rules and Regulations.

These rules have been promulgated into Part 800, et seq. as follows:

Part 1010-Approval of Substance Abuse Services has been replaced by Part 810;

Part 1020-Requirements for the Operation of all Substance Abuse Programs have been replaced by Parts 822, 823, 818 and 819;

Part 1035-Requirements for the Operation of Medically Supervised Ambulatory Substance Abuse Programs have been replaced by Parts 822 and 823;

Part 1060-Public Access to Records has been replaced by Part 803;

Part 1061-Access to Personal Information has been replaced by Part 803.

This rule making is filed as a Consensus rule on the grounds that its purpose is to repeal obsolete regulations and that no person is likely to object.

This proposal by Consensus rulemaking has been widely circulated within the provider community and received no objections.

#### Job Impact Statement

No change -- increase or decrease -- in the number of jobs and employment opportunities is anticipated as a result of the proposed repeal of this Part because this Part does not apply to any existing programs. The proposed repeal will not result in the loss of any jobs within New York State.

No change - increase or decrease - in the number of jobs and employment opportunities is anticipated as a result of the proposed amend to Part 810.13(c)(2) because additional locations are extensions of currently certified providers and current staffing patterns.

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

#### Repeal of 14 NYCRR Parts 303, 306, 340, 342, 366, 369, 372, 374, 375, 380 and 381

I.D. No. ASA-51-11-00003-P

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

**Proposed Action:** This is a consensus rule making to repeal Parts 303, 306, 340, 342, 366, 369, 372, 374, 375, 380 and 381 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 19.09(b), 19.15(a), 19.40, 32.01 and 32.07(a)

**Subject:** Repeal of 14 NYCRR Parts 303, 306, 340, 342, 366, 369, 372, 374, 375, 380 and 381.

**Purpose:** This repeal is necessary in that it will remove obsolete regulations that are no longer applicable to OASAS certified programs.

**Text of proposed rule:** Parts 303, 306, 340, 342, 366, 369, 372, 374, 375, 380 and 381 of Title 14 NYCRR are repealed.

**Text of proposed rule and any required statements and analyses may be obtained from:** Sara Osborne, Office of Alcoholism and Substance Abuse Services, 1450 Western Ave., Albany, NY 12203, (518) 485-2317, email: SaraOsborne@OASAS.State.NY.US

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

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

#### Consensus Rule Making Determination

14 NYCRR 303,306, 340, 342, 366, 369, 372, 374, 375, 380 and 381 were promulgated by the Division of Alcoholism and Alcohol Abuse. As a result of the consolidation of the Division of Alcoholism and Alcohol Abuse (DAA) and the Division of Substance Abuse Services (DSAS) into the Office of Alcoholism and Substance Abuse Services (OASAS) and the passage of Chapter 558 of the Laws of 1999 which requires the promulgation of rules and regulations to regulate and assure the consistent high quality of services provided within the state to persons suffering from chemical abuse or dependence, their families and significant others, and those who are at risk of becoming chemical abusers, OASAS has consolidated and promulgated regulations under Part 800, et seq. of Title 14 of the New York Codes, Rules and Regulations.

These rules have been promulgated into Part 800, et seq. as follows:

Part 303-Public Access to Records has been replaced by Part 803;

Part 306-Incidents at Facilities for Alcoholism and Alcohol Abuse has been replaced by Part 836;

Part 340-Rural Initiative Funding is obsolete;

Part 342-The Project for Employee Assistance Program Consortia is obsolete;

Part 366-Establishment or Incorporation of Providers and the Construction of Facilities has been replaced by Part 810;

Part 369-Appeals and Hearings has been replaced by Part 831;

Part 372-Operation of Alcoholism Outpatient Facilities has been replaced by Part 822 and 823;

Part 374-Operation of Alcoholism Facilities has been replaced by Parts 810,822,818 and 819;

Part 375-Operation of Community Residences for Alcoholism has been replaced by Part 819;

Part 380-Outpatient Programs and Services has been replaced by Parts 822 and 823;

Part 381-Program Standards for Inpatient Alcoholism Programs has been replaced by Part 818.

This rule making is filed as a Consensus rule on the grounds that its purpose is to repeal obsolete regulations and that no person is likely to object.

This proposal by Consensus rulemaking has been widely circulated within the provider community and received no objections.

#### Job Impact Statement

No change -- increase or decrease -- in the number of jobs and employment opportunities is anticipated as a result of the proposed amendments because the repeal of this Part does not apply to any existing programs. The proposed repeal will not result in the loss of any jobs within New York State.

## Department of Corrections and Community Supervision

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

#### Urinalysis Testing

I.D. No. CCS-51-11-00009-P

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

**Proposed Action:** Renumbering of section 1020.4(e) to (f); addition of new section 1020.4(e); and amendment of section 1020.4(d)(3), (4) and (f)(1)(ii) of Title 7 NYCRR.

**Statutory authority:** Correction Law, section 112

**Subject:** Urinalysis Testing.

**Purpose:** To introduce urinalysis testing procedures for inmates alleging a shy bladder and other minor amendments.

**Text of proposed rule:** Revise 7 NYCRR 1020.4(d)(3) and 1020.4(d)(4) as indicated below:

(3) Security or medical staff shall ensure that the inmate submits an unadulterated urine specimen in the specimen bottle provided by witnessing the inmate urinate into the bottle. The inmate must be pat frisked prior to submitting the urine specimen and s/he may be required to wash *hands* or wear gloves to further ensure that the specimen submitted is that of the inmate. The foregoing shall be conducted by security or medical staff of the same sex, in private and outside the presence of other inmates or staff. Female inmates may be required to urinate into a urine collector or an unused plastic cup, rather than the specimen bottle itself. The contents of the collector or the cup shall then be transferred to the specimen bottle by the inmate, or by the witnessing staff person in the presence of the inmate.

(4) If the inmate is unable to provide a urine specimen immediately, s/he shall be detained until s/he is able to provide a urine specimen. Drinking water should be available in an amount not to exceed eight ounces per hour. An inmate who is unable to provide a urine specimen within three hours of being ordered to do so shall be considered to be refusing to submit the specimen. The inmate shall be informed that this refusal constitutes a violation of facility rules and that s/he may incur the same disciplinary disposition that a positive urinalysis result could have supported. The resultant misbehavior report shall indicate that the inmate was informed of the above *and it should include an alleged violation of Rule 180.14 as described in 270.2 of this title.*

Add new 7 NYCRR 1020.4(e) as follows:

(e) *Procedure for Inmates Claiming to be Unable to Urinate in Presence of Others:* The following procedures shall be employed when the watch commander reasonably believes that the inmate is unable to provide a urine specimen due to an alleged inability to urinate in the presence of others (*shy bladder*). Reasonable belief is based upon the following criteria, including, but not limited to: Medical or mental health records supporting the inmate's claim (to be evaluated by health services or OMH staff), prior disciplinary and/or computerized urinalysis testing data indicating a history of urinalysis testing violations, if applicable, and the inmate's behavior and demeanor at the time of request for the urine sample.

(1) *Authorization:* The watch commander shall be notified by the staff member assigned to obtain the urine sample and provide verbal authorization for these procedures.

(2) *Location:* The procedure shall take place in temporary isolation in the facility drug watch cell/room or other appropriate area.

(3) *Procedure:*

(i) *The inmate shall be strip frisked, subject to a metal detector search and given a gown or other garment to wear prior to placement in the drug watch cell/room and will be required to wash their hands or wear gloves, to further ensure that the sample is unadulterated. The cell/room shall be thoroughly searched prior to admission of the inmate and, if applicable, the water supply to the cell/room shall be turned off.*

(ii) *Security staff shall hand to the inmate the specimen container, labeled with the inmate's name and number, the date and any other relevant identifying information. Staff shall not witness the inmate urinate into the specimen container.*

(iii) *he inmate shall be detained until he/she is able to provide a urine specimen for up to three hours including any time prior to a determination that special arrangements are necessary. Drinking water should be made available in an amount not to exceed eight ounces per hour. Water given to the inmate shall be consumed under the direct observation of staff. The inmate shall not be allowed to retain any amount of water.*

(iv) *An inmate who is unable to provide a urine specimen*

*within three hours of the initial order to produce a sample shall be considered to be refusing to submit the specimen. The inmate shall be informed that this refusal constitutes a violation of facility rules and that s/he may incur the same disciplinary disposition that a positive urinalysis result could have supported. The resultant misbehavior report shall indicate that the inmate was informed of the above and it should include an alleged violation of Rule 180.14 as described in 207.2 of this title, noting that the procedures listed above in sub-sections 1020.4(e)(3)(i)-(iii) were followed.*

Revise 7 NYCRR 1020.4(f)(1)(ii) as indicated below:

(f) [(e)] Process the urine specimen.

(1) If the facility has urinalysis testing apparatus:

(i) All persons handling the specimen shall make an appropriate notation under Chain of Custody on the request for urinalysis test form. The number of persons handling the specimen shall be kept to the minimum. The specimen shall be kept in a secure area at all times.

(ii) Place the specimen in a secured refrigerator if it is not to be tested immediately. If it is anticipated that the specimen will not be tested within one day, place it in a secured freezer. It is recommended that the specimen be stored frozen. A log book shall be kept in the vicinity of the refrigerator/freezer, and each person accessing the specimens shall note his or her name, the date, and the time of each such access.

**Text of proposed rule and any required statements and analyses may be obtained from:** Maureen E. Boll, Deputy Commissioner and Counsel, NYS Department of Corrections and Community Supervision, 1220 Washington Avenue - Harriman State Campus - Building 2, Albany, NY 12206-2050, (518) 457-4951, email: Rules@doccs.ny.gov

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

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

#### **Regulatory Impact Statement**

##### **Statutory Authority**

Section 112 of Correction Law assigns to the Commissioner the superintendence, management and control of all inmates confined within correctional facilities of all matters relating to the government, discipline, and policing thereof.

##### **Legislative Objective**

By vesting the commissioner with the rulemaking authority as stated in section 112 of Correction Law, the legislature intended the commissioner to promulgate rules and regulations governing inmate discipline and related procedures that are in the best interest of institutional and public safety and welfare. Such rules and regulations include, but are not limited to, procedures for the reasonable and fair administration of urinalysis testing procedures for inmates who allege to be unable to urinate in the presence of others (shy bladder).

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

The use of illicit drugs and alcohol presents a serious threat to the safety and security of a correctional facility. The Department has promulgated Urinalysis testing procedures which have proved to be an effective means by which to detect and to discipline inmates found to be in violations of Department rules covering inmate use of illicit drugs or alcohol. Urinalysis testing provides the means to ensure a drug free environment within the Department's facilities is maintained.

The Department recognizes that the inability to urinate in front of others has been determined to be a legitimate condition that can negatively affect an inmate's ability to comply with the Department's current urinalysis testing procedures. The new enhanced procedures as listed in the new 1020.4(e) are being created for those instances when an inmate is required to provide a urinalysis sample and claims to be unable to urinate in the presence of others. They provide security supervisory staff (Watch Commander) with a reasonable means to assess the validity of such a claim. Such means include, but are not limited to, consideration of an inmate's medical and mental health records, if applicable, prior disciplinary and urinalysis testing data indicating a history of urinalysis testing violations, and the inmate's behavior and demeanor at the time of the request for the urine sample. If the claim is determined to be substantiated, the new procedures provide the inmate with an accommodation to comply with the

urinalysis with a reasonable level of privacy given the need to provide an uncompromised specimen for accurate testing.

These new procedures were determined to be necessary since a positive urinalysis test result, as well as an inmate's refusal to comply with urinalysis test request, can result in disciplinary proceedings due to violations of the Department's Standards of Inmate Conduct.

The other minor revisions to this part are being made for the sake of clarity and consistency.

##### **Costs**

a) To agency, the state and local governments: None.

b) Costs to private regulated parties: None. The proposed amendment does not apply to private parties.

c) This cost analysis is based upon the fact that the new procedures represent modest changes to established Department procedures. Mental health and medical staff are available to conduct the records reviews if the need arises and there is no anticipated increase in services provided in order to enact implementation.

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

There are no new mandates imposed upon local governments by these proposals. The proposed amendments do not apply to local governments.

##### **Paperwork**

There is one new Departmental form that has been created in order to document the medical and mental health records review. The form will be distributed electronically, therefore the costs of reproduction and distribution are minimal.

##### **Duplication**

These proposed amendments do not duplicate any existing State or Federal requirement.

##### **Alternatives**

No alternatives are apparent and none have been considered. The proposed amendment was determined to be necessary due to documented cases of shy bladder for inmates. With the continued assistance and input of clinical professionals from the Office of Mental Health, as well as DOCS medical staff, the Department believes it can implement these new procedures while maintaining the integrity of the urinalysis testing process. This should enhance the effectiveness of the inmate disciplinary process in adjudicating applicable rule violations when deemed necessary.

##### **Federal Standards**

There are no apparent minimum standards of the Federal government regarding this issue.

##### **Compliance Schedule**

The Department of Correctional Services will achieve compliance with the proposed rules upon publication in the New York State Register.

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

A regulatory flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, record keeping or other compliance requirements on small businesses or local governments. This proposal merely enhances the Department's established Urinalysis Testing procedures when an inmate alleges a "shy bladder" is at issue, and it makes other minor amendments for the sake of clarity.

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

A rural area flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on rural areas. This proposal merely enhances the Department's established Urinalysis Testing procedures when an inmate alleges a "shy bladder" is at issue, and it makes other minor amendments for the sake of clarity.

##### **Job Impact Statement**

A job impact statement is not submitted because this proposed rule will have no adverse impact on jobs or employment opportunities. This proposal merely enhances the Department's established Urinalysis Testing procedures when an inmate alleges a "shy bladder" is at issue, and it makes other minor amendments for the sake of clarity.



## Department of Economic Development

### EMERGENCY RULE MAKING

#### Economic Transformation and Facility Redevelopment Program

**I.D. No.** EDV-51-11-00019-E

**Filing No.** 1319

**Filing Date:** 2011-12-06

**Effective Date:** 2011-12-06

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

**Action taken:** Addition of Parts 200 - 204 to Title 5 NYCRR.

**Statutory authority:** Economic Development Law, art. 18

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

**Specific reasons underlying the finding of necessity:** Regulatory action is needed immediately to implement the Economic Transformation and Facility Redevelopment Program ("the Program") which was created by Chapter 61 of the Laws of 2011. The Program is created to support communities affected by the closure of correctional and juvenile justice facilities. The Program will provide tax credits to firms that create jobs and make investments in certain areas designated as economic transformation areas. The Program will leverage private sector job creation and investments and help transform the economies of the communities in these areas and lessen the impact of the facility closures.

New York is in the midst of a national economic slowdown. The impact of the national financial crisis and resulting slowed economic growth was particularly devastating to New York State and could be even more severe for those communities where correctional and juvenile justice facilities will be closed.

The Economic Transformation and Facility Redevelopment Program will be a key economic development tool for creating jobs and private sector investment in communities affected by the facility closures. It is imperative that this Program be implemented immediately so that the State can respond quickly to the dislocation and job losses that will likely result from the closure of these facilities.

It bears noting that section 403 of the Economic Development Law directs the Commissioner of Economic Development to promulgate regulations and explicitly indicates that such regulations may be adopted on an emergency basis.

**Subject:** Economic Transformation and Facility Redevelopment Program.

**Purpose:** Allow Dept to implement the Economic Transformation and Facility Redevelopment Program.

**Substance of emergency rule:** The regulation creates new Parts 200-204 in 5 NYCRR as follows:

1) The regulation adds the definitions relevant to the Economic Transformation and Facility Redevelopment Program (the "Program"). Key definitions include, but are not limited to, certificate of eligibility, preliminary schedule of benefits, net new jobs, new business, economic transformation area, and closed facility.

2) The regulation creates the application and review process for the Program. In order to become a participant in the Program, an applicant must submit a complete application by the later of: (1) the date that is three years after the date of the closure of the closed facility located in the economic transformation area in which the business entity would operate or (2) January 1, 2015. An applicant must also agree to a variety of requirements, including, but not limited to, the following: (a) allowing the exchange of its tax information between Department of Taxation and Finance and Department of Economic Development (the "Department"); (b) allowing the exchange of its tax and employer information between the Department of Labor and the Department; and (c) agreeing to not participate in either the Excelsior Jobs Program, the Empire Zones Program or claim any tax credits under the Brownfield Cleanup Program if admitted into the Economic Transformation and Facility Redevelopment Program specifically with regard to the facility located in the economic transformation area.

3) Upon receiving a complete application, the Commissioner of the Department shall review the application to ensure it meets eligibility criteria set forth in the statute (see 5 below). If it does not, the application

shall not be accepted. If it does meet the eligibility criteria, the Commissioner may admit the applicant into the Program. If admitted into the Program, an applicant will receive a certificate of eligibility. When considering an application, the Commissioner shall consider factors including, but not limited to, the overall cost and effectiveness of the project, and whether the project is consistent with the intent of the Program. If a participant does not start construction on or acquire a qualified investment or create at least one net new job within one year of the issuance of its certificate of eligibility, the participant will not be eligible for any of the Program's tax credits.

4) The regulation sets forth the eligibility criteria for the Program. In order to qualify for the Program, (1) a participant must create and maintain at least five net new jobs in an economic transformation area, and must demonstrate that its benefit-cost ratio is at least ten to one; (2) a participant must be in compliance with all worker protection and environmental laws and regulations; (3) a participant must not owe past due federal or state taxes or local property taxes, unless those taxes are being paid pursuant to an executed payment plan; and (4) the location of the participant's operations for which it seeks tax benefits must be wholly located within the economic transformation area.

5) In addition, a business entity that is primarily operated as a retail business is not eligible to participate in the program if its application is for any facility or business location that will be primarily used in making retail sales to customers who personally visit such facilities. A business entity that is engaged in offering professional services licensed by the state or by the courts of this state is not eligible to participate in the Economic Transformation and Facility Redevelopment Program. In addition, a business entity that is or will be principally operated as a real estate holding company or landlord for retail businesses or entities offering professional services licensed by the state or by the courts of this state is also not eligible to participate in the Note, however, that that the commissioner may determine that such a business entity described in the preceding three sentences may be eligible to participate in the Program at the site of a closed facility if it is pursuant to an adaptive reuse plan for a substantial portion of such facility, the adaptive reuse plan is consistent with the strategic plan of the Regional Economic Development Council and it has been recommended by the Regional Economic Development Council to the Commissioner.

6) The regulation sets forth the fourteen (14) evaluation standards that the Commissioner can utilize when determining whether to admit an applicant to the Program. These include, but are not limited to, the following: (1) the number of net new jobs to be created in New York State; or (2) the amount of capital investment to be made; or (3) whether the applicant is proposing to substantially renovate and reuse closed facilities; or (4) whether the applicant will use energy-efficient measures, including, but not limited to, the reduction of greenhouse gas and emissions and the Leadership in Energy and Environmental Design (LEED) green building rating system for the project identified in its application; or (5) whether the application has been recommended by the Regional Economic Council representing the region where the project will be located; or (6) the degree to which the project is consistent with the strategic plan and priorities for the region; or (7) the degree of economic distress in the area where the applicant will locate the project identified in its application; or (8) the degree of an applicant's financial viability, strength of financials, readiness and likelihood of completion of the project identified in the application; or (9) the degree to which the project identified in the application supports New York State's minority and women business enterprises; or (10) the degree to which the project identified in the application supports the principles of Smart Growth; or (11) the estimated return on investment that the project identified in the application will provide to the state; or (12) the overall economic impact that the project identified in the application will have on a region, including, but not limited to, the impact of any direct and indirect jobs that will be created; or (13) the degree to which other state or local incentive programs are available to the applicant; or (14) the likelihood that the project identified in the application would be located outside of New York State or would not occur but for the availability of state or local incentives.

7) The regulation states that the Commissioner shall prepare a program report on a quarterly basis for posting on the Department's website.

8) The regulation calls for removal of a participant in the Program for failing to meet the application requirements or eligibility criteria of the statute. Upon removal, a participant will be notified in writing and have the right to appeal such removal.

9) The regulation lays out the appeal process for participants who have been removed from the Program. A participant will have thirty (30) days to appeal to the Department. An appeal officer will be appointed and shall evaluate the merits of the appeal and any response from the Department. The appeal officer will determine whether a hearing is necessary and the level of formality required. The appeal officer will prepare a report and make recommendations to the Commissioner. The Commissioner will then issue a final decision in the case.

The full text of the emergency rule is available at the Department's website at <http://esd.ny.gov/BusinessPrograms/EconomicTransformation.html>.

**This notice is intended** to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires March 4, 2012.

**Text of rule and any required statements and analyses may be obtained from:** Thomas P Regan, NYS Department of Economic Development, 30 South Pearl Street, Albany, NY 12245, (518) 292-5123, email: [tregan@empire.state.ny.us](mailto:tregan@empire.state.ny.us)

#### **Regulatory Impact Statement**

##### **STATUTORY AUTHORITY:**

Chapter 61 of the Laws of 2011 established Article 18 of the Economic Development Law, creating the Economic Transformation and Facility Redevelopment Program and authorizing the Commissioner of Economic Development to adopt, on an emergency basis, rules and regulations governing the Program.

##### **LEGISLATIVE OBJECTIVES:**

The emergency rulemaking accords with the public policy objectives the Legislature sought to advance because they directly address the legislative findings and declarations that New York State needs, as a matter of public policy, to create competitive financial incentives for businesses to create jobs and invest in the redevelopment of closed facilities and the economic transformation of surrounding communities. The Economic Transformation and Facility Redevelopment Program is created to support communities affected by closure of correctional and juvenile justice facilities. The Program will provide tax credits to firms that create jobs and make investments in certain areas designated as economic transformation areas. The Program will leverage private sector job creation and investments and help transform the economies of the communities in these areas and lessen the impact of the facility closures. The emergency rule is specifically authorized by the Legislature.

##### **NEEDS AND BENEFITS:**

The emergency rule is required in order to immediately implement the statute contained in Article 18 of the Economic Development Law, creating the Economic Transformation and Facility Redevelopment Program. The statute directed the Commissioner of Economic Development to adopt regulations with respect to an application process and eligibility criteria and authorized the adoption of such regulations on an emergency basis notwithstanding any provisions to the contrary in the state administrative procedures act. New York is in the midst of a national economic slowdown. The impact of the national financial crisis and resulting slowed economic growth was particularly devastating to New York State and could be even more severe for those communities where correctional and juvenile justice facilities will be closed.

The Economic Transformation and Facility Redevelopment Program will be one of the State's key economic development tools for creating jobs and private sector investment in communities affected by the facility closures. It is imperative that this Program be implemented immediately so that the State can respond quickly to the dislocation and job losses that will likely result from closure of these facilities.

This rule will establish the process and procedures for launching this new Program in the most efficient and cost-effective manner while protecting all New York State taxpayers with rules to ensure accountability, performance and adherence to commitments by businesses choosing to participate in the Program.

##### **COSTS:**

A. Costs to private regulated parties: None. There are no regulated parties in the Economic Transformation and Facility Redevelopment Program, only voluntary participants.

B. Costs to the agency, the State, and local governments: The Department of Economic Development does not anticipate any significant costs with respect to implementation of this program. There is no additional cost to local governments.

C. Costs to the State government: None. There will be no additional costs to New York State as a result of the emergency rule making.

##### **LOCAL GOVERNMENT MANDATES:**

None. There are no mandates on local governments with respect to the Economic Transformation and Facility Redevelopment Program. This emergency rule does not impose any costs to local governments for administration of the Economic Transformation and Facility Redevelopment Program.

##### **PAPERWORK:**

The emergency rule requires businesses choosing to participate in the Economic Transformation and Facility Redevelopment Program to establish and maintain complete and accurate books relating to their participation in the Economic Transformation and Facility Redevelopment Program for a period of three years beyond their participation in the Program. However, this requirement does not impose significant additional paperwork burdens on businesses choosing to participate in the

Program but instead simply requires that information currently established and maintained be shared with the Department in order to verify that the business has met its job creation and investment commitments.

##### **DUPLICATION:**

The emergency rule does not duplicate any state or federal statutes or regulations.

##### **ALTERNATIVES:**

No alternatives were considered with regard to amending the regulations in response to statutory revisions.

##### **FEDERAL STANDARDS:**

There are no federal standards in regard to the Economic Transformation and Facility Redevelopment Program. Therefore, the emergency rule does not exceed any Federal standard.

##### **COMPLIANCE SCHEDULE:**

The period of time the state needs to assure compliance is negligible, and the Department of Economic Development expects to be compliant immediately.

#### **Regulatory Flexibility Analysis**

##### **1. Effect of rule**

The emergency rule imposes record-keeping requirements on all businesses (small, medium and large) that choose to participate in the Economic Transformation and Facility Redevelopment Program. The emergency rule requires all businesses that participate in the Program to establish and maintain complete and accurate books relating to their participation in the Program for the duration of their term in the Program plus three additional years. Local governments are unaffected by this rule.

##### **2. Compliance requirements**

Each business choosing to participate in the Economic Transformation and Facility Redevelopment Program must establish and maintain complete and accurate books, records, documents, accounts, and other evidence relating to such business's application for entry into the program and relating to annual reporting requirements. Local governments are unaffected by this rule.

##### **3. Professional services**

The information that businesses choosing to participate in the Economic Transformation and Facility Redevelopment Program would be required to keep is information such businesses already must establish and maintain in order to operate, i.e. wage reporting, financial records, tax information, etc. No additional professional services would be needed by businesses in order to establish and maintain the required records. Local governments are unaffected by this rule.

##### **4. Compliance costs**

Businesses (small, medium or large) that choose to participate in the Economic Transformation and Facility Redevelopment Program must create new jobs and/or make capital investments in order to receive any tax incentives under the Program. If businesses choosing to participate in the Program do not fulfill their job creation or investment commitments, such businesses would not receive the tax incentives. There are no other initial capital costs that would be incurred by businesses choosing to participate in the Economic Transformation and Facility Redevelopment Program. Annual compliance costs are estimated to be negligible for businesses because the information they must provide to demonstrate their compliance with their commitments is information that is already established and maintained as part of their normal operations. Local governments are unaffected by this rule.

##### **5. Economic and technological feasibility**

The Department of Economic Development ("DED") estimates that complying with this record-keeping is both economically and technologically feasible. Local governments are unaffected by this rule.

##### **6. Minimizing adverse impact**

DED finds no adverse economic impact on small or large businesses with respect to this rule. Local governments are unaffected by this rule.

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

DED is in compliance with SAPA Section 202-b(6), which ensures that small businesses and local governments have an opportunity to participate in the rule-making process. DED has conducted outreach within the small and large business communities and maintains continuous contact with small and large businesses with regard to their participation in this program. Local governments are unaffected by this rule.

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

The Economic Transformation and Facility Redevelopment Program is a tax credit program available to new businesses that locate in communities affected by the closure of correctional and juvenile justice facilities, create jobs and make private sector investments. Economic transformation areas will be designated through implementation of these regulations. New businesses to these areas that create jobs and make investments are eligible to apply to participate in the Program entirely at their discretion. Municipalities are not eligible to participate in the Program. The emergency rule does not impose any special reporting, recordkeeping or other compliance



requirements on private entities in rural areas. Therefore, the emergency rule will not have a substantial adverse economic impact on rural areas nor on the reporting, recordkeeping or other compliance requirements on public or private entities in such rural areas. Accordingly, a rural area flexibility analysis is not required and one has not been prepared.

#### **Job Impact Statement**

The emergency rule relates to the Economic Transformation and Facility Redevelopment Program. The Economic Transformation and Facility Redevelopment Program will enable New York State to provide financial incentives to businesses that create jobs and make investments in communities affected by the closure of correctional and juvenile justice facilities. This Program, given its design and purpose, will have a substantial positive impact on job creation and employment opportunities. The emergency rule will immediately enable the Department to fulfill its mission of job creation and investment in certain areas designated as economic transformation areas. Because this emergency rule will authorize the Department to immediately begin offering financial incentives to firms that commit to creating new jobs and/or to making significant capital investment in these areas, it will have a positive impact on job and employment opportunities. Accordingly, a job impact statement is not required and one has not been prepared.

## Education Department

### EMERGENCY RULE MAKING

#### **Annual Professional Performance Reviews for Classroom Teachers and Building Principals**

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

**Filing No.** 1317

**Filing Date:** 2011-12-06

**Effective Date:** 2011-12-06

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 regulations 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 proposed amendment was adopted as an emergency rule at the May 2011 Regents meeting, with the provisions regarding the new Subpart 30-2 becoming effective on May 20, 2011 and the amendments to section 100.2(o) becoming effective on July 1, 2011. On June 28, 2011, litigation was commenced against the proposed amendment in State Supreme Court. On August 24, 2011, State Supreme Court, Albany County (Lynch, J.) issued a Decision and Order in *New York State United Teachers, et al. v. Board of Regents, et al.* finding sections 30-2.4(c)(3)(d), 30-2.4(d)(1)(iii), 30-2.4(d)(1)(iv)(c), 30-2.12(b), 30-2.1(d) and 2.11(c), and 30-2.6(a)(1) of the proposed regulations invalid to the extent set forth in the Decision and Order. An appeal is being taken from that Decision and Order.

The proposed amendment was subsequently readopted as an emergency rule at the July 18-19, 2011 and September 12-13, 2011 Regents meetings. The September emergency adoption was filed with the Department of State on October 7, 2011 and will expire on December 5th, before the December 12-13, 2011 Regents meeting. Another emergency adoption is therefore necessary at the November 14-15, 2011 Regents meeting to ensure the emergency rule remains continuously in effect while litigation is pending on certain of its provisions until all appeals are final and it can be adopted as a permanent rule.

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 emergency rule remains continuously in effect until it can be adopted as a permanent rule.

**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 Board of Regents has amended section 100.2(o) of the Commissioner's Regulations and has added a new Subpart 30-2 to the Rules of the Board of Regents, as an emergency action, effective December 6, 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 emergency rule.

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 June 8, 2011. The emergency rule will expire February 3, 2012.

**Text of rule and any required statements and analyses may be obtained from:** Mary Gammon, NYS Education Department, Office of Counsel, 89 Washington Avenue, Room 112, Albany, NY 12234, (518) 474-8857, email: legal@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 measure 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 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.

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 as-

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 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. 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.

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

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on June 8, 2011, the State Education Department received the following comments.

##### **1. COMMENT:**

The use of student test data to evaluate teachers and administrators is contrary to the evidence as established in research and reports, which predicts that, using one year of data, 35% of teacher classifications will be wrong, and that different tests yield different teacher rankings. More importantly, it creates a system which ties the economic well being of educators to student test scores, which will give rise to treating students as mere conduits of cash, leading to student abuse and debasement of public education.

##### **DEPARTMENT RESPONSE:**

The provisions in the proposed rule relating to student growth on State assessments or other comparable measures, and locally selected measures of student achievement, are necessary to implement Education Law section 3012-c, which provides that the annual review of teachers and principals must "include measures of student achievement" (§ 3012-c[1]). Because this requirement is imposed by statute, it cannot be changed except through a statutory amendment, which is beyond the scope of this rule making.

##### **2. COMMENT:**

The proposed rule provides that the "State Assessments or Other Comparable Measures" subcomponent of a teacher's or principal's quality rating be based on a comparison of the individual teacher's or principal's results with the State average for similar students. An average merely shows how individuals in a group compare relative to each other and shows nothing about how they compare to an actual standard. Whenever comparisons are made to any average, 50% of the individuals within a group will be above average and 50% will be below average, regardless of how the data are disaggregated into various types of similar groupings. This will result in 50% of teachers and building principals in every school district in the State being below average and will require them to have mandated improvement plans. Furthermore, since the year-to-year reliability of New York State Assessments is low and approximately equal to random chance, the same individuals who happened to be above average one year will likely be below average the next year thus requiring that they also have mandated improvement plans. Also, the proposed rule will result in more mandated student testing to generate the data needed to rate teachers, which will put an enormous strain on school district resources.

##### **DEPARTMENT RESPONSE:**

The provisions in the proposed rule relating to student growth on State assessments or other comparable measures are necessary to implement Education Law section 3012-c, which provides that the annual review of

teachers and principals must "include measures of student achievement" (§ 3012-c[1]). Because this requirement is imposed by statute, it cannot be changed except through a statutory amendment, which is beyond the scope of this rule making. The rule requires scores for each of the three subcomponents in addition to an overall score out of 100 points. Section 30-2.6(a)(1) lists the range of scores needed to classify the overall composite score into the four rating categories. The composite score classification, not a single subcomponent score classification, is used to determine whether a teacher or principal improvement plan is required. Per section 30-2.10(a), a teacher or principal who is rated as developing or ineffective on the entire annual professional performance review (i.e. the composite score) shall have an improvement plan implemented; improvement plans are NOT required for educators who receive a rating of developing or ineffective on a subcomponent score, they are only required if they receive a developing or ineffective rating on the composite score.

##### **3. COMMENT:**

Section 30-2.4(c)(3)(i)(d) of the proposed rule should be revised to require that 20% of the teacher's evaluation for student performance be based on State and standardized assessments and the remaining 20% be based on local assessment tools. Concern was expressed that having school districts use scores from State and standardized tests for 40% of a teacher's annual professional performance review, by permitting districts to select State and standardized assessments as their local assessment tool, will discourage school districts from developing effective local assessments, because of the ease in simply doubling the score received by State and standardized assessments and the possibility that funding may at some point be tied to the use of standardized assessments.

##### **DEPARTMENT RESPONSE:**

On August 24, 2011, State Supreme Court, Albany County (Lynch, J.) issued a Decision and Order in *New York State United Teachers, et al. v. Board of Regents, et al.* that, among other things, found section 30-2.4(c)(3)(i)(d) of the proposed rule invalid to the extent that the same student growth measures used to measure the first 20% category may not be used to measure the second 20% category. An appeal is being taken from that Decision and Order. The Department acknowledges that, to the extent set forth in the Decision and Order, section 30-2.4(c)(3)(i)(d) is invalid and unenforceable, pending a final determination on appeal. School districts and BOCES will not be required to comply with section 30-2.4(c)(3)(i)(d) while the appeal is pending to the extent it has been declared invalid. Additional guidance on the impact of the litigation is being provided separately.

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## Department of Health

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### EMERGENCY RULE MAKING

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

**I.D. No.** HLT-39-11-00007-E

**Filing No.** 1300

**Filing Date:** 2011-12-02

**Effective Date:** 2011-12-02

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

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

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

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

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

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

**Purpose:** To impose benefit limitations on Medicaid coverage of enteral formula, prescription footwear, and compression stockings.

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

(2) the identification card on its face:

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

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

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

The opening language of paragraph (4) of subdivision (a) of section 505.5 is amended to read as follows:

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

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

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

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

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

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

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

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

(i) Payment for orthopedic footwear must not exceed the lower of:  
(a) [the acquisition cost to the provider plus 50%] *the maximum*

*reimbursable amount as shown in the fee schedule for durable medical equipment, medical/surgical supplies, orthotics and prosthetic appliances and orthopedic footwear; the maximum reimbursable amount will be determined for each item of footwear based on an average cost of products representative of that item; or*

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

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

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

[ITEM]	LIMIT
Cane	1 every 3 yrs.
Cane, Quad or three prong	1 every 3 yrs.
Flare heels (each)	2 pair per yr.
Cork lifts	2 pair per yr.
Steindler heel corrections	2 pair per yr.
Spenco Insert	2 pair per yr. per child
Heel wedge	2 pair per yr.
Foot, insert, removable, molded to patient model, longitudinal arch support, each	2 per yr. per adult
Foot, insert, removable, molded to patient model, longitudinal/metatarsal support, each	2 per yr. per adult
Foot, arch support, removable, premolded, longitudinal, each	2 per yr. per adult
Foot, arch support, removable, premolded, longitudinal/metatarsal, each	2 per yr. per adult
Longitudinal arch support	1 pair per yr. per adult
Foot, arch support,	2 pair per yr. per adult
Removable mold/Levi mold	1 pair per yr. per adult
Elastic stocking/below knee medium wt.	4 pair per yr.
Elastic stocking/below knee heavy wt.	4 pair per yr.
Elastic stocking/above knee medium wt.	4 pair per yr.
Elastic stocking/above knee heavy wt.	4 pair per yr.
Elastic stocking/full length medium wt.	4 pair per yr.
Elastic stocking/full length heavy wt.	4 pair per yr.
Elastic stocking/leotards	4 pair per yr.
Elastic stocking/garter belt	4 pair per yr.
Surgical stocking/below knee	4 pair per yr.
Surgical stocking/thigh length	4 pair per yr.
Surgical stocking/full length	4 pair per yr.
Corset, Sacroiliac 2 per yr. Corset, Lumbar	2 per yr.
Handheld shower head	1 every 3 yrs.
Bed pan, fracture	1 every 3 yrs.
Urinary suspensory	1 every 5 yrs.
Emesis basin	1 every 5 yrs.
Sitz bath	1 every 5 yrs.
Urinal, female, any material	1 every 5 yrs.
Urinal, male, any material	1 every 5 yrs.
Commode pad	1 every 5 yrs.



Flotation pad	1 per yr.
Humidifier, cold air	1 every 3 yrs.
Vaporizer, room type	1 every 3 yrs.
Standard adult wheelchair	1 every 3 yrs.
Electric heating pad standard	1 every 3 yrs.
Hot fomentation heating pads	1 every 3 yrs.
Orthopedic shoes	2 pair per yr.]

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

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

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

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

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

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

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

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

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

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

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

***This notice is intended*** to serve only as a notice of emergency adoption. This agency intends to adopt 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. HLT-39-11-00007-P, Issue of September 28, 2011. The emergency rule will expire January 30, 2012.

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

#### **Regulatory Impact Statement**

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

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

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

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

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

Enteral formula. Enterals are ordered by practitioners and dispensed by

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

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

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

Orthopedic footwear. Orthopedic footwear is ordered by practitioners and dispensed by durable medical equipment providers. Medicaid currently reimburses the cost of footwear for treatment of any physical deformity, range of motion malfunction, or foot or ankle weakness. A significant portion of utilization under the current benefit is for individuals whose needs can be met with off the shelf footwear. When prescribed for these less serious purposes, it is objectively difficult to assess medical necessity for the footwear and to prevent such reimbursement. Medicare reimburses footwear only for treatment of diabetes complications. Additionally, footwear is currently manually priced at invoice cost plus 50 percent, resulting in paper claims.

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

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

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

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

##### **COSTS:**

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

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

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

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

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

There will be no additional costs to the Department.

**Local Government Mandates:**

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

**Paperwork:**

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

**Duplication:**

There are no duplicative or conflicting rules identified.

**Alternatives:**

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

**Federal Standards:**

The proposed regulations do not exceed any minimum federal standards.

**Compliance Schedule:**

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

**Regulatory Flexibility Analysis****Effect of Rule:**

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

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

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

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

**Compliance Requirements:**

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

**Professional Services:**

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

**Compliance Costs:**

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

**Economic and Technological Feasibility:**

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

**Minimizing Adverse Impact:**

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

**Small Business and Local Government Participation:**

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

**Rural Area Flexibility Analysis****Types and Estimated Number of Rural Areas:**

The benefit limit on enteral formula will apply to 3123 pharmacies and 369 durable medical equipment providers in New York State. The benefit

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

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

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

**Costs:**

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

**Minimizing Adverse Impact:**

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

**Rural Area Participation:**

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

**Job Impact Statement****Nature of Impact:**

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

**Categories and Numbers Affected:**

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

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

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

**Regions of Adverse Impact:**

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

**Minimizing Adverse Impact:**

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

**Self-Employment Opportunities:**

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

## EMERGENCY RULE MAKING

**Potentially Preventable Negative Outcomes**

**I.D. No.** HLT-44-11-00023-E

**Filing No.** 1318

**Filing Date:** 2011-12-06

**Effective Date:** 2011-12-06

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

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

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

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

**Specific reasons underlying the finding of necessity:** It is necessary to issue the proposed regulations on an emergency basis in order to meet the statutory timeframes prescribed by Section 2807-c(35)(b)(v) of the Public Health Law, as amended by Chapter 59 of the Laws of 2011 related to the

reimbursement for hospital acquired conditions. The Centers for Medicare and Medicaid Services (CMS) issued a final rule prohibiting Medicaid payments to providers for conditions that are reasonably preventable, referred to as hospital acquired conditions, effective on or after July 1, 2011. The proposed regulations will comply with CMS regulations.

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

Further, there is compelling interest in enacting these regulations immediately in order to secure federal approval of the associated Medicaid State Plan Amendment.

**Subject:** Potentially Preventable Negative Outcomes.

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

**Text of emergency rule:** Pursuant to the authority vested in the Commissioner of Health by section 2807-c(35) of the Public Health Law, Subpart 86-1 of Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York, is amended, effective on or after July 1, 2011, by adding a new section 86-1.42 to read as follows:

*86-1.42 Potentially preventable negative outcomes.*

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

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

*including, but not limited to:*

- i. Fractures*
- ii. Dislocations*
- iii. Intracranial injuries*
- iv. Crushing injuries*
- v. Burns*
- vi. Electronic shock*

*(6) A patient's manifestations of poor glycemic control, including, but not limited to:*

- i. Diabetic ketoacidosis*
- ii. Nonketotic hyperosmolar coma*
- iii. Hypoglycemic coma*
- iv. Secondary diabetes with ketoacidosis*
- v. Secondary diabetes with hyperosmolarity*

*(7) A patient's development of a catheter-associated urinary tract infection.*

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

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

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

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

**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. HLT-44-11-00023-P, Issue of November 2, 2011. The emergency rule will expire February 3, 2012.

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

#### **Regulatory Impact Statement**

**Statutory Authority:**

The requirement to deny reimbursement for hospital acquired conditions, which are avoidable hospital complications and medical errors that are identifiable, preventable, and serious in their consequences to patients, is set forth in section 2807-c(35)(b)(v) of the Public Health Law, as amended by section 35-a of Part H of Chapter 59 of the Laws of 2011. Further, section 111(a) of Part H of Chapter 59 of the Laws of 2011 permits such regulations to be implemented retroactively.

**Legislative Objectives:**

The Legislature chose to address the issue of patient safety and quality of care through this proposal, which denies reimbursement for hospital acquired conditions. The proposal is also the result of a federal requirement and recommendations submitted by the Medicaid Redesign Team.

**Needs and Benefits:**

The Patient Protection & Affordable Care Act (HR 3590) requirement, effective on or after July 1, 2011, mandates states to implement a policy for Medicaid that prohibits federal payments for any costs of providing medical assistance for hospital acquired conditions (HACs). This proposal appropriately implements those requirements. HACs are conditions deemed to be reasonably preventable in accordance with evidence-based guidelines. Healthcare providers, patients and payers are all adversely impacted by the occurrence of HACs.

This proposal offers more direct and accountable reimbursement of healthcare services, thereby incentivizing providers to improve quality and provide higher valued healthcare for Medicaid beneficiaries.

**COSTS:**

**Costs to State Government:**

Section 2807-c(35)(b)(v) of the Public Health Law requires that the rates of payment for hospital inpatient services do not include, for APR-DRG assignment purposes, any conditions as a secondary diagnosis that were not present on admission and are therefore deemed a HAC. Since less than 0.1% of total Medicaid discharges (2009 data) were found to include a HAC, the denial in reimbursement results in an insignificant decrease in aggregate Medicaid payments.

**Costs of Local Government:**

There will be no additional cost to local governments as a result of these amendments. Costs to the Department of Health:

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

**Local Government Mandates:**

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

**Paperwork:**

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

**Duplication:**

These regulations do not duplicate existing State and federal regulations.

**Alternatives:**

No significant alternatives are available. New York State is required by federal regulations to implement a policy, and the Department is required by the Public Health Law sections 2807-c(35)(b)(v) to promulgate implementing regulations.

**Federal Standards:**

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

**Compliance Schedule:**

Section 86-1.42 requires reimbursement for hospital acquired conditions, which are avoidable hospital complications and medical errors that are identifiable, preventable, and serious in their consequences, to be denied effective on or after July 1, 2011; there is no period of time necessary for regulated parties to achieve compliance.

#### **Regulatory Flexibility Analysis**

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

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

Health care providers subject to the provisions of this regulation under section 2807-c(35)(b)(v) of the Public Health Law will not be reimbursed for any cost associated with the ten identified categories of hospital acquired conditions. Using 2009 Medicaid data, a total of 728 HACs were identified, accounting for less than 0.1% of total Medicaid discharges.

This rule will have no direct effect on local governments.

**Compliance Requirements:**

No new reporting, recordkeeping or other compliance requirements are being imposed as a result of these rules. Affected health care providers will bill Medicaid using procedure codes and ICD-9 codes approved by the American Medical Association, as is currently required. The rule should have no direct effect on local governments.

**Professional Services:**

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

**Compliance Costs:**

No initial capital costs will be imposed as a result of this rule, nor will there be an annual cost of compliance. As a result of this proposal there will be a minimal decrease in hospital Medicaid revenues for hospital inpatient services that include HACs.



**Economic and Technological Feasibility:**

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

**Minimizing Adverse Impact:**

The proposed amendments reflect statutory intent and requirements.

**Small Business and Local Government Participation:**

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

**Rural Area Flexibility Analysis****Effect on Rural Areas:**

Rural areas are defined as counties with a population less than 200,000 and, for counties with a population greater than 200,000, includes towns with population densities of 150 persons or less per square mile. The following 43 counties have a population less than 200,000:

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

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

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

**Compliance Requirements:**

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

**Professional Services:**

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

**Compliance Costs:**

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

**Minimizing Adverse Impact:**

The proposed amendments reflect statutory intent and requirements.

**Rural Area Participation:**

This amendment is the result of federal requirement, effective on or after July 1, 2011, that requires states to implement a policy for Medicaid that prohibits federal payments for any costs of providing medical assistance for hospital acquired conditions (HACs).

**Job Impact Statement**

A Job Impact Statement is not required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature and purpose of the proposed rules, that they will not have a substantial adverse impact on jobs or employment opportunities. The proposed regulations establish quality-related measures pertaining to the reimbursement for hospital acquired conditions. The proposed regulations have no implications for job opportunities.

**Long Island Power Authority****PROPOSED RULE MAKING  
HEARING(S) SCHEDULED****Daily Service, Monthly and Demand Charges Under the Authority's Tariff for Electric Service**

**I.D. No.** LPA-51-11-00005-P

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

**Proposed Action:** The Long Island Power Authority ("Authority") is considering a proposal to modify its Tariff for Electric Service to increase certain Daily Service, Monthly and Demand charges to cover increases in the costs of Delivery Service.

**Statutory authority:** Public Authorities Law, section 1020-f(z) and (u)

**Subject:** Daily Service, Monthly and Demand charges under the Authority's Tariff for Electric Service.

**Purpose:** To increase certain Daily Service, Monthly and Demand charges to cover increases in the costs of Delivery Service.

**Public hearing(s) will be held at:** 10:00 a.m., Feb. 6, 2012 at H. Lee Denison Bldg., 100 Veterans Memorial Hwy., Hauppauge, NY; 2:00 p.m., Feb. 6, 2012 at Long Island Power Authority, 333 Earle Ovington Blvd., 2nd Fl., Uniondale, NY.

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

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

**Substance of proposed rule:** The Long Island Power Authority ("Authority") is considering a proposal to modify its Tariff for Electric Service to increase the Daily Service Charge or Monthly Charge for the residential and smaller commercial classes, and to increase the Demand Charges for the larger commercial service classifications to cover increases in the costs of Delivery Service, consistent with LIPA's proposed 2012 Budget. The Authority may approve, modify, or reject, in whole or part, the proposal.

**Text of proposed rule and any required statements and analyses may be obtained from:** Andrew McCabe, Long Island Power Authority, 333 Earle Ovington Blvd., Suite 403, Uniondale, NY 11553, (516) 222-7700, email: amccabe@lipower.org

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

**Public comment will be received until:** Five days after the last scheduled public hearing.

**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.

**PROPOSED RULE MAKING  
HEARING(S) SCHEDULED****Authority's Tariff for Electric Service**

**I.D. No.** LPA-51-11-00006-P

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

**Proposed Action:** The Long Island Power Authority ("Authority") is considering a proposal to modify its Tariff for Electric Service to make miscellaneous changes in connection with certain temporary pole attachments and with the Authority's Solar Hot Water Heating program.

**Statutory authority:** Public Authorities Law, section 1020-f(z) and (u)

**Subject:** Authority's Tariff for Electric Service.

**Purpose:** To make miscellaneous Tariff changes in connection with certain pole attachments and the Solar Hot Water Heating program.

**Public hearing(s) will be held at:** 10:00 a.m., Feb. 6, 2012 at H. Lee Den-

nison Bldg., 100 Veterans Memorial Hwy., Hauppauge, NY; 2:00 p.m., Feb. 6, 2012 at Long Island Power Authority, 333 Earle Ovington Blvd., 2nd Fl., Uniondale, NY.

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

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

**Substance of proposed rule:** The Long Island Power Authority ("Authority") is considering a proposal to modify its Tariff for Electric Service to make miscellaneous changes to add language to the Tariff indicating that the pole attachment fee may be waived for certain temporary and revocable attachments where the disposition is of nominal value to the parties. The Authority also proposes to modify the Tariff to allow the customers on the water heating discounted rate to participate in the Solar Hot Water efficiency program without losing their rate benefits. The Authority may approve, modify, or reject, in whole or part, the proposal.

**Text of proposed rule and any required statements and analyses may be obtained from:** Andrew McCabe, Long Island Power Authority, 333 Earle Ovington Blvd., Suite 403, Uniondale, NY 11553, (516) 222-7700, email: amccabe@lipower.org

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

**Public comment will be received until:** Five days after the last scheduled public hearing.

#### **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.

### **PROPOSED RULE MAKING HEARING(S) SCHEDULED**

#### **Residential Service Eligibility Criteria of Authority's Tariff for Electric Service**

**I.D. No.** LPA-51-11-00008-P

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

**Proposed Action:** The Long Island Power Authority ("Authority") is considering a proposal to modify its Tariff for Electric Service to expand and clarify the eligibility criteria for Residential Service.

**Statutory authority:** Public Authorities Law, section 1020-f(z) and (u)

**Subject:** Residential Service eligibility criteria of Authority's Tariff for Electric Service.

**Purpose:** To expand and clarify the eligibility criteria for Residential Service.

**Public hearing(s) will be held at:** 10:00 a.m., Feb. 6, 2012 at H. Lee Denison Bldg., 100 Veterans Memorial Hwy., Hauppauge, NY; 2:00 p.m., Feb. 6, 2012 at Long Island Power Authority, 333 Earle Ovington Blvd., 2nd Fl., Uniondale, NY.

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

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

**Substance of proposed rule:** The Long Island Power Authority ("Authority") is considering a proposal to modify its Tariff for Electric Service to expand and clarify the eligibility criteria for Residential Service, including with regard to two and three family dwellings on a single meter, accessory buildings and temporary service. The Authority may approve, modify, or reject, in whole or part, the proposal.

**Text of proposed rule and any required statements and analyses may be obtained from:** Andrew McCabe, Long Island Power Authority, 333 Earle Ovington Blvd., Suite 403, Uniondale, NY 11553, (516) 222-7700, email: amccabe@lipower.org

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

**Public comment will be received until:** Five days after the last scheduled public hearing.

#### **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.

## **Division of the Lottery**

### **NOTICE OF ADOPTION**

#### **Jackpot Prize Payments for Multi-Jurisdictional Games, the Lotto Game and Technical Rule Changes**

**I.D. No.** LTR-42-11-00010-A

**Filing No.** 1315

**Filing Date:** 2011-12-05

**Effective Date:** 2011-12-21

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

**Action taken:** Amendment of Parts 2806 and 2817 of Title 21 NYCRR.

**Statutory authority:** Tax Law, sections 1601, 1604, 1612 and 1617

**Subject:** Jackpot prize payments for Multi-Jurisdictional Games, the Lotto Game and technical rule changes.

**Purpose:** To clarify the options for payment of jackpot prizes and game features to conform with accepted industry standards.

**Text or summary was published in** the October 19, 2011 issue of the Register, I.D. No. LTR-42-11-00010-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Julie B. Silverstein Barker, Associate Attorney, New York State Division of Lottery, One Broadway Center, PO Box 7500, Schenectady, NY 12301-7500, (518) 388-3408, email: nylrules@lottery.ny.gov

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

The agency received no public comment.

### **NOTICE OF ADOPTION**

#### **Powerball Game Design and Quick Draw Game "Draw" Definition**

**I.D. No.** LTR-42-11-00011-A

**Filing No.** 1316

**Filing Date:** 2011-12-05

**Effective Date:** 2012-01-15

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

**Action taken:** Amendment of Parts 2806 and 2835 of Title 21 NYCRR.

**Statutory authority:** Tax Law, sections 1601, 1604, 1612 and 1617

**Subject:** Powerball game design and Quick Draw game "draw" definition.

**Purpose:** To conform to the changes required by the Powerball consortium and recent amendments to section 612 of the Lottery for Education.

**Text or summary was published in** the October 19, 2011 issue of the Register, I.D. No. LTR-42-11-00011-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Julie B. Silverstein Barker, Associate Attorney, New York Lottery, One Broadway Center, Schenectady, NY 12301-7500, (518) 388-3493, email: nylrules@lottery.ny.gov

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

The agency received no public comment.

## Public Service Commission

### PROPOSED RULE MAKING HEARING(S) SCHEDULED

#### LIWC Proposes to Retain a Portion of Property Tax Refunds

I.D. No. PSC-51-11-00018-P

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

**Proposed Action:** The PSC is considering the petition of Long Island Water Corporation d/b/a Long Island American Water (LIWC) to retain a certain portion from approximately \$2,393,833 in property tax refunds.

**Statutory authority:** Public Service Law, section 113(2)

**Subject:** LIWC proposes to retain a portion of property tax refunds.

**Purpose:** To allow LIWC to retain a portion of property tax refunds.

**Public hearing(s) will be held at:** 1:00 p.m. (Evidentiary Hearing),\* Feb. 7, 2012 at Department of Public Service, Three Empire State Plaza, 3rd Fl. Hearing Rm., Albany, NY.

\*On occasion there are requests to reschedule or postpone evidentiary hearing dates. If such a request is granted, notification of any subsequent scheduling changes will be available at the DPS website ([www.dps.ny.gov](http://www.dps.ny.gov)) under Case 11-W-0484.

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

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

**Substance of proposed rule:** The Public Service Commission is considering whether to approve or reject, in whole or part, the petition of Long Island Water Corporation d/b/a Long Island American Water (LIWC), pursuant to Public Service Law Section 113(2), for approval of a proposed allocation between shareholders and customers of \$2,393,833 in property tax refunds from the Villages of East Rockaway, Atlantic Beach, Island Park, Lynbrook, and Valley Stream. LIWC proposes to calculate net refunds by deducting \$546,681.87 in expenses incurred to achieve the refunds received to date, and retain for customers 18% of such net refunds.

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

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

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

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

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

(11-W-0484SP1)

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

#### The Total Resource Cost (TRC) Test, Used to Analyze Measures in the Energy Efficiency Portfolio Standard Program

I.D. No. PSC-51-11-00010-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 petition for rehearing of its Order of October 25, 2011 in Case 07-M-0548. The petition seeks revisions in the Total Resource Cost test, used to analyze measures under the Energy Efficiency Portfolio Standard program.

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

**Subject:** The Total Resource Cost (TRC) test, used to analyze measures in the Energy Efficiency Portfolio Standard program.

**Purpose:** Petitioners request that the TRC test and/or its application to measures should be revised.

**Substance of proposed rule:** The Total Resource Cost (TRC) test is used to determine costs and benefits under the Commission's Energy Efficiency Portfolio Standard (EEPS). The Commission's October 25, 2011 order in Case 07-M-0548 considered parties' comments regarding the TRC and determined that the TRC would not be revised in that order. The Commission stated that it would consider revising the TRC in the future. Petitioners request that a process for revision of the TRC, and/or revising the application of the TRC to individual measures, should be instituted.

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

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

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

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

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

(07-M-0548SP46)

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

#### Transfer a Parcel of Land

I.D. No. PSC-51-11-00011-P

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

**Proposed Action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, or modify, a petition filed by Saratoga Water Services, Inc. for approval to transfer approximately 1.23 acres of land to an adjacent property owner.

**Statutory authority:** Public Service Law, sections 4(1), 5(1)(f), 89-c(1) and 89-h

**Subject:** Transfer a parcel of land.

**Purpose:** To approve the transfer of a parcel of land.

**Substance of proposed rule:** On November 23, 2011, Saratoga Water Services, Inc. (Saratoga) filed a petition requesting approval to transfer approximately 1.23 acres of land to an adjacent property owner. Saratoga serves approximately 2,100 customers in the Towns of Malta and Stillwater in Saratoga County. The Commission may approve or reject, in whole or in part, or modify the petition.

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

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

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

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

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

(11-W-0648SP1)



## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Electronic Tariff Schedule

**I.D. No.** PSC-51-11-00012-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. to convert its Economic Development Delivery Service (EDDS) No. 2 tariff schedule into electronic format.

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

**Subject:** Electronic Tariff Schedule.

**Purpose:** To convert its EDDS No. 2 electric tariff schedule into electronic format.

**Substance of proposed rule:** The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by Consolidated Edison Company of New York, Inc. to convert its electric tariff schedule, Economic Development Delivery Service No. 2, to a new electricity rate schedule, P.S.C. No. 11 – Electricity. The proposed filing is being made to convert its electric tariffs into electronic format in compliance with Commission Order issued April 24, 2009 in Case 08-E-0538. The proposed filing has an effective date of February 20, 2012. 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.ny.gov](mailto:leann_ayer@dps.ny.gov)

**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.ny.gov](mailto:Secretary@dps.ny.gov)

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

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

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

(08-E-0539SP8)

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Waiver of Service Quality Reporting Results

**I.D. No.** PSC-51-11-00013-P

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

**Proposed Action:** The Commission is considering a petition from Frontier Communications Companies to waive certain service quality reporting results pursuant to section 603.1(c) of the Commission's Regulations.

**Statutory authority:** Public Service Law, section 91(1)

**Subject:** Waiver of service quality reporting results.

**Purpose:** To allow Frontier Communications Companies a waiver of certain service quality reporting results.

**Substance of proposed rule:** The Public Service Commission is considering whether to approve, modify or deny in whole or in part, a petition by Frontier Communications Companies for a waiver of certain service quality reporting results pursuant to the Commission's Regulations.

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

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

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

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

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

(11-C-0588SP1)

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Lightened Regulatory Regime Approval for Cricket Valley Energy Center, LLC

**I.D. No.** PSC-51-11-00014-P

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

**Proposed Action:** The Public Service Commission is considering an application filed by Cricket Valley Energy Center, LLC for the provision of a lightened regulatory regime.

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

**Subject:** Lightened regulatory regime approval for Cricket Valley Energy Center, LLC.

**Purpose:** Consideration of an application for lightened regulatory regime.

**Substance of proposed rule:** In connection with its petition for a certificate of public convenience and necessity authorizing construction of a natural gas-powered, 1,000 MW electric generating facility, Cricket Valley Energy Center, LLC seeks an order establishing a lightened ratemaking regime.

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

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

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

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

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

(11-E-0593SP1)

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Demand Response Programs

**I.D. No.** PSC-51-11-00015-P

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

**Proposed Action:** The Commission is considering a petition by the Consolidated Edison Company of New York, Inc. to make various changes in the rates, charges, rules and regulations contained in its Schedule for Electric Service, P.S.C. No. 9—Electricity.

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

**Subject:** Demand Response Programs.

**Purpose:** For approval of changes to demand response programs.

**Substance of proposed rule:** The Commission is considering a petition filed by Consolidated Edison Company of New York, Inc. (Con Edison) for approval of changes to demand response programs to improve the design of its Commercial System Relief Program ("CSRP" or "Rider S"), Distribution Load Relief Program ("DLRP" or "Rider U"), Direct Load Control Program ("DLC" or "Rider L") and retire the Critical Peak Rebate Program ("CPRP" or "Rider T"). This petition also provides supplemental support for revised tariffs Rider S, Rider U and Rider L. In addition, this petition proposes changes to improve the economic and operational potential of the non-tariffed Network Relief Program ("NRP") and the Residential Smart Appliance Program ("RSAP"). 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.ny.gov](mailto:leann_ayer@dps.ny.gov)

**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.ny.gov](mailto:Secretary@dps.ny.gov)

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

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

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

(09-E-0115SP9)

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Electronic Tariff Schedule

**I.D. No.** PSC-51-11-00016-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. to convert its PASNY No. 4 tariff schedule into electronic format.

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

**Subject:** Electronic Tariff Schedule.

**Purpose:** To convert its PASNY No. 4 electric tariff schedule into electronic format.

**Substance of proposed rule:** The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by Consolidated Edison Company of New York, Inc. to convert its electric tariff schedule, PASNY No. 4, to a new electricity rate schedule, P.S.C. No. 12 — Electricity. The proposed filing is being made to convert its electric tariffs into electronic format in compliance with Commission Order issued April 24, 2009 in Case 08-E-0538. The proposed filing has an effective date of February 20, 2012. 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.ny.gov](mailto:leann_ayer@dps.ny.gov)

**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.ny.gov](mailto:Secretary@dps.ny.gov)

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

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

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

(08-E-0539SP9)

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Discontinuance of Water Service

**I.D. No.** PSC-51-11-00017-P

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

**Proposed Action:** The Public Service Commission is considering whether to approve or reject, in whole or in part or modify a petition filed by Antlers of Raquette Lake, Inc. requesting approval to abandon its water system.

**Statutory authority:** Public Service Law, sections 4(1), 5(1)(f), 89-c(1), (10) and 89-h

**Subject:** Discontinuance of water service.

**Purpose:** To allow Antlers of Raquette Lake, Inc. to abandon its water system.

**Substance of proposed rule:** On October 31, 2011, Antlers of Raquette Lake, Inc. (Antlers or company) filed a petition requesting Commission approval to abandon its water system. The company provides unmetered seasonal water service (May 15 – October 15) to approximately 30 residential customers and one commercial customer on Antlers Road and Brightside Road on Antlers Point in the Town of Long Lake, Hamlet of Raquette Lake, Hamilton County, New York. The Commission may approve or reject, in whole or in part, or modify the company's request.

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

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

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

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

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

(11-W-0600SP1)

## Racing and Wagering Board

### NOTICE OF ADOPTION

#### Jurisdiction of Licenses

**I.D. No.** RWB-35-11-00003-A

**Filing No.** 1281

**Filing Date:** 2011-11-29

**Effective Date:** 2011-12-21

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

**Action taken:** 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 or summary was published** in the August 31, 2011 issue of the Register, I.D. No. RWB-35-11-00003-P.

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

**Text of rule and any required statements and analyses may be obtained from:** John J. Googas, New York State Racing and Wagering Board, One Broadway Center, Suite 600, Schenectady, New York 12305-2553, (518) 395-5400, email: [info@racing.ny.gov](mailto:info@racing.ny.gov)

**Assessment of Public Comment**

The agency received no public comment.

### NOTICE OF ADOPTION

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

**I.D. No.** RWB-35-11-00006-A

**Filing No.** 1280

**Filing Date:** 2011-11-29

**Effective Date:** 2011-12-21

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

**Action taken:** 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 or summary was published** in the August 31, 2011 issue of the Register, I.D. No. RWB-35-11-00006-P.

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

**Text of rule and any required statements and analyses may be obtained from:** John J. Googas, New York State Racing and Wagering Board, One Broadway Center, Suite 600, Schenectady, New York 12305-2553, (518) 395-5400, email: info@racing.ny.gov

**Assessment of Public Comment**

The agency received no public comment.

## Department of Taxation and Finance

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

#### Location of the Division of Tax Appeals and the Tax Appeals Tribunal

I.D. No. TAF-51-11-00020-P

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

**Proposed Action:** This is a consensus rule making to amend sections 3000.2(a)(4), 3000.3(c), 3000.13(f)(3), 3000.15(d)(7), 3000.17(a)(1), 3000.18(a), 3000.22(a)(1), (2)(i), (b)(1)(ii) and (e)(1) of Title 20 NYCRR.

**Statutory authority:** Tax Law, section 2006(14)

**Subject:** Location of the Division of Tax Appeals and the Tax Appeals Tribunal.

**Purpose:** To reflect new address of the Division of Tax Appeals and the Tax Appeals Tribunal.

**Text of proposed rule:** Paragraph (4) of subdivision (a) of Section 3000.2 of Title 20 of the NYCRR is amended to read as follows:

(4) Representation by permission of tribunal. An attorney, certified public accountant or licensed public accountant authorized to practice or licensed in any other jurisdiction of the United States may appear and represent a petitioner for a particular matter after receiving special permission from the tribunal. A request for such permission shall be made in writing addressed to:

Secretary to the Tax Appeals Tribunal  
State of New York  
Division of Tax Appeals  
[Riverfront Professional Tower  
500 Federal Street  
Troy, NY 12180-2893]  
*Agency Building 1  
Empire State Plaza  
Albany, New York 12223*

Subdivision (c) of section 3000.3 of Title 20 of the NYCRR is amended to read as follows:

(c) Filing of petition. The petition must be filed within the time limitations prescribed by the applicable statutory sections, and there can be no extension of those time limitations. The petition should be filed, along with the two conformed copies, with the supervising administrative law judge either in person at the offices in [Troy] *Albany* or by mail addressed to:

Supervising Administrative Law Judge  
State of New York  
Division of Tax Appeals  
[Riverfront Professional Tower  
500 Federal Street  
Troy, NY 12180-2893]  
*Agency Building 1*

*Empire State Plaza*

*Albany, New York 12223*

Where the supervising administrative law judge determines that the petition is in proper form, he or she will immediately forward it to the office of counsel for preparation of the answer. The time within which the office of counsel must answer the petition shall start to run from the date the supervising administrative law judge acknowledges receipt of a petition in proper form.

Paragraph (3) of subdivision (f) of Section 3000.13 of Title 20 of the NYCRR is amended to read as follows:

(3) The small claims hearing will be stenographically reported or otherwise recorded, but a transcript thereof need not be made unless the presiding officer otherwise directs. Where a transcript is made, it shall be available for examination at the offices of the division of tax appeals in [Troy] *Albany*, or may be purchased pursuant to section 3000.19 of this Part.

Paragraph (7) of subdivision (d) of Section 3000.15 of Title 20 of the NYCRR is amended to read as follows:

(7) The hearing will be stenographically reported. A transcript thereof will be made available for examination at the offices of the division of tax appeals in [Troy] *Albany*, or may be purchased pursuant to section 3000.19 of this Part. If either party deems the transcript to be inaccurate in any material respect, the party shall promptly notify the administrative law judge, setting forth specifically the alleged inaccuracies. The administrative law judge shall specify the corrections to be made in the transcript, and such corrections shall be made a part of the record.

Paragraph (1) of subdivision (a) of section 3000.17 of Title 20 of the NYCRR is amended to read as follows:

(1) Within 30 days after the giving of notice of the determination of an administrative law judge, any party may take exception to such determination and seek review thereof by the tribunal by filing an exception with the secretary. The exception should be filed with the secretary either in person at the offices in [Troy] *Albany* or by mail addressed to:

Secretary to the Tax Appeals Tribunal  
State of New York  
Division of Tax Appeals  
[Riverfront Professional Tower  
500 Federal Street  
Troy, NY 12180-2893]  
*Agency Building 1  
Empire State Plaza  
Albany, New York 12223*

A copy of the exception shall be served at the same time on the other party. When the Division of Taxation is the other party, service shall be made on the director of the Law Bureau.

Subdivision (a) of section 3000.18 of Title 20 of the NYCRR is amended to read as follows:

(a) Hearing preference. Whenever a petition is filed protesting a statutory notice which advises a person of the denial of such person's application for a license, permit, registration or certificate of authority, or which advises a person of an increase in the amount of a bond or other security required to be filed, an expedited hearing shall be granted. A form of petition, together with the Rules of Practice and Procedure, will be enclosed with such notice. Section 3000.4 of this Part, which provides for pleadings and amended pleadings, shall not apply when a preference for an expedited hearing is exercised; however, a petition for an expedited hearing shall be acknowledged and reviewed for timeliness and acceptability as to content. With the exception of the time limitations described in subdivision (b) of this section for the rendering of expedited determinations and decisions, all other provisions of this Part shall apply. Within 10 business days of the receipt of the petition for an expedited hearing (determined with regard to any postponement of any scheduled hearing or other delay made at the request of the petitioner), a hearing will be scheduled at an office of the Division of Tax Appeals in [Troy] *Albany* or New York City, or at a convenient office of the Division of Taxation as determined by the supervising administrative law judge.

Paragraph (1) of subdivision (a) of section 3000.22 of Title 20 NYCRR is amended to read as follows:

(1) Date of filing. If any document required to be filed under this Part within a prescribed period or on or before a prescribed date under authority of any provision of article 40 of the Tax Law is, after such period or date, delivered by United States mail to the New York State Division of Tax Appeals or Tax Appeals Tribunal, [Riverfront Professional Tower, 500 Federal Street, Troy, NY 12180] *Agency Building 1, Empire State Plaza, Albany, New York 12223*, the date of the United States postmark



stamped on the envelope or other appropriate wrapper in which such document is contained will be deemed to be the date of filing. Where delivery is made by courier, delivery, messenger or similar services, the date of delivery will be deemed to be the date of filing.

Subparagraph (i) of paragraph (2) of subdivision (a) of section 3000.22 of Title 20 NYCRR is amended to read as follows:

(i) The document must be contained in an envelope or other appropriate wrapper and properly addressed to: State of New York Division of Tax Appeals or Tax Appeals Tribunal, [Riverfront Professional Tower, 500 Federal Street, Troy, NY 12180] *Agency Building 1, Empire State Plaza, Albany, New York 12223*.

Subparagraph (ii) of paragraph (1) of subdivision (b) of section 3000.22 of Title 20 NYCRR is amended to read as follows:

(ii) the document must be received by the State of New York Division of Tax Appeals or the Tax Appeals Tribunal, [Riverfront Professional Tower, 500 Federal Street, Troy, NY 12180] *Agency Building 1, Empire State Plaza, Albany, New York 12223*, not later than the time when an envelope or other appropriate wrapper which is properly addressed and mailed and sent by the same class of mail would ordinarily be received if it were postmarked at the same point of origin by the United States Postal Service within the prescribed period or on or before the prescribed date for filing (including any extension of time granted for filing the document).

Paragraph (1) of subdivision (e) of section 3000.22 of Title 20 NYCRR is amended to read as follows:

(1) Filing. Filing of all pleadings, motions, exceptions and other papers with the Division of Tax Appeals or the tribunal pursuant to this Part shall be made by either delivery during business hours to its [Troy] *Albany* offices or by mail properly addressed to New York State Division of Tax Appeals or Tax Appeals Tribunal, [Riverfront Professional Tower, 500 Federal Street, Troy, NY 12180] *Agency Building 1, Empire State Plaza, Albany, New York 12223*.

**Text of proposed rule and any required statements and analyses may be obtained from:** Nicholas A. Behuniak, Division of Tax Appeals/Tax Appeals Tribunal, 400 Federal Street, Troy, New York 12180-2893, (518) 266-3052, email: NBehuniak@NYSDDTA.org

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

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

#### Consensus Rule Making Determination

This proposed rule would update various sections of 20 NYCRR Part 3000 to set forth the new address for the New York State Division of Tax Appeals and the Tax Appeals Tribunal. The current regulations reflect that the Division of Tax Appeals and the Tax Appeals Tribunal have been located in the Riverfront Professional Tower at 500 Federal Street, Troy, New York. In 2012, the Division of Tax Appeals and the Tax Appeals Tribunal will be relocating to Agency Building 1, Empire State Plaza, Albany, New York 12223. This proposed rule would update the State regulations to reflect the new address.

Consistent with the State Administrative Procedure Act §§ 102 (11) and 202 (1)(b), the Division of Tax Appeals has determined that no person is likely to object to the adoption of the rule as written. This rule is non-controversial. It merely would make technical changes to set forth the new address of the Division of Tax Appeals and the Tax Appeals Tribunal.

#### Job Impact Statement

A Job Impact Statement is not required for the proposed amendments. It is apparent from the nature and the purpose of the proposed amendments that they would not have a substantial adverse impact on jobs and employment opportunities in either the public or the private sectors. The New York State Division of Tax Appeals has determined that the changes would have no impact on jobs and employment opportunities in New York State.

## Thoroughbred Breeding and Development Fund

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

#### Disqualification of Certain Owners and Breeders Charged with Cruelty and Abuse of Horses from Receiving Breeding Funds

I.D. No. TBD-51-11-00021-P

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

**Proposed Action:** Renumbering of section 4081.12 to section 4081.13; and addition of new section 4081.12 to Title 9 NYCRR.

**Statutory authority:** Racing, Pari-Mutuel Wagering and Breeding Law, section 254(2)

**Subject:** Disqualification of certain owners and breeders charged with cruelty and abuse of horses from receiving breeding funds.

**Purpose:** To ensure that New York State Thoroughbred Breeding and Development Funds are not awarded to persons convicted of horse cruelty.

**Text of proposed rule:** Section 4081.12 of 9 NYCRR is renumbered as new section 4081.13, and a new section 4081.12 is added to read as follows:

#### 4081.12 Disqualification for Cruelty, Abuse or Neglect of Horses

(a) Any individual or any entity that is charged with the commission of a crime, offense or other violation of the law involving cruelty to, abuse or neglect of, any horses within the State of New York or elsewhere within the United States, shall be required to report such charge to the Fund within ten (10) days thereof. Upon notice of the charge, the individual or entity may be suspended from receiving breeder's awards, stallion awards and owners awards pending final disposition of said charge. The suspension of such individual or entity shall attach upon adoption of a resolution of the Board. In the event of such suspension, the Fund Board shall provide written notification to the individual or entity who may request an opportunity to be heard. Such individual or entity shall not receive any breeders awards, stallion awards and owner awards, pending the final disposition of the charge. Said monies shall be placed in an interest bearing account pending final disposition of the charge.

(b) In the event an individual or entity that is charged with a crime, offense or other violation of law described in Section 4081.12(a) is convicted, the Board shall be authorized to impose an appropriate remedy, including, but not limited to, declaring a forfeiture of awards and continuing the suspension or permanently barring such individual or entity from participating in the Fund in any manner or from otherwise deriving any benefits or awards from the Fund. In the event that the final disposition of a charge results in a forfeiture of awards, then any award monies that are so forfeited shall be distributed on a pro rata basis within each relevant awards category to all other participants of the Fund in the year in which the final disposition occurred unless impracticable, in which event such monies shall be distributed in the following year.

(c) In the event an individual or entity that is charged with a crime, offense or other violation of law described in Section 4081.12(a) is acquitted or otherwise found to be not guilty of such a crime, offense or other violation of law, then such individual or entity, including any and all principals of such entity, shall have their suspension rescinded retroactively. In the event that the charge is finally disposed and results in the individual or entity being acquitted or otherwise found not to be guilty of such crime, offense or violation of law, then the awards plus interest that had been withheld from such individual or entity shall be paid retroactively to the date of suspension.

**Text of proposed rule and any required statements and analyses may be obtained from:** Tracy Egan, Executive Director, Thoroughbred and Breeding Development Fund, Saratoga Spa State Park, 19 Roosevelt Dr., Suite 250, Saratoga Springs, NY 12866, (518) 580-0100, email: nybreds@nybreds.com

**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 New York Thoroughbred Breeding and Development Fund ("Fund") is authorized to promulgate these rules pursuant to Racing Pari-Mutuel Wagering and Breeding Law ("RPMWBL") section 254, subdivision 2. Under section 254(2) of the RPMWBL, the Fund is authorized to dispose and distribute the money received by it pursuant to the provisions of Sections 222 through 705 of the RPMWBL in accordance with distribution schedules promulgated by the Fund and adopted in the rules and regulations of the Fund's Board. This rulemaking is consistent with such statutory authority in that it establishes guidelines for the proper distribution of breeding and development funds to worthy breeders and owners.

2. Legislative objectives: To enable the Fund to promote agriculture generally and the improvement of breeding of horses particularly in the state. [RPMWBL Section 231.]

3. Needs and benefits: These amendments are necessary to prevent thoroughbred breeding funds from being awarded to owners and breeders who are criminally charged or have been convicted of animal cruelty, abuse or neglect of horses.

The Fund was established in 1973 and is the regulatory body of the New York Breeding and Racing Program. The Program distributes over \$52 million per year in the form of incentives, breeder awards, stallion

awards, owner awards, and purse money for New York-bred horses. In terms of the Fund's impact on horse racing in 2009, foals born in New York had purse earnings of over \$82 million throughout the U.S. and the world.

The Fund works to make thoroughbred breeding and racing a vital force in New York State's economy, utilizing its rich racing tradition, vast agricultural resources, and thriving tourism industry. This rulemaking is necessary to ensure that the integrity of such a critical economic program is not tarnished or otherwise corrupted by individuals who are convicted of animal cruelty, neglect or abuse against horses.

The Fund is a public benefit corporation of New York that oversees the registration process for foals and stallions, and distributes incentives awards to breeders, owners, and stallion owners. Awards are available only to the breeders and owners of registered New York-breds or registered New York State-based stallions.

The Fund maintains the registry of New York-breds and participating New York-based stallions, establishes the criteria for entry into that registry, and ensures that state statutes regarding the eligibility for registration of foals and stallions standing in the state are followed.

When a New York-bred thoroughbred wins a race, the breeder, owner and the owner of the stallion who bred the racehorse are entitled to Fund awards. Even though the breeder or the stallion owner may not own the racehorse at the time that it wins a race, they are entitled to breeder's funds whenever the horse wins a race by virtue of their prior role in the horse's breeding in New York State.

Since breeders and stallion owners are not required to be licensed for pari-mutuel wagering, it is impossible for the Fund or its collaborative agency, the New York State Racing and Wagering Board to ascertain when a breeder or stallion owner is charged with or convicted of animal cruelty, abuse or neglect against a horse. This rulemaking is necessary to make it the breeder's or stallion owner's duty to report to the Fund whenever they have been charged with offenses against a horse.

#### 4. Costs:

(a) Costs to regulated parties for the implementation of and continuing compliance with the rule: Negligible. Regulated parties would be required to report the charge of animal cruelty against a horse to the Fund, which may include the cost of a telephone call, an e-mail, or a letter. The rule does not prescribe how notification is made, therefore cost will be determined by the regulated party. An e-mail would usually involve no cost while a letter would cost less than \$1 for postage and paper.

(b) Costs to the agency, the state and local governments for the implementation and continuation of the rule: None. The Fund routinely reviews awards to determine eligibility. The review of awards for eligibility under the criteria of this rulemaking would be accomplished under the existing regulatory framework and budget without adding additional costs. The Fund may incur additional costs for appeals of persons who have been denied funds. The cost of conducting a hearing will be determined by the type of hearing required. Since the Fund would have to show through documentation that a person was criminally charged or convicted, in the rare instance where testimony would have to be taken cost to the Fund for transcribing and conducting a hearing should not exceed \$500. Otherwise, hearings based on documentary evidence of a criminal proceeding alone should be negligible.

(c) The information, including the source(s) of such information and the methodology upon which the cost analysis is based:

The Office of Counsel for the New York State Racing and Wagering Board reviewed this proposed rulemaking to determine costs. Insofar as the reporting rule isn't complex, it conducted a basic analysis of the real cost requirements of the new rule. The analysis involved a notional circumstance where a breeder or owner would be found guilty of animal cruelty, and reviewing the cost imposed by each obligation by the rule. The cost of conducting a hearing was determined by looking at the historical costs of the Racing and Wagering Board conducting a similar hearing.

(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. Local governments are not involved in the awarding or regulation of thoroughbred breeding funds.

6. Paperwork: There are no specific forms prescribed for the rule. The Fund will be required to provide written notification to the individual or entity who is suspended from receiving breeder's awards, stallion awards and owners awards, or purse enrichment. Furthermore, the rule requires that a breeder or owner report a criminal charge of animal cruelty, but does not limit how the report should be made. Therefore, a report may be made by telephone, or electronic mail, and does not necessarily require a written report. If a written report is made, a simple letter will suffice the reporting requirement. If a breeder or owner opts for a hearing, the Fund will be required to produce official court documents demonstrating criminal charges or criminal conviction.

7. Duplication: None.

8. Alternatives: No alternatives were considered as this proposal was considered directly tailored to the issue of prohibiting awards and purses to breeders and owners who are criminally charged with animal cruelty.

9. Federal standards: None.

10. Compliance schedule: Once adopted, the rule can be implemented immediately.

#### ***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 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 not affect local governments because local governments are not involved in the awarding of thoroughbred breeding awards. The impact for reporting, recordkeeping or other compliance requirements on public or private entities in rural areas, and the impact on small businesses and jobs in rural areas will be minimal because horse cruelty charges against breeders and owners are extremely rare. In the rare instance where an individual is criminally charged with horse cruelty, he or she would be required to report it to the Thoroughbred Breeding and Development Fund. This reporting process is not onerous nor will it adversely affect small business or jobs in rural areas.

A Job Impact Statement is not required. Regulatory requirements associated with forfeiture of money awards and purses 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.