

RULE MAKING ACTIVITIES

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

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

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

Education Department

EMERGENCY RULE MAKING

Advisory Committee on Long-Term Clinical Clerkships

I.D. No. EDU-17-11-00013-E

Filing No. 586

Filing Date: 2011-06-28

Effective Date: 2011-06-28

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

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

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

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

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

The proposed amendment establishes an Advisory Committee on Long-Term Clinical Clerkships to oversee the process for evaluating medical schools that seek authorization to place students in long-term clinical clerkships in New York State, including the criteria and standards to be

applied in reviewing such medical programs. Currently there are several programs that seek continuation of authorization that was previously granted. Other medical programs have requested first-time authorization and are awaiting an evaluation and site visit.

Emergency action is necessary to ensure that all programs that seek either a continuing approval or a first-time approval to place students in long-term clinical clerkships will be evaluated in a timely manner using uniform criteria and standards of review. Without emergency action, the reevaluation of programs that have already been approved and the approval of programs seeking first-time approval will be delayed. Additionally, emergency action is necessary at the June Board of Regents meeting in order to ensure that the rule remains continuously in effect until it can be adopted as a permanent rule at the July Regents meeting.

Subject: Advisory Committee on Long-Term Clinical Clerkships.

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

Text of emergency rule: 1. Paragraph (5) of subdivision (d) of section 3.2 of the Rules of the Board of Regents is amended, effective June 28, 2011, to read as follows:

(5) Committee on Professional Practice:

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

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

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

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

2. Section 60.2 of the Regulations of the Commissioner of Education is amended, effective June 28, 2011, to read as follows:

§ 60.2 Clinical clerkships.

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

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

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

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

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

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

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

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

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

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

(iv) one representative of the Department of Health;

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

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

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

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

(3) *Terms of members.* The terms of the members of the first committee appointed pursuant to subparagraphs (v) through (viii) of paragraph (1) of this subdivision shall be so arranged that the terms of two members shall expire on June 30, 2013, the terms of two on June 30, 2014, and the terms of two on June 30, 2015, and the terms of two on June 30, 2016. Thereafter, all members appointed pursuant to subparagraphs (v) through (viii) of paragraph (1) of this subdivision shall be appointed to serve a term of four years each, beginning with the first day of July next following the ending of the term to which each, respectively, is to succeed, except that an appointment to fill a vacancy created other than by the expiration of a term shall be for the unexpired term. Members shall serve no more than two terms in succession, except that a member may serve a succeeding third term if at least one of the preceding two terms was less than two years in duration. Members may again serve two terms in succession after a gap in service of at least four years.

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

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

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

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

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

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

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

This notice is intended to serve 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-17-11-00013-EP, Issue of April 27, 2011. The emergency rule will expire August 26, 2011.

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

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

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

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

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

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

2. LEGISLATIVE OBJECTIVES:

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

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

3. NEEDS AND BENEFITS:

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

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

After consideration of the various preliminary findings and the changes

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

4. COSTS:

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

First Year Costs

1. Interview of candidates (travel, lodging):	
24 Candidates - avg travel per candidate \$200	\$4,800
2. Organizational Meetings (3 meetings)	
Travel - avg per member \$200	\$7,200
Per diem - \$100/member (if not waived)	\$3,600
Organizational meetings total cost	\$10,800
3. Meetings (2 meetings)	
12 members - avg travel per member 200	\$4,800
Avg lodging cost \$200 (4 members)	\$1,600
Per diem - \$100/member (if not waived)	\$2,400
Post organizational meetings total cost	\$8,800
Total First Year Cost	\$24,400
Annual Costs After First Year	
Meetings (2 annually after first year)	
12 members - avg travel per member \$200	\$4,800
Avg lodging cost \$200 (4 members)	\$1,600
Meetings after first year total cost	\$6,400

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

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

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

5. LOCAL GOVERNMENT MANDATES:

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

6. PAPERWORK:

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

7. DUPLICATION:

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

8. ALTERNATIVES:

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

9. FEDERAL STANDARDS:

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

10. COMPLIANCE SCHEDULE:

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

Regulatory Flexibility Analysis

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

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

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

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

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

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

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

3. COSTS:

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

4. MINIMIZING ADVERSE IMPACT:

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

5. RURAL AREA PARTICIPATION:

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

Job Impact Statement

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

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

Assessment of Public Comment

Since publication of a Notice of Proposed Rule Making in the *State Register* on April 27, 2011, the State Education Department received the following comments.

COMMENT: One comment requested that section 60.2(f)(2)(viii) of the proposed regulations be amended to specifically state that at least one hospital representative be from a hospital that is affiliated with an approved international medical school. The comment suggests that the proposed regulation be revised to read as follows:

(viii) two representatives of hospitals that serve as sites for clinical clerkships in New York State, *at least one of which is a hospital affiliated with an approved international medical school that trains students from international medical schools in such clerkships.*

The comment states that it is essential for at least one of the hospital representatives on the Committee to be an institution that actually works with approved international medical students in such clerkships, and that including at least one hospital with first-hand experience would allow for

direct input and informed discussion regarding pertinent medical education, training and patient care issues.

RESPONSE: The proposed regulation provides for two representatives from “approved” international medical schools and two representatives of hospitals that serve as sites for clinical clerkships. Such representation will ensure that the advisory committee will have input from persons who are engaged in providing clinical clerkship programs and are familiar with pertinent aspects of the implementation of a clinical clerkship program. Moreover, the selection of representatives for each category mentioned in the regulation will be guided by the recognition that the advisory committee must reflect a broad range of perspectives and experiences, including experience with the implementation of a long-term clinical clerkship program.

EMERGENCY RULE MAKING

Due Process Procedures for Criminal History Checks of Prospective School Employees and Certification Applicants

I.D. No. EDU-27-11-00002-E

Filing No. 575

Filing Date: 2011-06-24

Effective Date: 2011-06-24

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

Action taken: Amendment of section 87.5 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 305(1), (2), (30) and 3035(3)

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

Specific reasons underlying the finding of necessity: The proposed amendment is necessary to conform the Regulations of the Commissioner of Education to changes in the internal organization of the State Education Department. Under the current Commissioner’s Regulation [8 NYCRR section 87.5(a)(5)], Department determinations denying clearance for employment to prospective school employees and certification applicants may be appealed to the Assistant Commissioner of the Office of Teaching Initiatives (or, in one instance, to the executive director of such Office). The proposed amendment will replace references to the specific staff titles with the terms “designee of the Commissioner” or “Commissioner’s designee.” The amendment will thereby provide flexibility in responding to future changes in the internal organization of the Department, and avoid the necessity of amending the regulation each time such changes occur. It is anticipated that, as a result of the retirement of the current Assistant Commissioner, effective June 23, 2011, the responsibility for determining such appeals will be assumed by a designee of the Commissioner of Education for such purpose.

Because the Board of Regents meets at fixed intervals, the earliest the proposed amendment could be adopted, pursuant to the requirements of the State Administrative Procedure Act, is the September 12-13, 2011 Regents meeting, and the earliest an adoption at such meeting could be made effective would be October 5, 2011. However, it is anticipated that a Commissioner’s designee will need to be appointed earlier in order to render decisions in Part 87 appeals currently pending or filed prior to October 5, 2011 and, specifically, to hear three Part 87 appeals that are scheduled for oral argument on July 13, 2011.

The recommended action is being proposed as an emergency measure upon a finding by the Board of Regents that such action is necessary for the preservation of the general welfare in order to ensure that the Commissioner’s Regulations, relating to determinations of appeals of employment clearance denials brought by prospective school employees and certification applicants, are immediately brought into conformance with changes in the Department’s internal organization, so as to ensure that an appropriate Department staff member may be delegated by the Commissioner to assume, in a timely and efficient manner, the duties and responsibilities relating to such appeals that were formerly exercised by the Assistant Commissioner of the Office of Teaching Initiatives.

It is anticipated that the proposed rule will be presented to the Board of Regents for adoption as a permanent rule at their September 12-13, 2011 meeting, which is the first scheduled meeting after expiration of the 45-day public comment period mandated by the State Administrative Procedure Act.

Subject: Due process procedures for criminal history checks of prospective school employees and certification applicants.

Purpose: To conform to recent change in Department’s Office of Teaching Initiatives.

Text of emergency rule: 1. Subparagraph (vii) of paragraph (4) of subdivision (a) of section 87.5 of the Regulations of the Commissioner of Education is amended, effective June 24, 2011, as follows:

(vii) Where the prospective school employee does not submit a response within the timeframe prescribed in subparagraph (vi) of this paragraph, the department shall make a determination denying clearance for employment and notification of such denial, along with the basis for such determination, shall be transmitted to the prospective school employee by certified mail, return receipt requested. In the case of a prospective school employee requesting conditional clearance for employment, such determination shall also deny the conditional clearance for employment. In the case of a prospective school employee who has already been granted conditional clearance for employment, such determination shall also terminate the conditional clearance for employment. Such notification shall state that the prospective school employee may appeal the determination to [the executive director of the Office of Teaching Initiatives of the State Education Department] *a designee of the Commissioner of Education*, at the address specified in the notification, in accordance with paragraph (5) of this subdivision, and shall include instructions for such an appeal. Notification of the denial of clearance for employment and denial or termination of conditional clearance for employment shall also be given to the covered school.

2. Subparagraph (viii) of paragraph (4) of subdivision (a) of section 87.5 of the Regulations of the Commissioner of Education is amended, effective June 24, 2011, as follows:

(viii) Where the prospective school employee submits a response within the timeframe prescribed in subparagraph (vi) of this paragraph, the department shall, upon review of the prospective school employee’s criminal history record, related information obtained by the department pursuant to the review of such criminal history record, and information and written argument provided by the prospective school employee in his or response, make a determination on whether clearance for employment shall be granted or denied. In such review, the department shall apply the standards for the granting or denial of a license or employment application set forth in Correction Law, section 752 and shall consider the factors specified in Correction Law, section 753. Such review shall be conducted in accordance with the requirements of section 296(16) of the Executive Law. Where the department’s determination is that clearance for employment is denied, the decision shall include the basis for such determination, and shall state that the prospective employee may appeal the department’s determination to [the assistant commissioner of the Office of Teaching Initiatives of the State Education Department] *a designee of the Commissioner of Education*, at the address specified in the determination, in accordance with paragraph (5) of this subdivision, and shall include instructions for such an appeal. A copy of the determination that clearance for employment is denied, or notice that such clearance is granted, as the case may be, shall be transmitted to the prospective school employee. Where clearance for employment is denied, such determination shall be sent to the prospective school employee by certified mail, return receipt requested. Where clearance for employment is granted, such determination shall be sent to the prospective school employee by regular first class mail. Where clearance for employment is denied and the prospective school employee also requested conditional clearance for employment, such determination shall also deny the conditional clearance for employment. Where clearance for employment is denied and the prospective school employee has already been granted conditional clearance for employment, such determination shall also terminate the conditional clearance for employment. In addition, the covered school shall be notified of the denial or granting of clearance.

3. Paragraph (5) of subdivision (a) of section 87.5 of the Regulations of the Commissioner of Education is amended, effective June 24, 2011, as follows:

(5) Appeal of department’s determination.

(i) A prospective school employee who was denied clearance

for employment by a determination of the department pursuant to paragraph (4) of this subdivision, may appeal that determination to [the assistant commissioner of the Office of Teaching Initiatives of the State Education Department] *a designee of the Commissioner of Education who did not participate in the department's determination*, provided that such appeal is mailed by regular first class mail or certified mail or is hand delivered to the address specified in the department's determination within 25 calendar days of the mailing of such determination denying clearance. [Such appeal shall be heard by the assistant commissioner of the Office of Teaching Initiatives or a State review officer designated by the assistant commissioner who did not participate in the department's determination].

(ii) . . .

(iii) Such appeal papers, submitted within the timeframes prescribed in subparagraph (i) or (ii) of this paragraph, may include any affidavits or other relevant written information and written argument which the prospective school employee wishes the [assistant commissioner, or a State review officer designated by the assistant commissioner,] *Commissioner's designee* to consider in support of the position that clearance for employment should be granted, including, where applicable, information in regard to his or her good conduct and rehabilitation. The prospective school employee may request oral argument and must do so in the appeal papers submitted within the timeframes prescribed in subparagraph (i) or (ii) of this paragraph. Such oral argument shall be conducted in accordance with the requirements of subparagraph (iv) of this paragraph.

(iv) A prospective school employee may request oral argument as part of the appeal of the department's determination denying clearance for employment. The department shall notify the prospective school employee of the time and location of such oral argument. Such argument shall be heard before the [assistant commissioner, or a State review officer designated by the assistant commissioner] *Commissioner's designee*. At the oral argument, the prospective school employee may present additional affidavits or other relevant written information and written argument which the prospective school employee wishes [the assistant commissioner, or the State review officer designated by the assistant commissioner,] *the Commissioner's designee* to consider in support of the position that clearance for employment should be granted, including, where applicable, written information in regard to his or her good conduct and rehabilitation. No testimony shall be taken at the oral argument and no transcript of oral argument shall be made. The prospective school employee may make an audio tape recording of the oral argument. However, such audio tape recording or transcript thereof shall not be part of the record upon which the [assistant commissioner or a State review officer designated by the assistant commissioner] *Commissioner's designee* makes the determination on whether clearance for employment shall be granted or denied.

(v) Where a timely request for an appeal is received, upon review of the prospective school employee's criminal history record, related written information obtained by the department pursuant to the review of such criminal history record, written information and written argument submitted by the prospective school employee in this appeal within the timeframes prescribed in subparagraph (i) or (ii) of this paragraph, and written information provided at oral argument if requested by the prospective school employee, the [assistant commissioner of the Office of Teaching Initiatives or a State review officer designated by the assistant commissioner who did not participate in the department's determination,] *Commissioner's designee* shall make a determination of whether clearance for employment shall be granted or denied. In such appeal, the [assistant commissioner or his or her designee] *Commissioner's designee* shall apply the standards for the granting or denial of a license or employment application set forth in Correction Law, section 752 and shall consider the factors specified in Correction Law, section 753. Such appeal shall be conducted in accordance with the requirements of section 296(16) of the Executive Law. Where the determination of the [assistant commissioner, or his or her designee,] *Commissioner's designee* is that clearance for employment is denied, his or her decision shall include the findings of facts and conclusions of law upon which the determination is based. A copy of the determination that clearance for employment is denied, or notice

that such clearance is granted, as the case may be, shall be transmitted to the prospective school employee by regular first class mail. In addition, the covered school shall be notified of the denial or granting of clearance.

4. Subdivision (b) of section 87.5 of the Regulations of the Commissioner is amended, effective June 24, 2011, as follows:

(b) Procedures for clearance for certification. Where the criminal history record reveals conviction of a crime, or an arrest for a crime, the department shall transmit the criminal history record and related information to the department's [assistant commissioner of the] Office of Teaching Initiatives for a determination of good moral character pursuant to Part 83 of this Title, which procedure shall determine the clearance for certification.

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-27-11-00002-P, Issue of July 6, 2011. The emergency rule will expire September 21, 2011.

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

Paragraph (a) of subdivision (30) of section 305 of the Education Law authorizes the Commissioner of Education to promulgate regulations to authorize the fingerprinting of prospective employees of nonpublic and private elementary and secondary schools, and for the use of information derived from searches of the records of the Division of Criminal Justice Services ("DCJS") and the Federal Bureau of Investigation ("FBI") based on the use of such fingerprints.

Paragraph (a) of subdivision (3) of section 3035 of the Education Law requires the Commissioner of Education to promptly notify the nonpublic or private elementary or secondary school when the prospective school employee is cleared for employment based on his or criminal history and provides a prospective school employee who is denied clearance the right to be heard and offer proof in opposition to such determination in accordance with the Regulations of the Commissioner of Education.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment carries out the objectives of the above-referenced statutes by establishing requirements and procedures necessary to implement the statutory requirements prescribed in Chapter 630 of the Laws of 2006. That statute authorizes nonpublic and private schools to require their prospective school employees to be fingerprinted, to undergo a criminal history check, and be cleared for employment by the State Education Department.

3. NEEDS AND BENEFITS:

The proposed amendment is necessary to conform the Regulations of the Commissioner of Education to changes in the internal organization of the State Education Department. Under the current Commissioner's Regulation [8 NYCRR section 87.5(a)(5)], Department determinations denying clearance for employment to prospective school employees and certification applicants may be appealed to the Assistant Commissioner of the Office of Teaching Initiatives (or, in one instance, to the executive director of such Office). The proposed amendment will replace references to the specific staff titles with the terms "designee of the Commissioner" or "Commissioner's designee." The amendment will thereby provide flexibility in responding to future changes in the internal organization of the Department, and avoid the necessity of amending the regulation each time such changes occur. It is anticipated that, as a result of the retirement of the current Assistant Commissioner, effective June 23, 2011, the responsibility for determining such appeals will be assumed by a designee of the Commissioner of Education for such purpose.

4. COSTS:

(a) Costs to State government: none.

- (b) Costs to local government: none.
- (c) Costs to private regulated parties: none.
- (d) Costs to the regulatory agency: none.

The proposed amendment merely replaces references in section 87.5(a)(5) to "assistant commissioner" and "executive director" of the Office of Teaching Initiatives with the terms "designee of the Commissioner" or "Commissioner's designee," in order to provide flexibility to the Department in responding to future changes in the internal organization of the Department, and avoiding the necessity of amending the regulation each time such changes occur.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any additional program, service, duty or responsibility upon local governments. The proposed amendment merely replaces references in section 87.5(a)(5) to "assistant commissioner" and "executive director" of the Office of Teaching Initiatives with the terms "designee of the Commissioner" or "Commissioner's designee," in order to provide flexibility to the Department in responding to future changes in the internal organization of the Department, and avoiding the necessity of amending the regulation each time such changes occur.

6. PAPERWORK:

The proposed amendment does not impose any additional reporting or other paperwork requirements. The proposed amendment merely replaces references in section 87.5(a)(5) to "assistant commissioner" and "executive director" of the Office of Teaching Initiatives with the terms "designee of the Commissioner" or "Commissioner's designee," in order to provide flexibility to the Department in responding to future changes in the internal organization of the Department, and avoiding the necessity of amending the regulation each time such changes occur.

7. DUPLICATION:

The proposed amendment does not duplicate other requirements of the State and Federal government.

8. ALTERNATIVES:

There are no significant alternatives to the proposed amendment, and none were considered. The proposed amendment merely replaces references in section 87.5(a)(5) to "assistant commissioner" and "executive director" of the Office of Teaching Initiatives with the terms "designee of the Commissioner" or "Commissioner's designee," in order to provide flexibility to the Department in responding to future changes in the internal organization of the Department, and avoiding the necessity of amending the regulation each time such changes occur.

9. FEDERAL STANDARDS:

There are no Federal requirements relating to the subject matter of the proposed amendment.

10. COMPLIANCE SCHEDULE:

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

Regulatory Flexibility Analysis

The proposed amendment relates to appeals brought by prospective school employees of Department determinations denying clearance for employment on the basis of criminal record checks, and does not impose any adverse economic impact, reporting, recordkeeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no affirmative steps are needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local Governments:

The proposed amendment applies to each public school district in the State.

1. COMPLIANCE REQUIREMENTS:

The proposed amendment does not impose any additional compliance requirements on school districts. The proposed amendment merely replaces references in section 87.5(a)(5) to "assistant commissioner" and "executive director" of the Office of Teaching Initiatives with the terms "designee of the Commissioner" or "Commissioner's designee," in order to provide flexibility to the Department in responding to future changes in the internal organization of the Department, and avoiding the necessity of amending the regulation each time such changes occur.

soner's designee," in order to provide flexibility to the Department in responding to future changes in the internal organization of the Department, and avoiding the necessity of amending the regulation each time such changes occur.

2. PROFESSIONAL SERVICES:

The proposed amendment does not impose any additional professional service requirements on school districts.

3. COMPLIANCE COSTS:

The proposed amendment does not impose any additional costs to school districts. The proposed amendment merely replaces references in section 87.5(a)(5) to "assistant commissioner" and "executive director" of the Office of Teaching Initiatives with the terms "designee of the Commissioner" or "Commissioner's designee," in order to provide flexibility to the Department in responding to future changes in the internal organization of the Department, and avoiding the necessity of amending the regulation each time such changes occur.

4. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any new technological requirements. Economic feasibility is addressed above under compliance costs.

5. MINIMIZING ADVERSE IMPACT:

The proposed amendment does not impose any compliance requirements or costs on school districts. The proposed amendment merely replaces references in section 87.5(a)(5) to "assistant commissioner" and "executive director" of the Office of Teaching Initiatives with the terms "designee of the Commissioner" or "Commissioner's designee," in order to provide flexibility to the Department in responding to future changes in the internal organization of the Department, and avoiding the necessity of amending the regulation each time such changes occur.

6. LOCAL GOVERNMENT PARTICIPATION:

Copies of the proposed amendment have been provided to District Superintendents for distribution to school districts within their supervisory districts for review and comment.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:

The proposed amendment applies to all public and nonpublic schools in the State and their prospective employees, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

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

The proposed amendment does not impose any additional compliance requirements, or professional services requirements, on rural areas. The proposed amendment merely replaces references in section 87.5(a)(5) to "assistant commissioner" and "executive director" of the Office of Teaching Initiatives with the terms "designee of the Commissioner" or "Commissioner's designee," in order to provide flexibility to the Department in responding to future changes in the internal organization of the Department, and avoiding the necessity of amending the regulation each time such changes occur.

3. COSTS:

The proposed amendment does not impose any additional costs to school districts. The proposed amendment merely replaces references in section 87.5(a)(5) to "assistant commissioner" and "executive director" of the Office of Teaching Initiatives with the terms "designee of the Commissioner" or "Commissioner's designee," in order to provide flexibility to the Department in responding to future changes in the internal organization of the Department, and avoiding the necessity of amending the regulation each time such changes occur.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment does not impose any additional compliance requirements or costs on rural areas. The proposed amendment merely replaces references in section 87.5(a)(5) to "assistant commissioner" and "executive director" of the Office of Teaching Initiatives with the terms "designee of the Commissioner" or "Commissioner's designee," in order to provide flexibility to the Department in responding to future changes in the internal organization of the Department, and avoiding the necessity of amending the regulation each time such changes occur.

responding to future changes in the internal organization of the Department, and avoiding the necessity of amending the regulation each time such changes occur.

5. RURAL AREA PARTICIPATION:

Copies of the proposed amendment were provided to the Department’s Rural Education Advisory Committee, which includes representatives of schools in rural areas.

Job Impact Statement

The proposed amendment relates to due process procedures for the fingerprinting and the criminal history record check of prospective nonpublic and private school employees, in order to implement the requirements set forth in sections 305 and 3035 of the Education Law. Because the proposed amendment simply implements the statutory requirements, it will not have any impact on jobs and employment opportunities beyond the impact of the statute.

The proposed amendment merely replaces references in section 87.5(a)(5) to “assistant commissioner” and “executive director” of the Office of Teaching Initiatives with the terms “designee of the Commissioner” or “Commissioner’s designee,” in order to provide flexibility to the Department in responding to future changes in the internal organization of the Department, and avoiding the necessity of amending the regulation each time such changes occur.

Because it is evident from the nature of the proposed amendment that it will not have a substantial adverse impact on jobs and employment opportunities, no further steps were needed to ascertain these facts and none were taken. Accordingly, a job impact statement was not required and one was not prepared.

NOTICE OF ADOPTION

Online Coursework

I.D. No. EDU-09-11-00008-A

Filing No. 585

Filing Date: 2011-06-28

Effective Date: 2011-07-13

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

Action taken: Addition of section 100.5(d)(10) to Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided), 208(not subdivided), 209(not subdivided), 305(1), (2), 308(not subdivided), 309(not subdivided) and 3204(3)

Subject: Online coursework.

Purpose: Establishes criteria for awarding credit towards a Regents diploma for online and online/classroom coursework.

Text of final rule: Paragraph (10) of subdivision (d) of section 100.5 of the Regulations of the Commissioner of Education is added, effective July 15, 2011, as follows:

(10) *Credit for Online and Blended Courses.*

(i) *Definitions. For purposes of this paragraph:*

(a) *Online course means instruction in a specific subject consisting of teacher-to-student, student-to-student and/or student-to-content interactions that occur solely through digital and/or Internet-connected media.*

(b) *Blended course means instruction in a specific subject consisting of teacher-to-student, student-to-student and/or student-to-content interactions that occur through a combination of classroom-based and digital and/or Internet-connected media.*

(c) *Certified teacher means a teacher who holds a New York State teaching certificate in the subject area in which instruction is provided.*

(ii) *A school district, a charter school or a registered nonpublic school may provide its students with an opportunity to earn units of credit towards a Regents diploma through online and/or blended course study, pursuant to the following:*

(a) *To receive credit, the student shall successfully complete an online or blended course and demonstrate mastery of the learning outcomes for the subject, including passing the Regents examination in the subject and/or other assessment in the subject if required for earning a diploma.*

(b) *The school district, registered nonpublic school or charter school shall ensure that:*

(1) *courses are aligned with the applicable New York State Learning Standards for the subject area;*

(2) *courses provide for documentation of student mastery of the learning outcomes for such subjects, including passing the Regents examination in the subject and/or other assessment in the subject if required for earning a diploma;*

(3) *instruction is provided by or under the direction and/or supervision of:*

(i) *a certified teacher from the school district in which the student is enrolled; or*

(ii) *a certified teacher from a board of cooperative educational services (BOCES) that contracts with the school district to provide instruction in the subject area where authorized pursuant to Education Law § 1950; or*

(iii) *a certified teacher from a school district who provides instruction in the subject area under a shared service agreement; or*

(iv) *in the case of a registered nonpublic school, a teacher of the subject area from a registered nonpublic school; or*

(v) *in the case of a charter school, a teacher of the subject area from a charter school.*

(4) *courses include regular and substantive interaction between the student and the teacher providing direction and/or supervision pursuant to subclause (3) of this clause; and*

(5) *instruction satisfies the unit of study and unit of credit requirements in section 100.1(a) and (b) of this Part.*

Final rule as compared with last published rule: Nonsubstantive changes were made in section 100.5(d)(10).

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

Revised Regulatory Impact Statement

Since publication of a Notice of Proposed Rule Making in the *State Register* on March 2, 2011, nonsubstantial revisions to the proposed rule were made for purposes of clarification as follows:

In the definitions of “online course” and “blended course” in 100.5(d)(10)(i)(a) and (b), respectively, the term “unit of study” was replaced with “subject” as a more appropriate descriptive term. In addition, the phrase “any combination of classroom-based and digital and/or Internet-connected media” was replaced by the phrase “a combination of classroom-based and digital and/or Internet-connected media.”

In section 100.5(d)(10)(ii)(a), the term “unit of study” was replaced with the more appropriate descriptive term “an online or blended course” and the phrase “including passing the Regents examination in the subject or other assessment required for graduation, if applicable” was replaced with the more appropriate descriptive phrase “including passing the Regents examination in the subject and/or other assessment in the subject if required for earning a diploma.”

Similarly, In section 100.5(d)(10)(ii)(b)(2), the phrase “including passing the Regents examination in the subject or other assessment required for graduation, if applicable” was replaced with the more appropriate descriptive phrase “including passing the Regents examination in the subject and/or other assessment in the subject if required for earning a diploma.”

In section 100.5(d)(10)(ii)(b)(3)(i), the phrase “a certified teacher from the school district” was replaced with the more appropriately descriptive phrase “a certified teacher from the school district in which the student is enrolled.”

These revisions do not require any changes to the previously published Regulatory Impact Statement.

Revised Regulatory Flexibility Analysis

Since publication of a Notice of Proposed Rule Making in the *State Register* on March 2, 2011, nonsubstantial revisions to the proposed rule were made as described in the Statement Concerning the Regulatory Impact Statement filed herewith.

These revisions do not require any changes to the previously published Regulatory Flexibility Analysis for Small Businesses and Local Government.

Revised Rural Area Flexibility Analysis

Since publication of a Notice of Proposed Rule Making in the *State Register* on March 2, 2011, nonsubstantial revisions to the proposed rule were made as described in the Statement Concerning the Regulatory Impact Statement filed herewith.

These revisions do not require any changes to the previously published Rural Area Flexibility Analysis.

Revised Job Impact Statement

Since publication of a Notice of Proposed Rule Making in the *State Register* on March 2, 2011, nonsubstantial revisions to the proposed rule were made as described in the Statement Concerning the Regulatory Impact Statement filed herewith.

The proposed rule, as so revised, establishes standards relating to earning credit towards a Regents degree by means of online or a combination of online and classroom-based (blended) coursework that is provided by school districts, registered nonpublic schools and charter schools. The proposed revised rule will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the revised rule that it will have a positive impact, or no impact, on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Assessment of Public Comment

Since publication of a Notice of Proposed Rule Making in the *State Register* on March 2, 2011, the State Education Department received the following comments:

1. COMMENT:

The rule's requirement that online courses be monitored by a content area teacher will restrict the ability to offer online coursework for purposes of earning Regents diploma credit, because small schools cannot spare content area teachers for this purpose. Instead, a district should be able to hire one teacher to monitor and coach a small group of students taking online courses.

DEPARTMENT RESPONSE:

The rule allows flexibility for certified teachers to use Internet and other computer-based resources to meet the individual instructional needs of their students. While the rule clearly requires that online/blended instruction be provided by or under the direction and/or supervision of New York State certified teachers in the subject area, if the teacher delivering the instruction via online or digital means is certified in the subject area then the school may provide for student supervision in any manner it deems appropriate consistent with applicable laws and regulations. If, however, the online interaction does not include a teacher certified in the subject area, then there must be a certified teacher assigned to direct and/or supervise the study. In order to ensure an appropriate and effective educational experience for students, the provision of any online/blended coursework must be predicated on the essential instructional role of a teacher who is employed by the school district, BOCES, non-public or charter school, and is highly qualified in the specific subject area, where applicable.

2. COMMENT:

For purposes of offering credit recovery in the summer, a student who has taken a traditional course during the school year should be allowed to take an online course monitored by school district staff, not necessarily a content area teacher.

DEPARTMENT RESPONSE:

The rule does not address credit recovery. However, the provisions in Commissioner's Regulation section 100.5(d)(8) are applicable to programs for making up incomplete or failed course credit, which may occur as part of a summer school program (8 NYCRR § 100.5[d][8][iv][b]) and may include online study (8 NYCRR § 100.5[d][8][iv][d]). Section § 100.5(d)(8)(ii)(c) requires that a make-up credit program ensure that equivalent, intensive instruction in the subject area is provided under the direction and/or supervision of a certified teacher.

3. COMMENT:

The rule limits the ability to offer the best resources and coursework to students, and reduces flexibility regarding supervision of on-line learning. The delivery system in the rule is not cost effective. To require courses be provided or supervised by a State-certified teacher severely limits the ability of students to take Advanced Placement (AP®) courses.

DEPARTMENT RESPONSE:

Students would be able to take the AP® courses consistent with the rule insofar as instruction is provided by or under the direction or supervision of a certified teacher in the subject area, and from the school district, provided there is regular and substantive interaction between the student and the teacher. The rule allows the direction and/or supervision to be provided in a variety of formats. If the teacher delivering the online content is not certified in the subject area, then the school district must provide the student with a supervising teacher who does hold such certification. This is necessary to ensure that the student has adequate support to be successful in the online course.

4. COMMENT:

Education Law § 1950 should be amended to permit BOCES to work with State agencies so that they may take advantage of online/blended courses offered through BOCES.

DEPARTMENT RESPONSE:

The rule addresses the need for increased flexibility to provide online/blended coursework in the context of registered public and nonpublic high schools and charter schools. Amendments to Education Law § 1950 are beyond the scope of the rule.

5. COMMENT:

The rule is unclear as to whether traditional seat time requirements apply.

DEPARTMENT RESPONSE:

Section 100.5(d)(10)(ii)(b)(5) requires that online instruction satisfy the unit of study and unit of credit requirements in Commissioner's Regulation section 100.1(a) and (b), respectively.

According to section 100.1(a), a unit of study "means at least 180 minutes of instruction per week throughout the school year, or the equivalent." To determine whether an online/blended course provides students with instruction that is equivalent to that received through 180 minutes of traditional classroom instruction, the principal must evaluate all course components (including, but not limited to, its curriculum, alignment to relevant State learning standards, instructional strategies and requirements, formative and summative assessments, professional development for teachers, and general delivery and revision processes). While Commissioner's regulations for completing a unit of study and earning a unit of credit refer to the amount of instruction to which students are entitled, the regulations do not limit or confine instruction solely to classroom-based instruction. As a result, instruction may be delivered in multiple ways and through multiple media that best meet the needs of the students, so long as such modes and media are under the direction of a certified teacher in that subject area and accountable to the district providing instruction, and so long as all applicable requirements are met. The mastery of learning outcomes, as determined by the principal, is based on an evaluation of the online/blended course as an equivalent mode of instruction.

6. COMMENT:

New York should provide for free Cyber schools similar to other states.

DEPARTMENT RESPONSE:

The creation of fully online schools in New York is beyond the scope of the rule, which addresses the need for increased flexibility in online and blended learning within the context of registered public and nonpublic schools as well as charter schools.

7. COMMENT:

Support was expressed for the requirement that online/blended instruction be provided by or under the direction and/or supervision of State-certified teachers, but it was recommended language be added to provide for collaborative engagement of teachers in the planning, development and implementation of online/blended programs, and to provide that coursework be implemented consistent with any collective bargaining obligation required by Civil Service Law Article 14.

DEPARTMENT RESPONSE:

The Department does not believe these changes are necessary. The rule provides for the essential role of the certified teacher in the specific subject area, employed by a school district or BOCES, and of the teacher of the subject area in a registered nonpublic or charter school. Provision of online/blended learning opportunities must be consistent with all applicable provisions of the Education Law, Commissioner's regulations and Civil Service Law Article 14.

8. COMMENT:

The rule requires online/blended courses to include "regular and substantive interaction between the student and the teachers providing direction and/or supervision." It is suggested that the term "regular" be replaced with "frequent" in order to support more timely and meaningful pedagogical oversight. The rule should be revised to clarify and the intent regarding such "interaction," particularly in meeting the unit of study and unit of credit requirements.

DEPARTMENT RESPONSE:

The Department believes the term "regular" is sufficient to describe the minimum amount of substantive interaction between the student and the teacher in this context. More specific minimum qualifiers may detract from the rule's flexibility to create new learning environments that meet student needs using online/blended coursework.

9. COMMENT:

Based on the input of an external advisory group of key stakeholders, the Department should develop guidance to provide programmatic standards for online/blended course, ensuring, for example, that curriculum requirements and State learning standards are maintained in online/blended coursework, appropriate measures are used to determine student mastery of learning outcomes, and safeguards are established for verifying completion of coursework by the student receiving the units of credit. The guidance should also provide school districts/BOCES with much needed direction in the use of commercial vendors of online and blended coursework. Concern was expressed that some school districts/BOCES are already using commercially available courses without any consistent State-wide oversight or quality content assurance and that, in some cases, courses extend into the questionable practice of providing core instructional services. In the January 28, 2011 memorandum from the Senior Deputy Commissioner P-12 Education to the Regents P-12 Education Committee, in connection with the Committee's discussion of the proposed rule at the February 7-8 Regents meeting, it was noted that "[s]chool districts lack the authority to contract with an independent

contractor to provide core instructional services through the employees of that independent contractor except where specifically authorized by statute or regulation, or where contracting is necessary to carry out duties imposed on the school district by State or federal law. Contracting out cannot be used as a vehicle for avoiding the tenure laws or the requirements that teachers be duly certified.”

Department guidance should also address the critical need for the identification and provision of appropriate professional development, particularly in light of the new teacher evaluation requirements established in Chapter 103 of the Laws of 2010.

DEPARTMENT RESPONSE:

The Department intends to issue guidance after adoption of the rule, to be developed in consultation with relevant stakeholders. As part of the Regents Reform Agenda, and as a component of the State’s Race to the Top plan, the Department is also developing guidance regarding the use of vendors for online and blended course models, including guidance and support to address the critical need for professional development to assist teachers and principals in developing pedagogical considerations, creating and developing effective learning environments, and using technology in the provision of online and blended courses.

Also, a June 2, 2010 Department memorandum provides guidance for school administrators regarding contracts for instruction and is available at:

<http://www.p12.nysed.gov/resources/contractsforinstruction>.

11. COMMENT:

While it would be beneficial for students to have the opportunity to earn credit through online courses, given the current fiscal situation of most districts it will be virtually impossible to vet all of the possible courses available to determine if they are aligned with applicable State learning standards. Additionally, it will require staff to determine if the course provides documentation of mastery, instruction satisfying credit and regular and substantive interaction between the student and the teacher. If a teacher is expected to develop such course, additional funding is necessary. It was suggested that the Department provide a list of approved online courses for course credit that meet the Department’s requirements.

DEPARTMENT RESPONSE:

The International Association of K-12 Online Learning (iNACOL) recommends that “online and blended courses need not be developed from scratch, but that many already exist that meet State Standards and are accredited by recognized organizations. These resources have been developed by State, private, business, and independent organizations. At least initially, collaborating and sharing these options may be more cost-effective and practical for school systems than developing online instruction in house.” Additionally, a school district would not need to vet or align all possible course, but only the ones they choose to use. The Department is currently developing a program to disseminate commencement-level (“high school”) online courses for State-wide use. These courses would be used by school districts, charter schools, and registered nonpublic schools for instruction, leading to credit for students who successfully complete them, delivered online or through other electronic means. The Department is also developing a program to implement sustained, ongoing, systems-building professional development, technical assistance, and follow-up support around online and blended courses and instruction (“virtual learning”) State-wide.

12. COMMENT:

Establishing online coursework is an excellent idea and will offer options for schools and families with circumstances that would require this educational flexibility. However, it is hoped that this will include elementary and junior high schools as well.

DEPARTMENT RESPONSE:

The comment is beyond the scope of the rule making, which is intended to provide opportunities for students to earn units of credit towards earning a high school diploma. Accordingly, only students who are in grades nine through twelve or who are in a grade eight acceleration for diploma credit program may earn units of credit towards a high school diploma. Nevertheless, the Department acknowledges the value of online/blended coursework and, as new research is conducted and published, it may consider providing online/blended course opportunities to elementary and middle school students in a future rule making.

NOTICE OF ADOPTION

Clinically Rich Graduate Level Teacher Preparation Program

I.D. No. EDU-13-11-00001-A

Filing No. 587

Filing Date: 2011-06-28

Effective Date: 2011-07-13

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

Action taken: Amendment of section 52.21(b)(5) of Title 8 NYCRR.

Statutory authority: Education Law, sections 207, 208, 210, 214, 216, 224, 305(1), (2), (7), 3004(1) and 3006(1)

Subject: Clinically rich graduate level teacher preparation program.

Purpose: Amend degree conferring requirements of pilot programs to provide program providers flexibility to confer degrees Master in Arts.

Text or summary was published in the March 30, 2011 issue of the Register, I.D. No. EDU-13-11-00001-EP.

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

Text of rule and any required statements and analyses may be obtained from: Christine Moore, NYS Education Department, 89 Washington Avenue, Albany, NY 12234, (518) 473-8927, email: cmoore@mail.nysed.gov

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Continuing Education for Certified Public Accountants and Public Accountants

I.D. No. EDU-14-11-00005-A

Filing No. 588

Filing Date: 2011-06-28

Effective Date: 2011-07-15

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

Action taken: Amendment of section 70.9 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 6501(not subdivided), 6502(not subdivided), 6504(not subdivided), 6507(not subdivided), 6508(not subdivided) and 7409(not subdivided)

Subject: Continuing Education for Certified Public Accountants and Public Accountants.

Purpose: Requires the completion of continuing education requirements in ethics for CPA’s and PA’s be calculated on a calendar year basis.

Text or summary was published in the April 6, 2011 issue of the Register, I.D. No. EDU-14-11-00005-P.

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

Text of rule and any required statements and analyses may be obtained from: Christine Moore, NYS Education Department, 89 Washington Avenue, Albany, NY 12234, (518) 473-8927, email: cmoore@mail.nysed.gov

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Continuing Education of Land Surveyors and Engineers

I.D. No. EDU-14-11-00006-A

Filing No. 589

Filing Date: 2011-06-28

Effective Date: 2011-07-15

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

Action taken: Amendment of sections 68.11 and 68.12 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 6504(not subdivided), 6507(2)(a), 7211(4) and 7212(4)

Subject: Continuing Education of Land Surveyors and Engineers.

Purpose: Requires mandatory continuing education in ethics for Engineers and Land Surveyors.

Text or summary was published in the April 6, 2011 issue of the Register, I.D. No. EDU-14-11-00006-P.

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

Text of rule and any required statements and analyses may be obtained from: Christine Moore, NYS Education Department, 89 Washington Avenue, Albany, NY 12234, (518) 473-8927, email: cmoore@mail.nysed.gov

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Local High School Equivalency Diplomas Based Upon Experimental Programs

I.D. No. EDU-14-11-00007-A
Filing No. 583
Filing Date: 2011-06-28
Effective Date: 2011-07-13

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

Action taken: Amendment of section 100.8 of Title 8 NYCRR.
Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided), 208(not subdivided), 209(not subdivided), 305(1), (2), 309(not subdivided) and 3204(3)

Subject: Local high school equivalency diplomas based upon experimental programs.
Purpose: To extend until 6/30/12 the provision for awarding local high school equivalency diplomas based upon experimental programs.

Text or summary was published in the April 6, 2011 issue of the Register, I.D. No. EDU-14-11-00007-P.

Final rule as compared with last published rule: No changes.
Text of rule and any required statements and analyses may be obtained from: Chris Moore, State Education Department, Office of Counsel, State Education Building, Room 148, 89 Washington Ave., Albany, NY 12234, (518) 473-8296, email: legal@mail.nysed.gov

Assessment of Public Comment
 The agency received no public comment.

NOTICE OF ADOPTION

Public School and School District Accountability - Annual Measurable Objectives (AMO)

I.D. No. EDU-14-11-00008-A
Filing No. 584
Filing Date: 2011-06-28
Effective Date: 2011-07-13

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(p)(14) of Title 8 NYCRR.
Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided), 210(not subdivided), 215(not subdivided), 305(1), (2), (20), 309(not subdivided), 3713(1) and (2)

Subject: Public school and school district accountability - annual measurable objectives (AMO).
Purpose: To reset AMO for grades 3-8 English language arts (ELA) and mathematics beginning in the 2010-2011 school year.

Text or summary was published in the April 6, 2011 issue of the Register, I.D. No. EDU-14-11-00008-P.

Final rule as compared with last published rule: No changes.
Text of rule and any required statements and analyses may be obtained from: Chris Moore, State Education Department, Office of Counsel, State Education Building, Room 148, 89 Washington Ave., Albany, NY 12234, (518) 473-8296, email: legal@mail.nysed.gov

Assessment of Public Comment
 The agency received no public comment.

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

Student Eligibility for the Higher Education Opportunity Program

I.D. No. EDU-26-11-00003-RP

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

Proposed Action: Amendment of section 27-1.1 of Title 8 NYCRR.
Statutory authority: Education Law, sections 207 and 6451(1)

Subject: Student eligibility for the Higher Education Opportunity Program.
Purpose: Update current criteria for determining student economic eligibility for Higher Education Opportunity Program.

Text of revised rule: Subdivision (b) of section 27-1.1 of the Rules of the Board of Regents is amended, effective October 5, 2011, as follows:
 (b) Economically disadvantaged.

(1) *For students first entering college between July 1, 2005 and June 30, 2012.* A student is economically disadvantaged if he or she is a member of a household supported by one member thereof with a total annual income which does not exceed the applicable amount set forth in the following tables; or of a household supported solely by one member thereof who is employed by two or more employers at the same time, if the total annual income of such household does not exceed the applicable amount set forth in the following tables for the number of members in the household plus the second job allowance; or of a household supported by more than one worker thereof, or a household in which one worker is the sole support of a one-parent family, if the total annual income of such household does not exceed the applicable amount set forth in the following tables for the number of members in the household plus the employment allowance. For the purposes of this subdivision, the number of members of a household shall be determined by ascertaining the number of individuals living in the student's residence who are economically dependent on the income, as defined in subdivision (c) of this section, supporting the student.

[Table I

For students first entering college between July 1, 2005 and June 30, 2008

Number of members in household (including head of household)	Total annual income in preceding calendar year
1	\$14,100
2	19,600
3	22,350
4	27,800
5	32,850
6	38,550
7 or more	42,900 plus \$4,350 for each family member in excess of 7
Second Job Allowance	\$ 1,800
Employment Allowance	\$ 4,800

Table II

For students first entering college between July 1, 2008 and June 30, 2009

Number of members in household (including head of household)	Total annual income in preceding calendar year
1	\$15,140
2	20,390
3	25,650
4	30,900
5	36,150
6	41,410
7 or more	46,660 plus \$5,250 for each family member in excess of 7
Second Job Allowance	\$ 2,630
Employment Allowance	\$ 5,250

Table III

For students first entering college between July 1, 2009 and June 30, 2010

Number of members in household (including head of household)	Total annual income in preceding calendar year
1	\$15,590
2	21,000
3	26,420

4	31,830
5	37,240
6	42,650
7 or more	48,060 plus \$5,410 for each family member in excess of 7
Second Job Allowance	\$ 2,710
Employment Allowance	\$ 5,410]

Table [IV] I

For students first entering college [on or after] *between July 1, 2010 and June 30, 2012*

Number of members in household (including head of household)	Total annual income in preceding calendar year
1	\$16,060
2	21,630
3	27,210
4	32,790
5	38,360
6	43,960
7 or more	49,500 plus \$5,570 for each family member in excess of 7
Second Job Allowance	\$ 2,790
Employment Allowance	\$ 5,570

The income figures in [Tables I, II, III, and IV] *Table I* of this paragraph apply to the student applicant's income only when he or she is an independent student. For purposes of this Part, an independent student means a student who:

- (i) is 24 years of age or older by December 31st of the program year; or
- (ii) is an orphan or ward of the court (A student is considered independent if he or she is a ward of the court or was a ward of the court until the individual reached the age of eighteen); or
- (iii) is a veteran of the Armed Forces of the United States who has engaged in the active duty in the United States Army, Navy, Air Force, Marines, or Coast Guard and was released under a condition other than dishonorable; or
- (iv) is a married individual; or
- (v) has legal dependents other than a spouse; or
- (vi) is a student for whom an opportunity program and financial aid administrator has made a satisfactory documented determination of independence by reason of other extraordinary circumstances.

(2) *For students first entering college on or after July 1, 2012, a student is economically disadvantaged if he or she is a member of a household where the total annual income of such household is equal to or less than 185 percent of the amount under the annual United States Department of Health and Human Services poverty guidelines for the applicant's family size. Federal poverty guidelines are published annually by the Department of Health and Human Services in the Federal Register. The income guidelines in this paragraph apply to the student applicant's income only when he or she is an independent student. For purposes of this Part, an independent student means a student who:*

- (i) is 24 years of age or older by December 31st of the program year; or
 - (ii) is an orphan or ward of the court (A student is considered independent if he or she is a ward of the court or was a ward of the court until the individual reached the age of eighteen); or
 - (iii) is a veteran of the U.S. Armed Forces; or
 - (iv) is currently an emancipated minor as determined by a court;
- or
- (v) is currently in legal guardianship as determined by a court; or
 - (vi) is a married individual; or
 - (vii) has legal dependents other than a spouse; or
 - (viii) is a student for whom an opportunity program and financial aid administrator has made a satisfactory documented determination of independence by reason of other extraordinary circumstances;

[2] (3) A maximum of 15 percent of the students admitted to a HEOP program by an institution may come from households whose income exceeds the household scale listed in the applicable table in paragraph (1) of this subdivision, provided that such institution has established to the satisfaction of the commissioner that unusual and extenuating circumstances as defined in this paragraph, exist for each such

student. Prior to admitting any such student, the institution shall submit to the commissioner such documentation of unusual and extenuating circumstances as the commissioner may require. Such documentation shall be kept on file by the institution at which such students were enrolled, and shall be corroborated by a disinterested, reliable party. For purposes of this paragraph, unusual and extenuating circumstances shall be limited to the following:

- (i) . . .
- (ii) . . .
- (iii) . . .
- (iv) families which must maintain two households in order to maintain employment, one for a wage earner and one for dependents; [or
- (v) families where the family contribution as computed from base year financial data by a United States Education Department approved needs analysis system indicates no contribution other than the minimum expectation from student income for independent students or a zero parental contribution for dependent students.]

[3] (4) . . .
 [(4)] (5) . . .

[(5)] (6) The following shall be acceptable documentation of paragraphs (1) through (3) of this subdivision:

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

[(viii)] Documentation of zero household contribution: the needs analysis output form from one of the United States Education Department's approved needs analysis systems.]

Revised rule compared with proposed rule: Substantial revisions were made in section 27-1.1(b)(3) and (6).

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

Data, views or arguments may be submitted to: Peg Rivers, New York State Education Department, 89 Washington Avenue, Albany, New York 12234, (518) 408-1189, email: privers@mail.nysed.gov

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

Revised Regulatory Impact Statement

Since publication of a Notice of Proposed Rule Making in the *State Register* on June 29, 2011, the following substantial revisions were made to the proposed rule:

Subparagraph (v) of renumbered paragraph (3) of section 27-1.1 of the Commissioner's regulations has been deleted because this provision is no longer necessary due to the changes in the economic eligibility guidelines, which are based on 185% of the federal poverty level.

Subparagraph (viii) of renumbered paragraph (3) of section 27-1.1 of the Commissioner's regulations has been deleted because documentation of zero household contribution is no longer necessary because the proposed amendment requires that economic eligibility be based on 185% of the federal poverty level.

The above revisions to the proposed rule do not require any revisions to the previously published Regulatory Impact Statement.

Revised Regulatory Flexibility Analysis

Since publication of a Notice of Proposed Rule Making in the *State Register* on June 29, 2011, the proposed rule was revised as set forth in the Revised Regulatory Impact Statement herewith.

The above revisions to the proposed rule do not require any revisions to the previously published Regulatory Flexibility Analysis.

Revised Rural Area Flexibility Analysis

Since publication of a Notice of Proposed Rule Making in the *State Register* on June 29, 2011, the proposed rule was revised as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

The above revisions to the proposed rule do not require any revisions to the previously published Rural Area Flexibility Analysis.

Revised Job Impact Statement

Since publication of the Notice of Proposed Rule Making in the *State Register* on June 29, 2011, the proposed rule was revised as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

The proposed rule, as so revised, relates to the economic eligibility guidelines for the Higher Education Opportunity Program. The revised rule will not have a substantial adverse impact on job or employment opportunities. Because it is evident from the nature of the revised rule that it will have no impact on jobs or employment opportunities, no further

measures were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Assessment of Public Comment

The agency received no public comment.

Department of Health

NOTICE OF ADOPTION

January 2011 Ambulatory Patient Groups (APGs) Payment Methodology

I.D. No. HLT-12-11-00003-A

Filing No. 572

Filing Date: 2011-06-22

Effective Date: 2011-07-13

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

Action taken: Amendment of Subpart 86-8 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 2807(2-a)(e)

Subject: January 2011 Ambulatory Patient Groups (APGs) Payment Methodology.

Purpose: To refine the APG payment methodology.

Text or summary was published in the March 23, 2011 issue of the Register, I.D. No. HLT-12-11-00003-P.

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

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

Assessment of Public Comment

The agency received no public comment.

Insurance Department

EMERGENCY RULE MAKING

Use of Senior-Specific Certifications and Professional Designations in the Sale of Life Insurance and Annuities

I.D. No. INS-28-11-00001-E

Filing No. 566

Filing Date: 2011-06-22

Effective Date: 2011-06-22

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

Action taken: Addition of Part 225 (Regulation No. 199) to Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 2103, 2104, 2110, 2403 and 4525

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

Specific reasons underlying the finding of necessity: This Part sets forth standards to protect consumers from misleading and fraudulent marketing practices with respect to the use of senior-specific certifications and professional designations in the solicitation, sale or purchase of, or advice made in connection with a life insurance policy or annuity contract. The Part prohibits the use of a senior-specific certification or professional designation by an insurance producer in such a way as to mislead a purchaser or prospective purchaser into thinking that the insurance producer has special certification or training in advising or providing services to seniors in connection with the sale of life insurance and annuities.

Seniors are often misled and harmed by the use of senior-specific certifications and designations by insurance producers that imply the

existence of a level of expertise and knowledge in senior matters that in fact does not exist. Misleading certifications and professional designations such as “certified elder planning specialist” and “certified senior advisor” are used by insurance producers to gain the confidence of seniors by creating an impression of expertise and knowledge. However, many of these designations are obtained by insurance producers in a manner that requires little more than the payment of a fee.

In recent years, the media has reported cases of unsuitable sales to elderly clients, resulting in the loss of seniors’ savings, by insurance producers utilizing misleading senior-specific certifications or designations. Legislators and regulators, both federal and state, responding to such reports, have proposed and/or adopted prohibitions on the use of senior-specific designations in a misleading manner. In 2008, the National Association of Insurance Commissioners adopted a new Model Regulation on the Use of Senior-Specific Certifications and Professional Designations in the Sale of Life Insurance and Annuities (“the NAIC Model”). The standards and procedures in this rule are substantially the same as those already adopted by the NAIC Model. While more than 15 states have implemented some form of the NAIC Model, New York has no statute or regulation that specifically provides this consumer protection by prohibiting the use of misleading senior-specific certifications or professional designations by an insurance producer in the sale of life insurance and annuities.

The recently enacted Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the “Act”) places a high level of importance on state regulation of the appropriate use of certifications and professional designations in the sale of insurance products. In an effort to provide incentives to states to adopt such regulations, the Act offers state agencies that promulgate such regulations federal grants of between \$100,000 and \$600,000 towards enhanced protection of seniors in connection with the sale and marketing of financial products. In order for the Department to be considered for the grants for 2011, and the subsequent two years, a rule governing the use of senior-specific certifications and designations in the sale of life insurance and annuities, and another governing suitability had to be promulgated by December 31, 2010 and must be maintained in effect. Given the state’s fiscal crisis and the constraints on the Department’s budget, the federal grant money would fund critical efforts to protect consumers.

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

Subject: Use of Senior-Specific Certifications and Professional Designations in the Sale of Life Insurance and Annuities.

Purpose: To protect consumers from misleading use of senior-specific certifications and designations in the sale of life insurance or annuities.

Text of emergency rule: Section 225.0 Purpose.

The purpose of this Part is to set forth standards to protect consumers from misleading and fraudulent marketing practices with respect to the use of senior-specific certifications and professional designations in the solicitation, sale or purchase of, or advice made in connection with, a life insurance policy or annuity contract.

Section 225.1 Applicability.

This Part shall apply to any solicitation, sale or purchase of, or advice made in connection with, a life insurance policy or annuity contract by an insurance producer.

Section 225.2 Prohibited uses of senior-specific certifications and professional designations.

(a)(1) No insurance producer shall use a senior-specific certification or professional designation that indicates or implies in such a way as to mislead a purchaser or prospective purchaser that the insurance producer has special certification or training in advising or providing services to seniors in connection with the solicitation, sale or purchase of a life insurance policy or annuity contract or in the provision of advice as to the value of or the advisability of purchasing or selling a life insurance policy or annuity contract, either directly or indirectly through publications or writings, or by issuing or promulgating analyses or reports related to a life insurance policy or annuity contract.

(2) The prohibited use of senior-specific certifications or professional designations includes use of:

(i) a certification or professional designation by an insurance producer who has not actually earned or is otherwise ineligible to use such certification or designation;

(ii) a nonexistent or self-conferred certification or professional designation;

(iii) a certification or professional designation that indicates or implies a level of occupational qualifications obtained through education, training or experience that the insurance producer using the certification or designation does not have; and

(iv) a certification or professional designation that was obtained from a certifying or designating organization that:

(a) is primarily engaged in the business of instruction in sales or marketing;

(b) does not have reasonable standards or procedures for assuring the competency of its certificants or designees;

(c) does not have reasonable standards or procedures for monitoring and disciplining its certificants or designees for improper or unethical conduct; or

(d) does not have reasonable continuing education requirements for its certificants or designees in order to maintain the certification or designation.

(b) There is a rebuttable presumption that a certifying or designating organization is not disqualified solely for purposes of subdivision (a)(2)(iv) of this section when the certification or designation issued from the organization does not primarily apply to sales or marketing and when the organization or the certification or designation in question has been accredited by:

(1) The American National Standards Institute (ANSI);

(2) The National Commission for Certifying Agencies; or

(3) any organization that is on the U.S. Department of Education's list entitled "Accrediting Agencies Recognized for Title IV Purposes."

(c) In determining whether a combination of words or an acronym standing for a combination of words constitutes a certification or professional designation indicating or implying that a person has special certification or training in advising or providing services to seniors, factors to be considered shall include:

(1) use of one or more words such as "senior," "retirement," "elder," or like words combined with one or more words such as "certified," "registered," "chartered," "advisor," "specialist," "consultant," "planner," or like words, in the name of the certification or professional designation; and

(2) the manner in which those words are combined.

(d)(1) For purposes of this Part, a job title held by an insurance producer within an organization or other entity that is licensed or registered by a state or federal financial services regulatory agency shall not be deemed a certification or professional designation, unless it is used in a manner that would confuse or mislead a reasonable consumer, when the job title:

(i) indicates seniority or standing within the organization or other entity; or

(ii) specifies an individual's area of specialization within the organization or other entity.

(2) For purposes of this subdivision, financial services regulatory agency includes an agency that regulates insurers, insurance producers, broker-dealers, investment advisers, or investment companies as defined under the Investment Company Act of 1940.

Section 225.3 Violations.

A contravention of this Part shall be deemed to be an unfair method of competition or an unfair or deceptive act and practice in the conduct of the business of insurance in this state and shall be deemed to be a trade practice constituting a determined violation, as defined in section 2402(c) of the Insurance Law and shall be a violation of section 2403 of the Insurance Law.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire September 19, 2011.

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

Regulatory Impact Statement

1. Statutory authority: The Superintendent's authority for promulgation of this rule derives from sections 201, 301, 2103, 2104, 2403, 2110, and 4525 the Insurance Law.

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

Sections 2103 and 2104 provide the Superintendent with licensing authority over insurance agents and brokers.

Section 2110 authorizes the Superintendent to investigate and discipline those licensees.

Section 2403 prohibits any person from engaging in this state in any trade practice constituting a defined violation or a determined violation as defined in Article 24.

Section 4525 specifically subjects fraternal benefit societies to certain provisions of Article 21, as well as to any other section that specifically applies to fraternal benefit societies.

2. Legislative objectives: Various sections of the Insurance Law address advertisements, statements and representations of licensees used in the solicitation of insurance. These sections seek to protect consumers and insurers in New York by establishing prohibitions and uniform standards governing the dissemination of such information to the public. Although this regulation is directed to certain practices involving the sale of life insurance and annuity contracts, many of the provisions of the law pursuant to which this regulation is promulgated apply equally to other kinds of insurers. In addition, certain other Insurance Law provisions and regulations promulgated thereunder may have corresponding applicability to other kinds of insurance. In any case, the focus of this regulation to life insurance and annuity contracts should not be construed to imply that similar prohibitions do not apply to, or that corrective action should not be implemented for, other types of insurers or other kinds of insurance.

Further, the recently enacted Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Act") places a high level of importance on state regulation of the appropriate use of certifications and professional designations in the sale of insurance products. To encourage state regulation, the Act offers those state agencies with such regulations in effect federal grants to fund specified regulatory activities that provide enhanced protection of seniors in connection with the sale and marketing of financial products.

This rule sets forth standards to protect consumers from misleading and fraudulent marketing practices with respect to the use of senior-specific certifications and professional designations in the solicitation, sale or purchase of, or advice made in connection with, a life insurance policy or annuity contract. It prohibits the use of a senior-specific certification or professional designation by an insurance producer in such a way as to mislead a purchaser or prospective purchaser into believing that the insurance producer has special certification or training in advising or providing services to seniors in connection with the sale of life insurance and annuities.

3. Needs and benefits: Seniors are often misled and harmed by insurance producers' use of senior-specific certifications and designations, which wrongly imply the existence of expertise and knowledge of senior matters. Misleading certifications and professional designations such as "certified elder planning specialist" and "certified senior advisor" are used by insurance producers to gain the confidence of seniors by creating an impression of expertise and knowledge. However, many of these designations are obtained by insurance producers in a manner that requires little more than the payment of a fee.

In recent years, the media has reported cases of unsuitable sales to elderly clients by insurance producers who utilized misleading senior-specific certifications or designations, which resulted in the loss of seniors' savings. Federal and state legislators and regulators, in responding to such reports, have proposed and adopted prohibitions on the misleading use of senior-specific designations. In 2008, the National Association of Insurance Commissioners ("NAIC") adopted

a new Model Regulation on the Use of Senior-Specific Certifications and Professional Designations in the Sale of Life Insurance and Annuities (“the NAIC Model”). While more than 15 states have implemented some form of the NAIC Model, New York has no statute or regulation that specifically provides a consumer protection that prohibits the misleading use of senior-specific certifications or professional designations by an insurance producer in the sale of life insurance and annuities. In recognition of the need to provide such consumer protection, the Insurance Department is adopting the NAIC Model, with minimal modifications, as Part 225 to Title 11 NYCRR (Regulation 199).

4. **Costs:** Insurance producers should not incur additional costs to comply with this rule. The acts prohibited by the rule comport with those prohibited by Insurance Law Article 24. The rule clarifies the prohibitions without imposing new obligations.

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

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

6. **Paperwork:** The rule does not impose any reporting or recordkeeping requirements on affected insurance producers.

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

8. **Alternatives:** The Insurance Department considered not implementing the NAIC Model and proceeding under the Department’s more general enforcement authority under Article 24. However, because of the misleading and fraudulent marketing practices reported in recent years, the Department determined that a regulation would be the best way to address the situation.

An outreach draft of the regulation was posted on the Department’s website on October 5, 2010 for a 14-day comment period. Interested parties, such as the Life Insurance Council of New York (LICONY), a life insurance industry trade association, and the National Association of Insurance and Financial Advisors - New York State (NAIFA- New York State), an agent trade association, supported the adoption of this Part in written comments and/or discussions with the Insurance Department.

9. **Federal standards:** There are no minimum standards imposed by the federal government for the same or similar subject area.

10. **Compliance schedule:** Insurance producers who currently make appropriate use of senior-specific certifications and professional designations in the solicitation, sale or purchase of, or advice made in connection with, a life insurance policy or annuity contract should not need to change their sales practices. The acts prohibited by the rule comport with those prohibited by Insurance Law Article 24. The rule clarifies the prohibitions without imposing new obligations.

Regulatory Flexibility Analysis

1. **Small businesses:** The Insurance Department finds that this rule will not impose any adverse economic impact on small businesses and will not impose any reporting or recordkeeping requirements or compliance costs on small businesses.

This rule is substantially the same as the National Association of Insurance Commissioners’ (“NAIC”) Model regulation on the Use of Senior-Specific Certifications and Professional Designations in the Sale of Life Insurance and Annuities and is directed to licensed insurance producers within New York State. The acts prohibited by the rule comport with those prohibited by Insurance Law Article 24. The rule clarifies the prohibitions without imposing new obligations. The rule does not impose any additional compliance requirements on insurance producers.

2. **Local governments:** The Insurance Department finds that this rule will not impose any adverse compliance requirements or adverse impacts on local governments. The basis for this finding is that this rule is directed at insurance producers, none of which are local governments.

Rural Area Flexibility Analysis

1. **Types and estimated numbers of rural areas:** Insurance producers covered by this rule do business in every county in this state, includ-

ing rural areas as defined under State Administrative Procedure Act Section 102(13).

2. **Reporting, recordkeeping and other compliance requirements, and professional services:** The rule prohibits the misuse of senior-specific certifications and professional designations by insurance producers in connection with the solicitation, sale, or purchase of, or advice made in connection with, a life insurance policy or annuity contract.

The rule does not impose any reporting, recordkeeping, or professional services requirements on affected insurance producers.

3. **Costs:** Insurance producers should not incur additional costs to comply with this rule. The acts prohibited by the rule comport with those prohibited directly by Insurance Law Article 24. The rule clarifies the prohibitions without imposing new obligations.

4. **Minimizing adverse impact:** This rule should not result in an adverse impact on rural areas.

5. **Rural area participation:** Affected parties doing business in rural areas of the State had the opportunity to comment on the draft of the rule posted on the Department website during the two-week comment period that commenced on October 5, 2010.

Job Impact Statement

The Insurance Department finds that this rule will have little or no impact on jobs and employment opportunities. This rule sets forth standards to protect consumers from misleading and fraudulent sales practices with respect to the use of senior-specific certifications and professional designations by insurance producers in the solicitation, sale, or purchase of, or advice made in connection with, life insurance policies and annuity contracts.

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

EMERGENCY RULE MAKING

Suitability in Annuity Transactions

I.D. No. INS-28-11-00002-E

Filing No. 567

Filing Date: 2011-06-22

Effective Date: 2011-06-22

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

Action taken: Addition of Part 224 (Regulation 187) to Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 308, 309, 2110, 2123, 2208, 3209, 4226 and 4525; and art. 24

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

Specific reasons underlying the finding of necessity: This Part requires life insurance companies and fraternal benefit societies (“insurers”) to set standards and procedures for recommendations to consumers with respect to annuity contracts so that the insurance needs and financial objectives of consumers at the time of a transaction are appropriately addressed.

As a result of a low interest rate environment, unsuitable annuities have been aggressively marketed to this state’s most vulnerable residents, particularly senior citizens. In New York alone, life insurance companies wrote \$17 billion in annuity premiums in 2009. The increased complexity of annuities, including the significant investment risk assumed by purchasers of some annuity products, requires the immediate adoption of this Part, which provides critical consumer protections in all annuity sales transactions.

The recently enacted Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the “Act”) places a high level of importance on state regulation of the appropriate use of certifications and professional designations in the sale of insurance products. In an effort to provide incentives to states to adopt such regulations, the Act offers state agencies that promulgate such regulations federal grants of between \$100,000 and \$600,000 towards enhanced protection of seniors in connection with the sale and marketing of financial products. In order for the Department to be considered for the grants for 2011, and the subsequent two years, a rule governing suitability, and another regarding senior-specific certifications and designations in the sale of life insurance and annuities, and another

governing suitability had to be promulgated by December 31, 2010 and must be maintained in effect. Given the state's fiscal crisis and the constraints on the Department's budget, the federal grant money would fund critical efforts to protect consumers.

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

Subject: Suitability in Annuity Transactions.

Purpose: Set forth standards and procedures for recommendations to consumers with respect to annuity contracts.

Text of emergency rule: Section 224.0 Purpose.

The purpose of this Part is to require insurers to set forth standards and procedures for recommendations to consumers with respect to annuity contracts so that the insurance needs and financial objectives of consumers at the time of the transaction are appropriately addressed. These standards and procedures are substantially similar to the National Association of Insurance Commissioners' Suitability in Annuity Transactions Model Regulation ("NAIC Model") for annuities, and the Financial Industry Regulatory Authority's current National Association of Securities Dealers ("NASD") Rule 2310 for securities. To date, more than 30 states have implemented the NAIC Model, while NASD Rule 2310 has applied nationwide for nearly 20 years. Accordingly, this Part intends to bring these national standards for annuity contract sales to New York.

Section 224.1 Applicability.

This Part shall apply to any recommendation to purchase or replace an annuity contract made to a consumer on or after June 30, 2011 by an insurance producer or an insurer, where no insurance producer is involved, that results in the purchase or replacement recommended.

Section 224.2 Exemptions.

Unless otherwise specifically included, this Part shall not apply to transactions involving:

(a) a direct response solicitation where there is no recommendation made; or

(b) a contract used to fund:

(1) an employee pension or welfare benefit plan that is covered by the Employee Retirement and Income Security Act (ERISA);

(2) a plan described by Internal Revenue Code sections 401(a), 401(k), 403(b), 408(k) or 408(p), as amended, if established or maintained by an employer;

(3) a government or church plan defined in Internal Revenue Code section 414, a government or church welfare benefit plan, or a deferred compensation plan of a state or local government or tax exempt organization under Internal Revenue Code section 457;

(4) a nonqualified deferred compensation arrangement established or maintained by an employer or plan sponsor; or

(5) a settlement or assumption of liabilities associated with personal injury litigation or any dispute or claim resolution process.

Section 224.3 Definitions.

For the purposes of this Part:

(a) Consumer means the prospective purchaser of an annuity contract.

(b) Insurer means a life insurance company defined in Insurance Law section 107(a)(28), or a fraternal benefit society as defined in Insurance Law section 4501(a).

(c) Recommendation means advice provided by an insurance producer, or an insurer where no insurance producer is involved, to a consumer that results in a purchase or replacement of an annuity contract in accordance with that advice.

(d) Replace or Replacement means a transaction subject to Part 51 of this Title (Regulation 60) and involving an annuity contract.

(e) Suitability information means information that is reasonably appropriate to determine the suitability of a recommendation, including the following:

(1) age;

(2) annual income;

(3) financial situation and needs, including the financial resources used for the funding of the annuity;

(4) financial experience;

(5) financial objectives;

(6) intended use of the annuity;

(7) financial time horizon;

(8) existing assets, including investment and life insurance holdings;

(9) liquidity needs;

(10) liquid net worth;

(11) risk tolerance; and

(12) tax status.

Section 224.4 Duties of Insurers and Insurance Producers.

(a) In recommending to a consumer the purchase or replacement of an annuity contract, the insurance producer, or the insurer where no insurance producer is involved, shall have reasonable grounds for believing that the recommendation is suitable for the consumer on the basis of the

facts disclosed by the consumer as to the consumer's investments and other insurance policies or contracts and as to the consumer's financial situation and needs, including the consumer's suitability information, and that there is a reasonable basis to believe all of the following:

(1) the consumer has been reasonably informed of various features of the annuity contract, such as the potential surrender period and surrender charge, availability of cash value, potential tax implications if the consumer sells, surrenders or annuitizes the annuity contract, death benefit, mortality and expense fees, investment advisory fees, potential charges for and features of riders, limitations on interest returns, guaranteed interest rates, insurance and investment components, and market risk;

(2) the consumer would benefit from certain features of the annuity contract, such as tax-deferred growth, annuitization or death or living benefit;

(3) the particular annuity contract as a whole, the underlying subaccounts to which funds are allocated at the time of purchase or replacement of the annuity contract, and riders and similar product enhancements, if any, are suitable (and in the case of a replacement, the transaction as a whole is suitable) for the particular consumer based on the consumer's suitability information; and

(4) in the case of a replacement of an annuity contract, the replacement is suitable including taking into consideration whether:

(i) the consumer will incur a surrender charge, be subject to the commencement of a new surrender period, lose existing benefits (such as death, living or other contractual benefits), be subject to tax implications if the consumer surrenders or borrows from the annuity contract, or be subject to increased fees, investment advisory fees or charges for riders and similar product enhancements;

(ii) the consumer would benefit from annuity contract enhancements and improvements; and

(iii) the consumer has had another annuity replacement, in particular, a replacement within the preceding 36 months.

(b) Prior to the recommendation of a purchase or replacement of an annuity contract, an insurance producer, or an insurer where no insurance producer is involved, shall make reasonable efforts to obtain the consumer's suitability information.

(c) Except as provided under subdivision (d) of this section, an insurer shall not issue an annuity contract recommended to a consumer unless there is a reasonable basis to believe the annuity contract is suitable based on the consumer's suitability information.

(d)(1) Except as provided under paragraph (2) of this subdivision, neither an insurance producer, nor an insurer, shall have any obligation to a consumer under subdivision (a) or (c) of this section related to any annuity transaction if:

(i) no recommendation is made;

(ii) a recommendation was made and was later found to have been prepared based on materially inaccurate material information provided by the consumer;

(iii) a consumer refuses to provide relevant suitability information and the annuity purchase or replacement is not recommended; or

(iv) a consumer decides to enter into an annuity purchase or replacement that is not based on a recommendation of the insurer or the insurance producer.

(2) An insurer's issuance of an annuity contract subject to paragraph (1) of this subdivision shall be reasonable under all the circumstances actually known to the insurer at the time the annuity contract is issued.

(e) An insurance producer or an insurer, where no insurance producer is involved, shall at the time of purchase or replacement:

(1) document any recommendation subject to subdivision (a) of this section;

(2) document the consumer's refusal to provide suitability information, if any; and

(3) document that an annuity purchase or replacement is not recommended if a consumer decides to enter into an annuity purchase or replacement that is not based on the insurance producer's or insurer's recommendation.

(f) An insurer shall establish a supervision system that is reasonably designed to achieve the insurer's and insurance producers' compliance with this Part. An insurer may contract with a third party to establish and maintain a system of supervision with respect to insurance producers.

(g) An insurer shall be responsible for ensuring that every insurance producer recommending the insurer's annuity contracts is adequately trained to make the recommendation.

(h) No insurance producer shall make a recommendation to a consumer to purchase an annuity contract about which the insurance producer has inadequate knowledge.

(i) An insurance producer shall not dissuade, or attempt to dissuade, a consumer from:

(1) truthfully responding to an insurer's request for confirmation of suitability information;

- (2) filing a complaint with the superintendent; or
 (3) cooperating with the investigation of a complaint.

Section 224.5 Insurer Responsibility.

The insurer shall take appropriate corrective action for any consumer harmed by a violation of this Part by the insurer, the insurance producer, or any third party that the insurer contracts with pursuant to subdivision (f) of section 224.4 of this Part. In determining any penalty or other disciplinary action against the insurer, the superintendent may consider as mitigation any appropriate corrective action taken by the insurer, or whether the violation was part of a pattern or practice on the part of the insurer.

Section 224.6 Recordkeeping.

All records required or maintained under this Part, whether by an insurance producer, an insurer, or other person shall be maintained in accordance with Part 243 of this Title (Regulation 152).

Section 224.7 Violations.

A contravention of this Part shall be deemed to be an unfair method of competition or an unfair or deceptive act and practice in the conduct of the business of insurance in this state and shall be deemed to be a trade practice constituting a determined violation, as defined in section 2402(c) of the Insurance Law, except where such act or practice shall be a defined violation, as defined in section 2402(b) of the Insurance Law, and in either such case shall be a violation of section 2403 of the Insurance Law.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire September 19, 2011.

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

Regulatory Impact Statement

1. Statutory authority: The Superintendent's authority for promulgation of this rule derives from sections 201, 301 308, 309, 2110, 2123, 2208, 3209, 4226, 4525, and Article 24 of the Insurance Law.

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

Section 308 authorizes the Superintendent to address to any authorized insurer or its officers any inquiry relating to its transactions or condition or any matter connected therewith.

Section 309 authorizes the Superintendent to make examinations into the affairs of entities doing or authorized to do insurance business in this state as often as the Superintendent deems it expedient.

Section 2110 provides grounds for the Superintendent to refuse to renew, revoke or suspend the license of an insurance producer if, after notice and hearing the licensee has violated any insurance laws or regulations.

Section 2123 prohibits an agent or representative of an insurer from making misrepresentations, misleading statements and incomplete comparisons.

Section 2208 provides that an officer or employee of a licensed insurer or a savings bank who has been certified pursuant to Article 22 is subject to section 2123 of the Insurance Law.

Section 3209 mandates disclosure requirements in the sale of life insurance, annuities, and funding agreements.

Section 4226 prohibits an authorized life, or accident and health insurer from making misrepresentations, misleading statements, and incomplete comparisons.

Section 4525 applies Articles 2, 3, and 24 of the Insurance Law, and Insurance Law Section 2110(a), (b), and (d) through (f), and Sections 2123, 3209, and 4226 to authorized fraternal benefit societies.

Article 24 regulates trade practices in the insurance industry by prohibiting practices that constitute unfair methods of competition or unfair or deceptive acts or practices.

2. Legislative objectives: The Legislature has long been concerned with the issue of suitability in sales of life insurance and annuities. Chapter 616 of the Laws of 1997, which, in part, amended Insurance Law § 308, required the Superintendent to report to the Governor, Speaker of the Assembly, and the majority leader of the Senate on the advisability of adopting a law that would prohibit an agent from recommending the purchase or replacement of any individual life insurance policy, annuity contract or funding agreement without reasonable grounds to believe that the recommendation is not unsuitable for the applicant (the "Report"). The Legislature set forth four criteria that an agent would consider in selling products, including: a consumer's financial position, the consumer's need for new or additional insurance, the goal of the consumer and the value, benefits and costs of any existing insurance.

In drafting the Report, the Department considered the legislative changes set forth in Chapter 616 of the Laws of 1997, and the Department's subsequent regulatory requirements that were designed to improve the

disclosure requirements to consumers that purchased or replaced life insurance policies and annuity products. It was the Department's determination in the Report that additional time was needed to assess the efficacy of those changes.

Since the Department's Report, the purchase of annuities have become complex financial transactions resulting in a greater need for consumers to rely on professional advice and assistance in understanding available annuities and making purchase decisions. While the Financial Industry Regulatory Authority ("FINRA") regulation and standards for the sale of certain variable annuities have existed nationwide for some time, the National Association of Insurance Commissioners ("NAIC") adopted, in 2003 (and further revised in 2010), the Suitability in Annuity Transactions Model Regulation (the "NAIC Model") for all annuity transactions. To date, more than 30 states have implemented the NAIC Model. Accordingly, this Part is intended to bring these national standards for annuity contract sales to New York. In addition, in light of a low interest rate environment that encourages unsuitable annuity sales, and federal incentives to impose suitability standards, the minimum suitability standards are critical.

3. Needs and benefits: This rule requires insurers to set forth standards and procedures for recommendations to consumers with respect to annuity contracts so that the insurance needs and financial objectives of consumers at the time of the transaction are appropriately addressed. It regulates the activities of insurers and producers who make recommendations to consumers to purchase or replace annuity contracts to ensure that insurers and producers make suitable recommendations based on relevant information obtained from the consumers.

As a result of a low interest rate environment, unsuitable annuities have been aggressively marketed to this state's most vulnerable residents, particularly senior citizens. In New York alone, life insurance companies wrote \$17 billion in annuity premiums in 2009. The increased complexity of annuities, including the significant investment risk assumed by purchasers of some annuity products, requires the immediate adoption of this Part, which provides critical consumer protections in all annuity sales transactions. In fact, the recently enacted Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Act") places such a high level of importance on state regulation of the suitability of annuities that, in an effort to provide incentives to states to adopt suitability requirements, the Act offers state agencies that promulgate suitability regulations federal grants of between \$100,000 to \$600,000 towards enhanced protection of seniors in connection with the sale and marketing of financial products.

4. Costs: Section 224.4(f) of New York Comp. Codes R. & Reg., tit. 11, Part 224 ("Regulation 187") requires an insurer to establish a supervision system designed to ensure an insurer's and its insurance producers' compliance with the provisions of Regulation 187. Additionally, § 224.4(g) requires an insurer to be responsible for ensuring that every insurance producer recommending the insurer's annuity contracts is adequately trained to make the recommendation.

As previously stated, the standards and procedures required by this rule are substantially similar to the standards and procedures set forth in the NAIC Model and the NASD Rule 2310. Thus, insurers selling variable annuities will likely already have in place the required supervisory system and training procedures to comply with NASD Rule 2310 and this rule. Similarly, insurers who sell fixed annuities in states where the NAIC Model previously has been adopted will likely have in place the required supervisory system and training procedures to comply with the requirements of the NAIC Model and this rule. As a result, most insurers should incur minimal additional costs in order to comply with the requirements of this rule.

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

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

6. Paperwork: The rule requires an insurance producer or an insurer to document: any recommendation subject to § 224.4(a) of Regulation 187; the consumer's refusal to provide suitability information, if any; and that an annuity purchase or replacement is not recommended if a consumer decides to enter into an annuity purchase or replacement that is not based on the insurance producer's or insurer's recommendation. Additionally, all records required or maintained in accordance with this rule must be maintained in accordance with Part 243 (Regulation 152).

The documentation required in this rule is substantially similar to the requirements of the aforementioned NAIC Model and NASD Rule 2310. As the NAIC Model has been implemented in many other states and NASD Rule 2310 is imposed nationwide, many companies are already complying with the similar provisions in other jurisdictions. As a result, minimal additional paperwork is expected to be required of most insurers in order to comply with the requirements of this rule.

7. Duplication: Sales of insurance products that are securities under federal law, such as variable annuities, are required to meet the suitability standards and procedures in the NASD Rule 2310. However, there currently exists no state or federal rule that specifically requires application of suitability standards in the sales of all annuities to New York consumers.

8. Alternatives: This rule is a modified version of the NAIC Model. NAIC Model provisions detailing the procedures and standards of the supervision system required to be established by an insurer and the insurance producer training requirements were not included in this rule.

In 2009, the Department held four public hearings throughout the state to gather information about suitability in order to ascertain whether additional oversight and regulation was needed to protect consumers when they are considering the purchase of life insurance and annuities in New York State and if so, the scope and form of such regulation. Testimony at the public hearings by the life insurance industry and agent trade associations supported adoption of a regulation setting forth standards and procedures for recommendations to consumers that was consistent with the NAIC Model.

An outreach draft of this regulation was posted on the Department's website for public comment. In addition to submitted written comments, the Life Insurance Council of New York (LICONY), a life insurance industry trade association, and the National Association of Insurance and Financial Advisors - New York State (NAIFA- New York State), an agent trade association, met with Department representatives to discuss the draft. Some revisions were made to the draft based on these comments and discussions. NAIFA-New York State remains concerned about producer education and training provisions in the regulation and supports the NAIC Model provisions, which permit an insurance producer to rely on insurer-provided product-specific training standards and materials to comply with the regulation.

9. Federal standards: While NASD Rule 2310 requires suitability standards to be met in the sale of insurance products which are securities under federal law, there are no minimum federal standards for the sale of fixed annuity products.

10. Compliance schedule: The regulation applies to any recommendation to purchase or replace an annuity contract made to a consumer on or after June 30, 2011 in order to provide insurers and producers adequate time to implement the standards and procedures to comply with the requirements of the rule.

Regulatory Flexibility Analysis

1. Effect of the rule: This rule requires insurers to set forth standards and procedures for recommendations to consumers with respect to annuity contracts so that the insurance needs and financial objectives of consumers at the time of the transaction are appropriately addressed.

This rule is directed to insurers and insurance producers. Most of insurance producers are small businesses within the definition of "small business" set forth in section 102(8) of the State Administrative Procedure Act, because they are independently owned and operated, and employ 100 or fewer individuals.

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

2. Compliance requirements: The affected parties are required to make suitable recommendations for the purchase or replacement of annuity contracts based on relevant information obtained from the consumers. The rule requires an insurance producer to document: any recommendation subject to Section 224.4(a) of this Part, the consumer's refusal to provide suitability information, if any, and that an annuity purchase or replacement is not recommended if a consumer decides to enter into an annuity purchase or replacement that is not based on the insurance producer's recommendation. Furthermore, all records required under this rule are to be maintained in accordance with Part 243 of this Title.

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

4. Compliance costs: Minimum additional costs are anticipated to be incurred by regulated parties. While there may be costs associated with the compliance of this rule, these costs should be minimal.

5. Economic and technological feasibility: Although there may be minimal additional costs associated with the new rule, compliance is economically feasible for small businesses.

6. Minimizing adverse impact: There is little if no adverse economic impact on small businesses. The compliance, documentation and record-keeping requirements of this rule should have little impact on small businesses. Differing compliance or reporting requirements or timetables for small businesses were not necessary.

7. Small business and local government participation: Affected small businesses had the opportunity to comment at suitability public hearings held by the Insurance Department last year and on the outreach draft of the rule, which was posted on the Department website for a two-week comment period.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: Insurers and insurance producers covered by this rule do business in every county in this state, including rural areas as defined under State Administrative Procedure Act Section 102(13).

2. Reporting, recordkeeping and other compliance requirements, and professional services: The rule requires an insurance producer or an insurer to document: any recommendation subject to section 224.4(a) of this Part; the consumer's refusal to provide suitability information, if any; and that an annuity purchase or replacement is not recommended if a consumer decides to enter into an annuity purchase or replacement that is not based on the insurance producer's or insurer's recommendation.

All records required or maintained under this Part shall be maintained in accordance with Part 243 (Regulation 152).

3. Costs: The standards and procedures required by this rule are substantially similar to the National Association of Insurance Commissioners' "Suitability in Annuity Transactions" Model Regulation ("NAIC Model") for annuities, and the Financial Industry Regulatory Authority's current National Association of Securities Dealers ("NASD") Rule 2310 for securities. Accordingly, insurers that currently sell variable annuities will likely already have in place the required supervisory system and training procedures to comply with NASD Rule 2310 and this rule. Similarly, insurers that sell fixed annuities in states in which the NAIC Model previously has been adopted will likely have in place the required supervisory system and training procedures to comply with the requirements of the NAIC Model and this rule. As a result, most insurers will incur minimal additional costs in order to comply with the requirements of this rule.

4. Minimizing adverse impact: This rule applies to insurers and insurance producers that do business throughout New York State. As previously stated, the standards and procedures required by this rule are substantially similar to the NAIC Model for annuities and the NASD Rule 2310 for securities. Since the NAIC Model has been implemented in many other states and NASD Rule 2310 is imposed nationwide, many companies are already complying with the provisions contained in this rule.

5. Rural area participation: Affected parties doing business in rural areas of the State had the opportunity to comment at suitability public hearings held by the Insurance Department last year and on the outreach draft of the rule, which was posted on the Department website for a two-week comment period.

Job Impact Statement

The Insurance Department finds that this rule will have little or no impact on jobs and employment opportunities. This rule requires insurers to set forth standards and procedures for recommendations to consumers with respect to annuity contracts so that the insurance needs and financial objectives of consumers at the time of the transaction are appropriately addressed.

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

Department of Labor

**EMERGENCY
RULE MAKING**

Restrictions on the Consecutive Hours of Work for Nurses As Enacted in Section 167 of the Labor Law

I.D. No. LAB-43-10-00003-E

Filing No. 571

Filing Date: 2011-06-22

Effective Date: 2011-06-22

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

Action taken: Addition of Part 177 to Title 12 NYCRR.

Statutory authority: Labor Law, section 21

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

Specific reasons underlying the finding of necessity: Section 167 of the Labor Law was effective July 1, 2009. However, Section 167 does not provide sufficient details with regard to what is expected of health care

providers so as to avoid mandatory overtime for nurses, except in emergency situations. Section 167 was enacted to improve the health care environment for patients and the working environment for nurses.

Subject: Restrictions on the consecutive hours of work for nurses as enacted in section 167 of the Labor Law.

Purpose: To clarify the emergency circumstances under which an employer may require mandatory overtime for nurses.

Text of emergency rule: A new Part 177 is added to 12 N.Y.C.R.R. to read as follows:

PART 177

RESTRICTIONS ON CONSECUTIVE HOURS OF WORK FOR NURSES

(Statutory authority: Labor Law § 167)

§ 177.1 Application.

In accordance with Labor Law, Section 167, this Part shall apply to health care employers, who shall be prohibited from assigning mandatory overtime to nurses except in certain circumstances as described in this regulation.

§ 177.2 Definitions.

(a) "Emergency" shall mean an unforeseen event that could not be prudently planned for by a health care employer and does not regularly occur, including an unanticipated staffing emergency.

(b) "Health care disaster" shall mean a natural or other type of disaster that increases the need for health care personnel, unexpectedly affecting the county in which the nurse is employed or in a contiguous county, as more fully explained in Section 177.3 of this Part.

(c) "Health care employer" shall mean any individual, partnership, association, corporation, limited liability company or any person or group of persons acting directly or indirectly on behalf of or in the interest of the employer, who provides health care services (i) in a facility licensed or operated pursuant to article twenty-eight of the public health law, including any facility operated by the state, a political subdivision or a public corporation as defined by section sixty-six of the general construction law, or (ii) in a facility operated by the state, a political subdivision or a public corporation as defined by section sixty-six of the general construction law, operated or licensed pursuant to the mental hygiene law, the education law or the correction law.

Examples of a health care facility include, but are not limited to, hospitals, nursing homes, outpatient clinics, comprehensive rehabilitation hospitals, residential health care facilities, residential drug and alcohol treatment facilities, adult day health care programs, and diagnostic centers.

(d) "Nurse" shall mean a registered professional nurse or a licensed practical nurse as defined by article one hundred thirty-nine of the education law who provides direct patient care, regardless of whether such nurse is employed full-time, part-time, or on a per diem basis. Nurses who provide services to a health care employer through contracts with third party staffing providers such as nurse registries, temporary employment agencies, and the like, or who are engaged to perform services for health care employers as independent contractors shall also be covered by this Part.

(e) "On call" shall mean when an employee is required to be ready to perform work functions and required to remain on the employer's premises or within a proximate distance, so close thereto that s/he cannot use the time effectively for his or her own purposes. An employee who is not required to remain on the employer's premises or within a proximate distance thereto but is merely required to leave information, at his or her home or with the health care employer, where he or she may be reached is not on call.

(f) "Overtime" shall mean work hours over and above the nurse's regularly scheduled work hours. Determinations as to what constitutes overtime hours for purposes of this Part shall not limit the nurse's receipt of overtime wages to which the nurse is otherwise entitled.

(g) "Patient care emergency" shall mean a situation which is unforeseen and could not be prudently planned for, which requires nurse overtime in order to provide safe patient care as more fully explained in Section 177.3 of this Part.

(h) "Regularly scheduled work hours" shall mean the predetermined number of hours a nurse has agreed to work and is normally scheduled to work pursuant to the budgeted hours allocated to the nurse's position by the health care employer.

(1) For purposes of this Part, for full-time nurses, "the budgeted hours allocated to the nurses position" shall be the hours reflected in the employer's full-time employee (FTE) level for the unit in which the nurse is employed.

(2) If no such allocation system exists, regularly scheduled work

hours shall be determined by some other measure generally used by the health care employer to determine when an employee is minimally supposed to work.

(3) The term regularly scheduled work hours shall be interpreted in a manner that is consistent with any relevant collective bargaining agreement and other statutes or regulations governing the hours of work, if any.

(4) Regularly scheduled work hours shall include pre-scheduled on-call time subject to the exceptions set forth in Section 177.3(b)(1) of this Part and the time spent for the purpose of communicating shift reports regarding patient status necessary to ensure patient safety.

(5) For a part-time nurse, regularly scheduled work hours mean those hours a part-time nurse is normally scheduled to work pursuant to the employer's budgeted hours allocated. If advance scheduling is not used for part-time nurses, the percentage of full-time equivalent, which shall be established by the health care employer (e.g. a 50% part-time employee), shall serve as the measure of regularly scheduled work hours for a part-time nurse.

(6) For per diem, privately contracted, or employment agency nurses, the employment contract and the hours provided therein shall serve as the basis for determining the nurse's regularly scheduled work hours.

§ 177.3 Mandatory Overtime Prohibition

(a) Notwithstanding any other provision of law, a health care employer shall not require a nurse to work overtime. On call time shall be considered time spent working for purposes of determining whether a health care employer has required a nurse to work overtime. No employer may use on-call time as a substitute for mandatory overtime.

(b) The following exceptions shall apply to the prohibition against mandatory overtime for nurses:

(1) Health Care Disaster. The prohibition against mandatory overtime shall not apply in the case of a health care disaster, such as a natural or other type of disaster unexpectedly affecting the county in which the nurse is employed or in a contiguous county that increases the need for health care personnel or requires the maintenance of the existing on-duty personnel to maintain staffing levels necessary to provide adequate health care coverage. A determination that a health care disaster exists shall be made by the health care employer and shall be reasonable under the circumstances. Examples of health care disasters within the meaning of this Part include unforeseen events involving multiple serious injuries (e.g. fires, auto accidents, a building collapse), chemical spills or releases, a widespread outbreak of an illness requiring hospitalization for many individuals in the community served by the health care employer, or the occurrence of a riot, disturbance, or other serious event within an institution which substantially affects or increases the need for health care services.

(2) Government Declaration of Emergency. The prohibition against mandatory overtime shall not apply in the case of a federal, state or local declaration of emergency in effect pursuant to State law or applicable federal law in the county in which the nurse is employed or in a contiguous county.

(3) Patient Care Emergency. The prohibition against mandatory overtime shall not apply in the case of a patient care emergency, which shall mean a situation that is unforeseen and could not be prudently planned for and, as determined by the health care employer, that requires the continued presence of the nurse to provide safe patient care, subject to the following limitations:

(i) Before requiring an on-duty nurse to work beyond his or her regularly scheduled work hours in connection with a patient care emergency, the health care employer shall make a good faith effort to have overtime covered on a voluntary basis or to otherwise secure nurse coverage by utilizing all methods set forth in its Nurse Coverage Plan required pursuant to Section 177.4 of this Part. The health care employer shall document attempts to secure nurse coverage through use of phone logs or other records appropriate to this purpose.

(ii) A patient care emergency cannot be established in a particular circumstance if that circumstance is the result of routine nurse staffing needs due to typical staffing patterns, typical levels of absenteeism, and time off typically approved by the employer for vacation, holidays, sick leave, and personal leave, unless a Nurse Coverage Plan which meets the requirements of Section 177.4 is in place, has been fully implemented and utilized, and has failed to produce staffing to meet the particular patient care emergency. Nothing in this provision shall be construed to limit an employer's right to deny discretionary time off (e.g., vacation time, personal time, etc.) where the employer is contractually or otherwise legally permitted to do so.

(iii) A patient care emergency will not qualify for an exception to the provisions of this Part if it was caused by the health care employer's

failure to develop or properly and fully implement a Nurse Coverage Plan as required under Section 177.4 of this Part.

(4) Ongoing Medical or Surgical Procedure. The prohibition against mandatory overtime shall not apply in the case of an ongoing medical or surgical procedure in which the nurse is actively engaged and in which the nurse's continued presence through the completion of the procedure is needed to ensure the health and safety of the patient. Determinations with regard to whether the nurse's continued active engagement in the procedure is necessary shall be made by the nursing supervisor or nurse manager supervising such nurse.

(c) Nothing in this Part shall prohibit a nurse from voluntarily working overtime. A nurse may signify his or her willingness to work overtime by either: a) agreeing to work a particular day or shift as requested, b) agreeing to be placed on a voluntary overtime list or roster, or c) agreeing to prescheduled on-call time pursuant to a collective bargaining agreement or other written contract or agreement to work.

§ 177.4 Nurse Coverage Plans

(a) Every health care employer shall implement a Nurse Coverage Plan, taking into account typical patterns of staff absenteeism due to illness, leave, bereavement and other similar factors. Such plan should also reflect the health care employer's typical levels and types of patients served by the health care facility.

(b) The Plan shall identify and describe as many alternative staffing methods as are available to the health care employer to ensure adequate staffing through means other than use of mandatory overtime including contracts with per diem nurses, contracts with nurse registries and employment agencies for nursing services, arrangements for assignment of nursing floats, requesting an additional day of work from off-duty employees, and development and posting of a list or roster of nurses seeking voluntary overtime.

(c) The Plan must identify the Supervisor(s) or Administrator(s) at the health care facility or at another identified location who will make the final determination as to when it is necessary to utilize mandatory overtime. The Plan may not require a nurse to find his or her own shift replacement or to self-mandate overtime.

(d) The Plan shall require documentation of all attempts to avoid the use of mandatory overtime during a patient care emergency and seek alternative staffing through the methods identified in subdivision (b) of this Section. In the event that the health care employer does utilize mandatory overtime, the documentation of such efforts to avoid the use of mandatory overtime shall be made available, upon request, to the nurse who was required to work the mandatory overtime and/or to the nurse's collective bargaining representative, provided, however, that the names and other personal identifying information about patients shall not be included unless authorized under State and federal law and regulations.

(e) The Plan shall be in writing and upon completion or amendment of such plan, it shall:

(i) be made readily available to all nursing staff through distribution to nursing staff, or conspicuously posting the Plan in a physical location accessible to nursing staff, or through other means that will ensure availability to nursing staff, e.g. posting on the employer's intranet site or its functional equivalent.

(ii) be provided to any collective bargaining representative representing nurses at the health care facility.

(iii) be provided to the Commissioner of Labor, or his or her designee, upon request.

(f) Nothing herein shall be read to establish the Nurse Coverage Plans required herein as standards to be used in assessing the health care employer's compliance with any other obligation or requirement, including facility accreditation.

(g) All such Plans were to have been prepared by October 13, 2009 in accordance with emergency regulations that were in effect. For health care employers who were not operating covered facilities on October 13, 2009, a Nurse Coverage Plan shall be in place prior to the time they commence operations.

§ 177.5 Report of Violations

Parties who wish to file complaints of violations of this Part shall follow procedures and utilize the forms set forth for this purpose on the Department's website.

§ 177.6 Conflicts with Law and Regulation; Collective Bargaining Rights Not Diminished

The provisions of this Part shall not be construed to diminish or waive any rights or obligations of any nurse or health care provider pursuant to any other law, regulation, or collective bargaining agreement.

§ 177.7 Waiver of Rights Prohibited

A health care employer covered by this Part may not utilize employee

waivers of the protections afforded under Labor Law § 167 or this Part as an alternative to compliance with such law or regulation. A health care employer who seeks such a waiver from a nurse in its employ shall be considered to have violated this Part.

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. LAB-43-10-00003-EP, Issue of October 27, 2010. The emergency rule will expire August 20, 2011.

Text of rule and any required statements and analyses may be obtained from: Teresa Stoklosa, NYS Department of Labor, State Office Campus, Building 12, Room 508, Albany, NY 12240, (518) 457-4380, email: teresa.stoklosa@dol.ny.gov

Regulatory Impact Statement

1. Statutory authority:

Section 21 of the Labor Law provides the Commissioner with authority to issue regulations governing any provision of the Labor Law as she finds necessary and proper. This rule is proposed pursuant to Section 167 of the Labor Law enacted by chapter 493 of the Laws of 2008. The effective date of the law was July 1, 2009.

2. Legislative objectives:

Legislation passed during the 2008 legislative session recognized the physical and emotional toll that mandatory overtime can take on nurses and on patient care. In response to these concerns, the legislation requires that health care employers take steps to prudently plan for adequate nursing staff coverage in their facilities so as to avoid the need to require mandatory overtime of nurses in most instances.

3. Needs and benefits:

Nurses work in a demanding and stressful environment where sound decision-making is a matter of life and death for patients. Limitations on mandatory overtime avoid successive work shifts which take a physical and mental toll on nurse's performance and can impact the quality of patient care. Labor Law Article 6, section 167 places restrictions on consecutive hours of work for nurses, except in emergency situations, while not prohibiting a nurse from voluntarily working overtime and allows an employer who experiences an unanticipated staffing emergency that does not regularly occur, to require overtime to ensure patient safety.

The enabling legislation does not provide sufficient details with regard to what is expected of health care employers so as to avoid mandatory overtime, except in emergency situations. The rule addresses these statutory gaps by requiring that covered employers develop a Nurse Coverage Plan (the Plan), by setting forth the minimum elements to be addressed in the Plan, and by requiring that the Plan be posted and made available to the Commissioner, to nursing staff and their employee representatives. At the same time, the rule clarifies circumstances under which various types of emergencies will allow health care employers to use mandatory overtime to cover nurse staffing needs.

4. Costs:

Employers in both the public and private sectors covered by this rule may have to enter into contracts with nursing staff providers such as nurses' registries, per diem nursing services, and temporary agencies to have a viable source of additional nursing staff to use in lieu of mandating overtime of current staff. The cost for individual health care employers will depend upon the extent to which the Plan relies on these contract workers and the degree of coverage that the health care employer will need. In the current environment of nursing shortages, a major medical center with several special care units requiring specially trained nursing staff may find it more difficult to fill shifts from among their own nursing staff. At the other end of the spectrum, facilities with a very small staff, few resources or in underserved or remote locations may not be able to compete to fill vacancies. At the time this legislation was before the Governor for action in 2008, the Division of Budget estimated compliance would cost approximately \$13 million in its first year. However, these projected costs - attributable to the hiring of per diem nurses necessary to ensure that sufficient nursing care is available for patients in the absence of the availability of mandatory overtime - should have been offset by savings of \$5 million, which otherwise would have been paid for such overtime.

Other than staffing needs, costs associated with the rule will be administrative. Health care employers must prepare a Nurse Coverage Plan.

The Plan must also identify and describe the alternative staffing methods the employer will use to avoid mandatory overtime. It is not anticipated that any health care employer would have to retain outside professional services to prepare the Nurse Coverage Plan. Although there are administrative costs and time associated with developing and maintaining a written Plan and a log of efforts to obtain coverage using the Plan, these costs may be offset through use of a Plan that may reduce the need for last-minute supplemental staffing.

Legal services may be required to negotiate, draft or review contracts with alternative staffing providers such as per diem agencies. It is anticipated that a vast majority of health care providers in the state already have such agreements in place or have procurement or legal staff who regularly work on such contracts.

Requirements with regard to the posting of such Plan and the logging of efforts to obtain staff coverage in compliance with the Plan will result in minimal or no additional cost.

5. Paperwork

The employer will be required to develop and post the Nurse Coverage Plan discussed above, along with all necessary paperwork to log the efforts to obtain staff coverage in compliance with the Plan. Additionally, the Nurse Coverage Plan may require the drafting of contracts with alternative staffing providers such as per diem agencies and the posting of a list of nurses seeking voluntary overtime. The rule does provide alternative, paperless options to meet this requirement including posting of the Nurse Coverage Plan on the employer's intranet or by sending electronic copies of the Plan to staff and their representatives.

6. Local government mandates:

This rule will have an impact on any county, city, town, village, school district, fire district or other special district that employ nurses. The impact will depend on the size of the facility and nursing staff and the degree to which mandatory, unscheduled overtime is currently being used on a routine basis.

7. Duplication:

This rule does not duplicate any state or federal regulations.

8. Alternatives:

One alternative is to draft regulations which allow the employers to have full discretion to make determinations regarding the existence of an emergency on an ad hoc basis. However, such discretion is inconsistent with the letter and spirit of the statute. Clearly, certain levels of absenteeism based upon sick leave, bereavement, leaves of absences, and breaks during shifts will always exist in all employment settings, including health care facilities. A health care employer must plan to cover for these expected staff absences, based upon patterns that have emerged from operating a facility and must have staffing options that address the need to provide appropriate nursing care. The Department of Labor circulated draft regulations for comment to State Agencies and other employer groups, and to various employee representative groups. In some instances, changes to the regulations were made in response to such concerns. For example, the Department of Corrections (DOCS) requested clarification regarding examples of health care disasters set forth in Section 177.3 of the regulations. The regulations were revised to include such language.

The Department received comments from one employer group, the Healthcare Association of New York State, that the regulations should provide alternatives to healthcare employers regarding the conspicuous posting of the Nurse Coverage Plans. It was suggested that the regulations authorize employers to utilize other means to make the Nurse Coverage Plans available to nursing staff such as the employer's intranet. The Department revised the regulations to allow for the use of other means to make the Nurse Coverage Plan available to nursing staff.

The Department also received a comment from employee representatives about requiring the filing of all Nurse Coverage Plans with the Commissioner of Labor. The Department considered such a filing requirement but decided it was unnecessary since the Commissioner will request such Plans once a complaint has been received about an employer. The Department heard from representatives of public sector nurses that the definition of regularly scheduled work hours should include a reference to regulations governing such typical work hours. The language in relevant sections of the rule has been changed in response to this request.

The representatives of public sector nurses had comments about the Nurse Coverage Plans and the requirement for documentation of all attempts to avoid the use of mandatory overtime during a patient care emergency. The representatives were concerned that some health care employers might have a nurse working alone and if that nurse is unable to find relief through alternative staffing methods, he or she might then have to self-mandate overtime. A Nurse Coverage plan that requires a nurse to find her own shift replacement or to self-mandate overtime is inadequate. The Department added language to Section 177.4 (c) (Nurse Coverage Plans) to require the Plan to identify the Supervisor at the health care facility who will make the final determination as to when it is necessary to utilize mandatory overtime.

Parties commenting on behalf of nurses in the public sector also asked that the regulations outline a system of record keeping regarding the documentation of all attempts to avoid the use of mandatory overtime. It was suggested that such documentation include information that would already be available in the employer's payroll records. The information provided in a nurse's complaint, the employer payroll records, and the documentation regarding all attempts to avoid mandatory overtime through the use of the Nurse Coverage Plan, should be sufficient for the

Department to complete an investigation regarding a violation of Section 167 and 12 NYCRR Part 177. The representatives also suggested that in the event a health care employer utilizes mandatory overtime for a patient care emergency, the documentation regarding the efforts to avoid the use of such mandatory overtime should be available upon request to the nurse who had to work the mandatory overtime and/or the collective bargaining representative. The Department added language to Section 177.4(d) to require that such documentation is made available, upon request, to the nurse or the collective bargaining representative. The representatives also noted that any amendment to Nurse Coverage Plans should be made available to nurses and their collective bargaining representatives. Accordingly, Section 177.4(d) now includes language regarding amendments to the Nurse Coverage Plans.

The representatives of public sector nurses also suggested that Section 177.3(c) be revised to make it clear that an individual nurse must volunteer to remain on-call regardless of any contractual provisions which provide for on-call time for nurses. The Department does not have the authority to modify the terms of collective bargaining agreements. If the collective bargaining agreement provides for on-call time for nurses, than such on-call time is presumed to be voluntary.

The representatives of public sector nurses all suggest the regulations collapse the separate and independent requirements set forth in Labor Law, Section 167(3)(c) to prudently plan for routine staffing shortages and to make good faith efforts to cover staffing on a voluntary basis before mandating overtime when a patient care emergency exists. The regulations require Nurse Coverage Plans to take into account typical patterns of absenteeism and to reflect the employer's typical levels and types of patients served in the facility. The Nurse Coverage Plan must identify and describe as many alternative staffing methods as are available to the employer to ensure adequate staffing other than by use of mandatory overtime during a patient care emergency. This language clearly requires employers to have a Nurse Coverage Plan that provides sufficient staffing to account for typical patterns of absenteeism and, at the same time, have alternative staffing methods to cover patient care emergencies.

The representatives of public sector nurses also suggest that the regulations provide for enforcement action against a health care employer who fails to develop and implement the required policies and procedures and maintain the required recordkeeping. While the Department does find penalties to be an effective means of encouraging employer compliance with regulations protecting the rights of workers, the implementing legislation does not provide for such penalties.

The representatives of public sector nurses also suggest that the regulations should clearly set forth protections against reprisals for filing a complaint. Such protections already exist under Section 215 of the Labor Law for nurses in private facilities. Civil Service Law, Section 75-b prohibits retaliatory actions by public employers against public employees.

The representatives of public sector nurses also suggest that the regulations set forth that the investigatory process be completed within 90 days and include an informal conference or means by which a Department Investigator, the complainant and/or the collective bargaining representative, and the employer meet to discuss issues arising from the investigation. The representatives also suggest a closing conference and a clearly defined appeal process or mechanism to dispute the Department's issuance of an order in a situation where the complainant employee or collective bargaining representative disputes the Department's decision. In short, the representatives of public sector nurses are requesting a procedural investigatory process similar to that for public employee safety and health complaints pursuant to Labor Law, Section 27-a. However, that investigatory process is clearly detailed in Section 27-a and includes site inspections, where representatives of the employer and an authorized employee representative are given an opportunity to accompany the Department Investigator during an inspection. This type of on-site inspection is needed to view whether safety and health hazards exist.

The representatives of public sector nurses suggest that nurse administrators or employees that have a nursing license, but do not provide direct patient care in their positions be covered under the provisions of Section 167 if the employer mandates them to provide direct patient care. Such a requirement is clearly contrary to the statutory provisions of Section 167. Specifically, Section 167(1)(b) defines a nurse as a registered professional nurse or a licensed practical nurse as defined by article one hundred thirty-nine of the Education Law who provides direct patient care. (Emphasis supplied) The Department does not have the statutory authority to expand the coverage of Section 167 to nurse administrators or other employees that have a nursing license, but do not have regularly scheduled work hours where they provide direct patient care.

During rule development, several parties presented diverse comments on many issues, some of which resulted in modification of this proposal. The Department looks forward to the public comment period, which will provide the opportunity for additional regulated parties and interested parties to explain their different perspectives and share expertise in this area that would help clarify, balance and generally improve the final regulation.

9. Federal standards:

There are no federal standards with like requirements.

10. Compliance schedule:

The rule would be effective on the date of final adoption.

However, emergency regulations have been in place for several months which have established the requirement for Nurse Coverage Plans. The Nurse Coverage Plans were required to be established by October 13, 2009.

Regulatory Flexibility Analysis

1. Effect of rule:

This rule will apply to all health care employers which include any individual, partnership, association, corporation, limited liability company or any person or group of persons acting directly or indirectly on behalf of or in the interest of the employer, which provides health care services in a facility licensed or operated pursuant to Article 28 of the Public Health Law, including any facility operated by the State, a political subdivision or a public corporation as defined by Section 66 of the General Construction Law or in a facility operated by the State, a political subdivision or a public corporation as defined by Section 66 of the General Construction Law, operated or licensed pursuant to the Mental Hygiene Law, the Education Law, or the Correction Law. Accordingly, small businesses and local governments may be impacted if they provide health care services in a facility noted above. The Department's Division of Research and Statistics estimates that there are 4,175 health care facilities in the State with fewer than 100 employees. Of these 4,175 employers, 4,143 are private employers and 32 are public employers.

2. Compliance requirements:

The record and reporting requirements contained in the proposed rule are minimal. Healthcare employers must prepare a Nurse Coverage Plan which takes into account typical patterns of staff absenteeism due to illness, leave, bereavement and other similar factors as well as the number and types of patients typically served in the health care employer's facility. The Plan must also identify and describe the alternative staffing methods the employer will use to avoid mandatory overtime. Additionally, the health care employer must make the Nurse Coverage Plan available to: nursing staff by posting the Plan or making it available to nursing staff by the intranet, employee representatives and to the Commissioner upon request. The health care employer must also maintain a log of efforts to obtain staff coverage in compliance with the Plan.

3. Professional services:

Legal services may be required to negotiate, draft and review contracts with alternative staffing providers such as per diem agencies. It is anticipated that a vast majority of health care providers in the state already have such agreements in place or have procurement or legal staff who regularly work on such contracts.

The rule will require health care employers to seek alternative sources to obtain the services of nurses other than forcing their current nursing staff to work mandatory overtime shifts. In this respect, the health care employers will be seeking professional nursing services which would have otherwise been performed by their current nursing staff on a mandatory basis.

4. Compliance costs:

Employers in both the public and private sectors covered by this rule may have to enter into contracts with nursing staff providers such as nurses' registries, per diem nursing services, and temporary agencies to have a viable source of nursing staff to use in lieu of mandatory overtime. The cost for individual health care employers will depend upon the extent to which the nurse staffing plan relies on these contract workers and the degree of coverage that the health care facility will need. For example, a major medical center with several special care units requiring specially trained nursing staff may find it more difficult to fill shifts from among their own nursing staff because of the need to fill such vacancies with nurses having the same specialized training. At the other end of the spectrum, facilities with very a small staff may find it equally difficult to fill vacancies without having to utilize outside staffing service providers. At the time this legislation was before the Governor for action in 2008, the Division of Budget estimated compliance would cost approximately \$13 million in its first year. However, these costs - attributable to the hiring of per diem nurses necessary to ensure that sufficient nursing care is available for patients in the absence of the availability of mandatory overtime - should have been offset by savings of \$5 million, which otherwise would have been paid for such overtime. Also, it is likely that in the approximately one and a half year period from when Section 167 was enacted into law, employers have been preparing for implementation of the statute and have taken steps to mitigate costs associated with this new law.

Other than staffing needs, costs associated with the rule will be administrative. Health care employers must prepare a Nurse Coverage Plan which takes into account typical patterns of staff absenteeism due to illness, leave, bereavement and other similar factors as well as the number and types of patients typically served in the health care employer's facility.

The Plan must also identify and describe the alternative staffing methods the employer will use to avoid mandatory overtime. It is not anticipated that any health care employer would have to retain outside professional services to prepare the Nurse Coverage Plan. Although there are administrative costs and time associated with developing and maintaining a written Plan and log, these costs may be offset through the use of a Plan that may reduce the need for last-minute supplemental staffing.

Legal services may be required to negotiate, draft or review contracts with alternative staffing providers such as per diem agencies. It is anticipated that a vast majority of health care providers in the state already have such agreements in place or have procurement or legal staff who regularly work on such contracts.

Requirements with regard to the posting of such Plan and the logging of efforts to obtain staff coverage in compliance with the Plan will result in minimal or no additional cost.

5. Economic and technological feasibility:

The proposed rule does not impose any new technological requirements. Economic feasibility is addressed above under compliance costs.

6. Minimizing adverse impact:

This rule is necessary to implement Labor Law, Section 167, as enacted by chapter 493 of the Laws of 2008. Although this enabling legislation does not require the promulgation of regulations, it does not provide sufficient details with regard to what is expected of health care employers so as to avoid, to the greatest extent possible, unnecessary mandatory overtime. The rule addresses these statutory gaps by requiring that covered employers develop a staffing plan, by setting forth the minimum elements to be addressed in this plan, and by requiring that the plan be made available to the Commissioner and to nursing staff and their representatives. At the same time, the rule clarifies circumstances under which various types of emergencies will exempt health care employers from the prohibition against mandatory overtime to cover nursing staffing needs that would otherwise apply.

This rule fulfills the legislative objective of chapter 493 by improving the health care environment for patients and the working environments for nurses and their families, while at the same time minimizes the potential impact on the health care employers by allowing them to develop a Nurse Coverage Plan which addresses their specific needs and takes into account all of their specific circumstances.

7. Small business and local government participation:

The Department solicited input on these regulations from various employer representatives. These employer representatives have members from small businesses and local governments.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

Any rural area where nurses are employed will be affected. The type of affect will depend on the degree to which those areas are currently relying on unscheduled, mandatory overtime to fill staffing requirements.

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

The reporting, recordkeeping and compliance requirements contained in the proposed rule are minimal. The employer will be required to develop a Nurse Coverage Plan which identifies and describes as many alternative staffing methods as are available to the health care employer to ensure adequate staffing through means other than use of overtime, including, but not limited to, contracts with per diem nurses, contracts with nurse registries and employment agencies for nursing services, arrangements for assignment of nursing floats, requesting an additional day of work from off-duty employees, and development and posting of a list of nurses seeking voluntary overtime. The healthcare employer must log all good faith attempts to seek alternative staffing through the methods identified in the health care employers' Nurse Coverage Plan. The Plan must be in writing, and be provided to the nursing staff, to any collective bargaining representative representing nurses at the health care facility and to the Commissioner of Labor upon request.

The rule will also require health care employers to seek alternative sources to obtain the services of nurses other than forcing their current nursing staff to work mandatory overtime shifts. In this respect, the health care employers will be seeking professional nursing services which would have otherwise been performed by their current nursing staff on a mandatory basis. This may necessitate the drafting of contracts with alternative staffing providers such as per diem agencies.

3. Costs:

Employers in both the public and private sectors covered by this rule may have to enter into contracts with nursing staff providers such as nurses' registries, per diem nursing services, and temporary agencies to have a viable source of additional nursing staff to use in lieu of mandating overtime of current staff. The cost for individual health care employers will depend upon the extent to which the Plan relies on these contract workers and the degree of coverage that the health care employer will need. In the current environment of nursing shortages, a major medical

center with several special care units requiring specially trained nursing staff may find it more difficult to fill shifts from among their own nursing staff. At the other end of the spectrum, facilities with a very small staff, few resources or in underserved or remote locations may not be able to compete to fill vacancies. At the time this legislation was before the Governor for action in 2008, the Division of Budget estimated compliance would cost approximately \$13 million in its first year. However, these costs - attributable to the hiring of per diem nurses necessary to ensure that sufficient nursing care is available for patients in the absence of the availability of mandatory overtime - should have been offset by savings of \$5 million, which otherwise would have been paid for such overtime. Also, it is likely that in the approximately one and a half year period from when Section 167 was enacted into law, employers have been preparing for implementation of the statute and have taken steps to mitigate costs associated with this new law.

Other than staffing needs, costs associated with the rule will be administrative. Health care employers must prepare a Plan which takes into account typical patterns of staff absenteeism due to illness, leave, bereavement and other similar factors as well as the number and types of patients typically served in the health care employer's facility. The Plan must also identify and describe the alternative staffing methods the employer will use to avoid mandatory overtime. It is not anticipated that any health care employer would have to retain outside professional services to prepare the Nurse Coverage Plan. Although there are administrative costs and time associated with developing and maintaining a written Plan and log, these costs may be offset through the use of a Plan in place that may reduce the need for last-minute supplemental staffing.

Legal services may be required to negotiate, draft or review contracts with alternative staffing providers such as per diem agencies. It is anticipated that a vast majority of health care providers in the state already have such agreements in place or have procurement or legal staff who regularly work on such contracts.

Requirements with regard to the posting of such Plan and the logging of efforts to obtain staff coverage in compliance with the Plan will result in minimal or no additional cost.

4. Minimizing adverse impact:

This rule is necessary to implement Labor Law, Section 167, as enacted by chapter 493 of the Laws of 2008. Although this enabling legislation does not require the promulgation of regulations, it does not provide sufficient details with regard to what is expected of health care employers so as to avoid, to the greatest extent possible, unnecessary mandatory overtime. The rule addresses these statutory gaps by requiring that covered employers develop a staffing plan, by setting forth the minimum elements to be addressed in this plan, and by requiring that the plan be made available to the Commissioner and to nursing staff and their representatives. At the same time, the rule clarifies circumstances under which various types of emergencies will exempt health care employers from the prohibition against mandatory overtime to cover nursing staffing needs that would otherwise apply.

This rule fulfills the legislative objective of chapter 493 by improving the health care environment for patients and the working environments for nurses and their families, while at the same time minimizes the potential impact on the health care employers by allowing them to develop a Nurse Coverage Plan which addresses their specific needs and takes into account all of their specific circumstances.

5. Rural area participation:

The Department sought input on these regulations from various employee representative groups which represent rural area employees. Additionally, the Department received input from various employer representative groups which also represent rural area employers.

Job Impact Statement

Health care employers covered by this rule may have to enter into contracts with nursing staff providers such as nurses' registries, per diem nursing services and temporary agencies to have a viable source of nursing staff to use in lieu of mandatory overtime. At the time Section 167 of the Labor Law (the statutory authority for this rule) was before the Governor for signature, the Division of the Budget estimated compliance would cost approximately \$13 million in its first year, which was attributable to the hiring of per diem nurses to ensure that sufficient nursing care is available for patients in the absence of the availability of mandatory overtime. Accordingly, it is apparent from the nature and purpose of this rule that it will not have any adverse impact on jobs or employment opportunities; in fact it will create more jobs.

Assessment of Public Comment

The agency received no public comment

Department of Motor Vehicles

NOTICE OF ADOPTION

Motorcycle Drivers Licenses

I.D. No. MTV-17-11-00009-A

Filing No. 591

Filing Date: 2011-06-28

Effective Date: 2011-07-13

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

Action taken: Amendment of section 3.7 of Title 15 NYCRR.

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

Subject: Motorcycle Drivers Licenses.

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

Text of final rule: Paragraph (5)(iii) of subdivision (a) of Section 3.7 of Part 3 is amended to read as follows:

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

Final rule as compared with last published rule: Nonsubstantive changes were made in section 3.7(a)(5)(iii).

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

Revised Job Impact Statement

A Revised Job Impact Statement is not submitted because the revisions to the text of the rule do not affect the job impact statement.

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Approval of Applications for Inspection Station License

I.D. No. MTV-19-11-00002-A

Filing No. 590

Filing Date: 2011-06-29

Effective Date: 2011-07-13

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

Action taken: Amendment of Part 79 of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a), 301(a), (d)(1), 302(a), (e), 303(a)(1) and (d)(1)

Subject: Approval of applications for inspection station license.

Purpose: Regulates the approval process relating to inspection stations in New York State.

Text or summary was published in the May 11, 2011 issue of the Register, I.D. No. MTV-19-11-00002-P.

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

Text of rule and any required statements and analyses may be obtained from: Monica J Staats, NYS Department of Motor Vehicles, Legal Bureau, Room 526, 6 Empire State Plaza, Albany, NY 12228, (518) 474-0871, email: monica.staats@dmv.ny.gov

Assessment of Public Comment

On May 10, 2011, the Department of Motor Vehicles notified the trade associations listed below that the regulation was being formally published in the New York State Register. On May 23, 2011, the Department of Motor Vehicles held a briefing session to provide any needed clarifications so that these parties could formally comment. This session was attended by some of these associations.

New York State Automobile Dealers Association

Greater New York Automobile Dealers Association
 Eastern New York Coalition of Automotive Retailers
 Syracuse Automobile Dealers Association
 Rochester Automobile Dealers Association
 Niagara Frontier Automobile Dealers Association
 American Automobile Association
 New York State Association of Service Stations & Repair Shops
 Service Station Dealers of Greater New York
 Service Station Operators of Southern New York
 Long Island Gasoline Retailers Association
 Service Station & Repair Shop Operators of Upstate New York

The Department has received written comments from the New York State Association of Service Stations & Repair Shops, Inc. (NYSASSRS), the Greater New York Automobile Dealers Association (GNYADA), and the American Automobile Association (AAA)

Comment: NYSASSRS comments that they "agree to the limitation of stations per county..." but since the proposed 79.7(f) does not define the terms "materially and substantially," such terms should either be deleted or better explained.

Response: The Department appreciates NYSASSRS' endorsement of the limitation of stations per county.

The Department understands NYSASSRS' concern about the phrase "materially and substantially." This phrase gives the Department the needed flexibility to revise the criteria to establish the cap on the number of inspection stations in a given county. It does not relate to criteria the Department would use in relation to a specific application (original, renewal or amendment) for a license.

Comment: NYSASSRS comments that there is a contradiction between 79.7(f) that allows the Commissioner to refuse to approve an application for a license or a license amendment and 79.7(f)(4) which provides that the Commissioner will accept an application for review if, "a licensee submits an amendment application for a change of location, and the change of location is within the same county, or within five (5) miles of the current location."

Response: There is no contradiction between these two provisions in the proposed rule. Section 79.7(f)(4) contains an exception to 79.7(f). If an existing licensee wants to move an existing business, the amendment would not be accepted for review if the cap for the destination county had been reached. However, under section 79.7(4), if the new location is in the current county or within five miles of the current location, the existing licensee could move its business. Therefore, the amendment application would be accepted for review if the new location is in the same county (regardless of the cap). If business were moving five miles and the location were in a different county, the amendment application would be accepted for review (regardless of the cap).

Comment: NYSASSRS objects to the language in 79.7(3) that a party shall be deemed in good standing if, "the facility has no hearings or appeals pending before the Department; and the facility has no litigation pending in which the Department is a named party." NYSASSRS states that it would be unfair, for example, to penalize a licensee who is suing the Department regarding an inspection fee increase.

Response: The Department recognizes NYSASSRS' concern. This language, however, provides a necessary public protection tool. As noted in the Regulatory Impact Statement, the Department has had a continuing problem protecting the public from the inspection station "revolving door." All too often, as the Department begins an administrative action, a business will simultaneously begin the process of selling/transferring the business to another individual to circumvent enforcement.

The language regarding litigation refers to matters related to the Department's enforcement action against the business due to violations of the Vehicle and Traffic Law and/or the Commissioner's regulation. It would not pertain to litigation regarding the inspection fee.

Comment: NYSASSRS requests that the Department publicize the number of inspections stations allowed in each county. In addition, an applicant for a license should be notified of its position on the "waiting list."

Response: 79.7(f) provides that, "The Department shall post on its public website a summary of its findings regarding the number of public inspection stations that shall be permitted in each county." The number of stations permitted in each county will be published on the Department website when the regulation is adopted and updated annually thereafter. In addition, the Department shall notify each applicant in writing of its position on the waiting list when the Department responds to an application.

Comment: NYSASSRS comments that an applicant for a license should be able to challenge the Department's "denial" of a license via an administrative hearing.

Response: An applicant for a license may pursue any remedy afforded by the Vehicle and Traffic Law and the Civil Practice Law and Rules.

Comment: NYSASSRS expresses concern about the "termination of the current OBDII emissions inspection program."

Response: The OBDII emissions inspection program will not be affected by this regulation. Further, the OBDII program is not being terminated. The Department's contract with SGS Testcom, the vendor that provides OBDII emissions equipment to inspection stations, is scheduled to terminate on November 30, 2011, but it may be extended until November 30, 2013 via a contract amendment. When the Department begins the process to contract with a new vendor, the Department will conduct outreach to the trade associations and the industry about this matter.

Comment: AAA, a not-for-profit organization, maintains that the proposal is anti-competitive and will be detrimental to its 2.7 million New York members. AAA explains that its services are "intended to enhance every aspect of vehicle ownership by providing members with reliable solutions to their automotive needs." AAA states that its members deserve high quality, affordable repairs. AAA suggests that if DMV maintains the cap, it should grant an exemption for not-for-profit organizations.

Response: The Department appreciates AAA's concern about this proposed rule, particularly that it is "anti-competitive." The Department maintains that this proposal represents a fair balance of the needs of the industry versus the Department's need to comply with federal law.

The Department is constrained by the mandates imposed by the federal Clean Air Act and its accompanying regulations. As explained in the Regulatory Impact Statement, the Department is obligated to perform three audits of each inspection station annually in the New York Metropolitan Area and 1.5 audits of each inspection station upstate. Due to attrition, early retirements and workforce reductions, the Department has insufficient staff to perform the number of required audits. A cap on the number of inspection stations is the only reasonable means to control the growth of inspection stations so that the Department is able to substantially comply with federal law and, consequently, minimize the risk of losing federal highway funding and/or sanctions affecting New York State businesses.

The Department declines to exempt not-for-profits from the cap. This would only open the door to other requests for exemptions, which the Department cannot grant if it hopes to comply with its audit obligations.

Comment: AAA comments that the regulation limits "consumer access to high quality automotive repair services."

Response: This regulation will have no affect on the public's ability to obtain high quality repairs. This proposal does not limit the number of repair shops or impose any new requirements on existing repair shops.

Comment: GNYADA comments that the association "supports that part of the proposed regulations that provides an exemption for registered new motor vehicle dealers from the proposed "cap" on new inspections stations."

Response: The Department appreciates GNYADA's support of this provision of the proposed regulation.

Comment: GNYADA comments that the advisory scan required by the regulation is "essentially the equivalent of full-blown emissions inspections for which dealers are normally compensated at \$27 per inspection in the New York Metropolitan Area (NYMA) region."

Response: The Department disagrees that the advisory scan is tantamount to an emissions inspection. Unlike the emissions inspection, the advisory scan can be completed two different ways-in conjunction with the already mandated safety inspection or as a standalone function. This will provide flexibility to the dealer community to implement in the most efficient way.

GNYADA is correct that \$27 is the fee for an emissions inspection in the NYMA. However, this fee cannot logically be used for analysis purposes. The fee for the very same emissions inspection upstate is \$11. The difference in fees is due to the fact that until January 1, 2011, NYMA inspection facilities were required to acquire and maintain NYTEST tailpipe inspection equipment. Therefore, there has been a significant decrease in the cost of conducting an emissions inspection in the NYMA since the demise of the NYTEST program.

In addition, the advisory scan procedure is not the same as a full emissions inspection procedure. Both procedures require that vehicle information be entered into the NYVIP CVIS (either by using the keyboard or scanning the VIN plate) and that the OBD system be scanned. However, the full OBD emission inspection has requirements far beyond the advisory scan. During a full OBD emissions inspection, a Certified Inspector is required to manually check the following components to make sure they have not removed, disconnected, or rendered inoperable as provided for in regulation. These are not required as part of the advisory scan:

- i. Gas cap
- ii. Catalytic Converter (CAT)
- iii. Exhaust Gas Recirculation valve (EGR)
- iv. Positive Crankcase Ventilation system (PCV)
- v. Air Injection System (AIS)
- vi. Evaporative Emissions Control (EVAP)
- vii. Fuel Inlet Restrictor (FIR)

- viii. Thermostatic Air Cleaner (TAC)
- ix. Malfunction Indicator Lamp (MIL) function

Comment: GNYADA comments that, "individual dealers will, in fact, incur very substantial costs in performing uncompensated advisory scans." GNYADA then lists various items, which are addressed below.

Response:

- Paying a fee to send the data for each advisory scan to the State's data aggregator (Currently, SGS Testcom).

Response: This is partially correct. If the advisory scan is completed in conjunction with the safety inspection, the fee for the safety inspection (37.3 cents) will cover both. If the advisory scan is completed alone, there will be a fee (37.3 cents).

- Paying very substantial salaries to skilled employees who perform the scans (inspections must be performed by state-certified inspectors who are required to be trained and experienced, and pass a state-administered examination).

Response: The advisory scan can be carried out during the mandated safety inspection and is not unduly burdensome. Under the existing regulation, NYCCR 79.8(b)(2), the safety inspection must be carried out by a state-certified inspector. The same individual currently doing the safety inspection can complete the advisory scan.

- Utilization of a service bay (real estate, building) of a size and type required by DMV regulations for the purpose of inspections (which bay could be used for other purposes more profitable purposes while it is "tied up" for an advisory scan).

Response: The advisory scan can be carried out during the safety inspection while the bay is being used for such purpose. No new space is needed.

- Purchasing and maintaining equipment specified by DMV for the purpose of inspections (NYVIP CVIS, scanners, printers, paper and other supplies).

Response: Nearly all dealers have this equipment. Out of approximately 1,100 dealers, 50 or so do not currently have a NYVIP CVIS. No dealer will be required to print any receipts for the advisory scan.

- Paying for utilities (light, heat, air conditioning, safety equipment, electrical power for overhead garage doors and the NYVIP CVIS units, including computers, scanners, and printers) and any other equipment necessary to complete the advisory scan.

Response: All of these basic costs are currently integral to carrying out the safety inspection and for that matter, operating a repair facility.

- Costs for other equipment and supplies (including safety equipment, Personal Protective Equipment, exhaust systems, etc.) as required by DMV, OSHA, DOL, etc.

Response: All of these basic costs are currently integral to carrying out the safety inspection and for that matter, operating a repair facility.

Comment: GNYADA comments that the Department could allow affected inspection stations to charge the fee for an emissions inspection to the consumer for the advisory scan.

Response: The Department does not believe that such a fee is warranted at this time.

Comment: GNYADA comments that multiple scans for each vehicle are possible (i.e. when the car first arrives at the dealership, as part of a pre-sale inspection, or during any safety inspection before it is two model years old.)

Response: It is the Department's intent that each vehicle get only one advisory scan. Each NYVIP CVIS will hold the vehicle identification number of any vehicle that receives an advisory scan on that machine for two years. This will automatically block the requirement for an advisory scan for a vehicle if it is presented to that NYVIP CVIS again.

Comment: GNYADA comments that inspection stations in Massachusetts can charge \$29 for the advisory scan there.

Response: The Department's reference to Massachusetts was simply an example of the ease of conducting an advisory scan. The fee structures in New York and Massachusetts are completely different. Massachusetts has a flat fee of \$29 for ALL inspections-safety only, safety with advisory scan, safety with emissions.

Comment: GNYADA comments that "only DMV benefits from those scans."

Response: The Department disagrees. There is a benefit to dealers and their customers. The Department will work with dealers to develop two ways to carry out the advisory scan. One will be a standalone function. The other will allow the advisory scan to be completed in conjunction with the mandated safety inspection. Further, we will work with dealers to use the advisory scan to provide any available information (i.e. diagnostic trouble codes) extracted from the vehicle to the dealer.

Currently when a new car is sold, the consumer has no assurance that the vehicle will be able to communicate properly for an emissions inspection when presented two years later. When such communications errors occur two years later, Department staff respond to assist the consumer with a problem that may date back to the time of sale. In such situations, the consumer is inconvenienced until a resolution can be found.

The advisory scan will provide a tool to address these problems for the dealer. The consumer currently needs to remedy the problem via the dealer or manufacturer. To avoid this significant inconvenience to the consumer and the additional workload to the dealer network, the advisory scan will allow the Department to address such communication issues with our emissions inspection vendor as we become aware of them. When the consumer has the vehicle emissions tested two years later, the issue will have already been addressed and will be transparent to the consumer and dealer/inspection station network.

Office of Parks, Recreation and Historic Preservation

NOTICE OF ADOPTION

Navigation of Vessels, Conduct of Regattas and Placement of Navigation Aids and Floating Objects on Navigable Waters

I.D. No. PKR-18-11-00008-A

Filing No. 573

Filing Date: 2011-06-23

Effective Date: 2011-07-13

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

Action taken: Repeal of Parts 380, 445, section 448.7 and Appendix I-1; addition of new Part 445 and sections 447.1(f), 447.2(i), 448.1(h), 448.4(d), 448.8(b)(2); and amendment of sections 377.1, 447.1(b), 447.2, 447.3(b)(4)-(6) and Part 448 of Title 9 NYCRR.

Statutory authority: Parks, Recreation and Historic Preservation Law, section 3.09(8); Navigation Law, sections 34, 34-a, 35, 35-a, 35-b, 36, 37, 41, 41(6), 43, 43(3), 45, 46, 46-aaaa; and L. 2000, ch. 342

Subject: Navigation of vessels, conduct of regattas and placement of navigation aids and floating objects on navigable waters.

Purpose: To update obsolete State navigation rules or conform them to the U.S. Coast Guard Inland Navigation Rules.

Text or summary was published in the May 4, 2011 issue of the Register, I.D. No. PKR-18-11-00008-P.

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

Text of rule and any required statements and analyses may be obtained from: Kathleen L. Martens, Associate Counsel, Office of Parks, Recreation and Historic Preservation, ESP, Agency Bldg, 1, 19th floor, Albany, NY 12238, (518) 486-2921, email: rulemaking@oprhp.state.ny.us

Additional matter required by statute: The rule incorporates by reference the U.S. Coast Guard Inland Navigation Rules at 33 CFR 83-88 and 90.

Assessment of Public Comment

The Office of Parks, Recreation and Historic Preservation (State Parks) received a comment from Assemblymen Englebright and Lavine on an earlier version of the proposed rule. They noted the "Good Samaritan" regulatory provision at 9 NYCRR § 445.3 implemented Navigation Law Section 41(3) that requires pilots to render assistance to vessels in distress when possible. The statute and prior regulatory provision have no direct counterpart in the U.S. Coast Guard rules being incorporated by reference. State Parks corrected this technical oversight and re-inserted the "Good Samaritan" provision in the final adopted rule at 9 NYCRR § 445.2.

Public Service Commission

NOTICE OF ADOPTION

Petition for the Submetering of Electricity

I.D. No. PSC-07-10-00010-A

Filing Date: 2011-06-23

Effective Date: 2011-06-23

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

Action taken: On 6/16/11, the PSC adopted an order approving the petition of 2148 Broadway Owner LLC to submeter electricity at 2150 Broadway, New York, New York located in the territory of Consolidated Edison Company of New York, Inc.

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

Subject: Petition for the submetering of electricity.

Purpose: To approve the petition of 2148 Broadway Owner LLC to submeter electricity at 2150 Broadway, New York, New York.

Substance of final rule: The Commission, on June 16, 2011 adopted an order approving the petition of 2148 Broadway Owner LLC to submeter electricity at 2150 Broadway, New York, New York located in the territory of Consolidated Edison Company of New York, Inc., subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(10-E-0046SA1)

NOTICE OF ADOPTION

Petition for the Submetering of Electricity

I.D. No. PSC-43-10-00014-A

Filing Date: 2011-06-23

Effective Date: 2011-06-23

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

Action taken: On 6/16/11, the PSC adopted an order approving the petition of Union Grove Associates, LLC to submeter electricity at 1468 Hoe Avenue, a/k/a Rev. Fletcher C. Crawford Housing, Bronx, New York.

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

Subject: Petition for the submetering of electricity.

Purpose: To approve the petition of Union Grove Associates, LLC to submeter electricity at 1468 Hoe Avenue, Bronx, New York.

Substance of final rule: The Commission, on June 16, 2011 adopted an order approving the Union Grove Associates, LLC to submeter electricity at 1468 Hoe Avenue, a/k/a Rev. Fletcher C. Crawford Housing, Bronx, New York, located in the territory of Consolidated Edison Company of New York, Inc., subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(10-E-0489SA1)

NOTICE OF ADOPTION

Minor Rate Filing

I.D. No. PSC-49-10-00010-A

Filing Date: 2011-06-22

Effective Date: 2011-06-22

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

Action taken: On 6/16/11, the PSC adopted an order approving, with

modifications, the Village of Endicott's amendments to PSC No. 1—Electricity, effective May 1, 2011 and postponed to July 1, 2011 to increase its annual revenues by \$300,000 or 10.3%.

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

Subject: Minor Rate Filing.

Purpose: To approve amendments to PSC No. 1—Electricity, effective July 1, 2011 to increase annual revenues by \$300,000 or 10.3%.

Substance of final rule: The Commission, on June 16, 2011 adopted an order approving, with modifications, the Village of Endicott's amendments to PSC No. 1—Electricity, effective May 1, 2011 and postponed to July 1, 2011 to increase its annual revenues by \$300,000 or 10.3%, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(10-E-0588SA1)

NOTICE OF ADOPTION

Initial Tariff Schedule

I.D. No. PSC-04-11-00003-A

Filing Date: 2011-06-23

Effective Date: 2011-06-23

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

Action taken: On 6/16/11, the PSC adopted an order approving, with modifications, the initial rate filing of Westfall Village Water Co., Inc., PSC No. 1—Water, effective April 1, 2011, and postponed to July 1, 2011.

Statutory authority: Public Service Law, section 89-e(2)

Subject: Initial Tariff Schedule.

Purpose: To approve an Initial Tariff Schedule.

Substance of final rule: The Commission, on June 16, 2011 adopted an order approving, with modifications, the initial rate filing of Westfall Village Water Co., Inc., PSC No. 1—Water, effective April 1, 2011, and postponed to July 1, 2011, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(10-W-0607SA1)

NOTICE OF ADOPTION

Exemption of Reliability Reporting Statistics for the Purposes of the 2010 Service Reliability Performance

I.D. No. PSC-15-11-00012-A

Filing Date: 2011-06-23

Effective Date: 2011-06-23

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

Action taken: On 6/16/11, the PSC adopted an order denying Orange and Rockland Utilities' (O&R) request for an exclusion relating to its failure to meet its 2010 Reliability Performance Mechanism duration target due to a July 19, 2010 storm event.

Statutory authority: Public Service Law, section 66

Subject: Exemption of reliability reporting statistics for the purposes of the 2010 Service Reliability Performance.

Purpose: To deny O&R's request for an exclusion relating to its failure to meet its 2010 Reliability Performance Mechanism.

Substance of final rule: The Commission, on June 16, 2011, adopted an order denying Orange and Rockland Utilities' request for an exclusion relating to its failure to meet its 2010 Reliability Performance Mechanism duration target due to a July 19, 2010 storm event and, therefore, be subject to a revenue adjustment of approximately \$800,000, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(07-E-0949SA5)

NOTICE OF ADOPTION

Mobile Stray Voltage Testing

I.D. No. PSC-15-11-00013-A

Filing Date: 2011-06-23

Effective Date: 2011-06-23

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

Action taken: On 6/16/11, the PSC adopted an order requiring affected utilities to complete two mobile stray voltage scans in Buffalo and one each in Yonkers, White Plains, Albany, Niagara Falls, Rochester, and New Rochelle, New York for 2011.

Statutory authority: Public Service Law, sections 2, 5, 65 and 66

Subject: Mobile stray voltage testing.

Purpose: To approve an order requiring affected utilities to complete two mobile stray voltage scans.

Substance of final rule: The Commission, on June 16, 2011 adopted an order requiring affected utilities to complete two mobile stray voltage scans in Buffalo and one each in Yonkers, White Plains, Albany, Niagara Falls, Rochester, and New Rochelle, New York for 2011, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(10-E-0271SA1)

NOTICE OF ADOPTION

Underground Line Extension

I.D. No. PSC-15-11-00016-A

Filing Date: 2011-06-22

Effective Date: 2011-06-22

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

Action taken: On 6/16/11, the PSC adopted an order approving the Central Hudson Gas & Electric's amendments to PSC No. 15—Electricity, effective July 1, 2011, to revise its charges for the installation of underground residential distribution (URD) line extensions.

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

Subject: Underground Line Extension.

Purpose: To approve Central Hudson Gas & Electric's amendments to PSC No. 15—Electricity, effective 7/1/11.

Substance of final rule: The Commission, on June 16, 2011 adopted an order approving the Central Hudson Gas & Electric's amendments to PSC No. 15—Electricity, effective July 1, 2011, to revise its charges for the installation of underground residential distribution (URD) line extensions and directed all other major electric utilities, excluding Consolidated Edison Company of New York, Inc. to prospectively file their underground residential distribution rates in statements, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(11-E-0112SA1)

NOTICE OF ADOPTION

Petition to Transfer Property

I.D. No. PSC-16-11-00005-A

Filing Date: 2011-06-22

Effective Date: 2011-06-22

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

Action taken: On 6/16/11, the PSC adopted as a permanent rule the order approving the transfer of property rights on de minimis portions of utility property in the City of Poughkeepsie, Dutchess County in connection with a project known as Walkway Over the Hudson.

Statutory authority: Public Service Law, section 70

Subject: Petition to transfer property.

Purpose: To approve the transfer of property rights on de minimis portions of utility property in the City of Poughkeepsie, New York.

Substance of final rule: The Commission, on June 16, 2011 adopted as a permanent rule the order approving the transfer of property rights on de minimis portions of utility property in the City of Poughkeepsie, Dutchess County in connection with a project known as Walkway Over the Hudson (2010 Project), subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(11-M-0101SA2)

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Water Rates and Service

I.D. No. PSC-28-11-00008-P

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

Proposed Action: PSC is considering a proposal by Long Island Water Company d/b/a Long Island American Water to change its rates, charges, rules and regulations for water service. The effective date of the filing is subject to suspension through March 27, 2012.

Statutory authority: Public Service Law, section 89-c(10)

Subject: Water rates and service.

Purpose: To consider Long Island Water's request for approval to increase annual water revenues by approximately \$9.6 million or 19.5%.

Public hearing(s) will be held at: 10:00 a.m., October 20, 2011 at Department of Public Service, Three Empire State Plaza, 3rd Fl. Hearing Rm., Albany, NY.

There could be requests to reschedule the hearings. Notification of any subsequent scheduling changes will be available at the DPS Website (www.dps.state.ny.us) under Case No. 11-W-0200.

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 a request by Long Island Water Corporation d/b/a Long Island American Water (the company) to increase its rates for water service. In an April 29, 2011 filing, the company proposed changes in the rates, charges, rules and regulations contained in its Schedule No. 1 for water service, so as to increase its annual revenues by \$9.6 million (19.5%). The effective date of the filing has been suspended through September 27, 2011, and is subject to further suspension through March 27, 2012, in Case 11-W-0200. The Commission will evaluate the filing and may approve or reject it in whole or part or may otherwise alter rates. The Commission also may take other actions related to the filing, including actions that may alter the company's service or management and/or establish a multi-year rate plan. Parties may propose negotiated terms to be considered by the Commission.

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

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

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

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

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

(11-W-0200SP1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Economic Development

I.D. No. PSC-28-11-00004-P

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

Proposed Action: The Commission is considering a proposed filing by National Grid d/b/a Niagara Mohawk Power Corporation to make various changes in the rates, charges, rules and regulations contained in its Schedule for Electric Service, P.S.C. No. 220 — Electricity.

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

Subject: Economic Development.

Purpose: To revise Service Classification ("SC") No. 12 - Special Contract Rates.

Substance of proposed rule: The Commission is considering a proposal filed by National Grid d/b/a Niagara Mohawk Power Corporation (Niagara Mohawk) to modify SC No. 12 - Special Contract Rates in accordance with the Low Income and Economic Development Stipulation adopted by Commission Order issued January 24, 2011 in Case 10-E-0050. Niagara Mohawk's proposal consists of simplifying the application process, revising the discount rate structure and expanding eligibility to further promote economic development opportunities. The proposed amendments have an effective date of September 19, 2011. The Commission may adopt in whole or in part, modify or reject Niagara Mohawk's proposal, and may apply its decision to other utilities.

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

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

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

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

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

(10-E-0050SP4)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

To Establish a Remedy to Provide Safe, Adequate, and Reliable Service to Customers of Orchard Hill and Scott Acres

I.D. No. PSC-28-11-00005-P

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

Proposed Action: Due to inadequate service and absence of a system operator, the PSC is considering whether to approve, modify, or reject, in whole or in part, appointment of a temporary system operator and other remedies against Orchard Hill and Scott Acres Water Cos.

Statutory authority: Public Service Law, sections 4(1), 5(1)(f), 25, 89-b(1), 89-c(b), (4), 89(j) and 112-a

Subject: To establish a remedy to provide safe, adequate, and reliable service to customers of Orchard Hill and Scott Acres.

Purpose: Assuring the provision of safe, adequate, and reliable service to the customers of Orchard Hill and Scott Acres water companies.

Substance of proposed rule: Due to inadequate service and absence of a system operator, the Public Service Commission is considering whether to approve, modify, or reject, in whole or in part, the appointment of a temporary system operator and other remedies against Orchard Hill W. Co., Inc. and Scott Acres Water Co., Inc.

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

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

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

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

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

(10-W-0594SP1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Implementing Delivery Discounts for Recharge New York Power Program Allocations

I.D. No. PSC-28-11-00006-P

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

Proposed Action: The Commission is considering proposals to implement the Recharge New York Power Program delivery discounts of Economic Development Law Section 188-a(d).

Statutory authority: Public Service Law, sections 4(1), 65, 66; Public Authorities Law, section 1005; Economic Development Law, section 188-a(d)

Subject: Implementing delivery discounts for Recharge New York Power Program allocations.

Purpose: Consideration of mechanisms for providing reduced delivery rates for power allocated to Recharge New York customers.

Substance of proposed rule: By filing dated June 27, 2011, the New York Power Authority (NYPA) petitioned the Commission seeking to implement reduced delivery service rates, as well as terms and conditions, for allocations of Recharge New York Power Program (RNY) electricity to RNY program participants. NYPA's petition was filed pursuant to Economic Development Law section 188-a(d) requiring NYPA, after consultation with Public Service Department Staff, to recommend to the Commission reduced rates for RNY power allocations. In its June 27, 2011 filing, NYPA proposed a discounted delivery rate consisting of exemptions to RNY customers of certain surcharges, as well as terms and conditions related to the respective roles of NYPA and New York's electric utilities as related to RNY program participants. The Commission is considering whether to grant or deny, in whole or in part, approval of the NYPA's proposals.

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

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

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

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

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

(11-E-0176SP2)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Whether a Proposed Agreement for the Provision of Water Service by Saratoga Water Services, Inc. is in the Public Interest

I.D. No. PSC-28-11-00007-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, deny, or modify, in whole or in part, the petition of Saratoga Water Services, Inc. for a waiver of the company's tariff and approval of the terms of a service agreement.

Statutory authority: Public Service Law, sections 4(1), 20(1) and 89-b

Subject: Whether a proposed agreement for the provision of water service by Saratoga Water Services, Inc. is in the public interest.

Purpose: Whether the Commission should issue an order approving the proposed provision of water service.

Substance of proposed rule: The Commission is considering whether to approve, deny, or modify, in whole or in part a Petition in which Saratoga Water Services, Inc. (Saratoga) seeks issuance of an Order (a) approving the terms and conditions of a certain "Agreement For The Provision of Water Service", dated May 25, 2010 (Agreement) between Saratoga and Brian Hayes as being in the public interest; (b) determining that the provision of water service by Saratoga in accordance with the terms set forth in the Agreement is in the public interest; (c) waiving Saratoga's tariff provisions to the extent they are inconsistent with the Agreement, and (d) waiving the applicability of the provisions of 16 N.Y.C.R.R. Parts 501 and 502 to the extent they are inconsistent with the Agreement.

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

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Secre-

tary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: Secretary@dps.state.ny.us

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

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

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

(10-W-0403SP1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

The Transfer of Billing Responsibility for 39 United Water New Rochelle, Inc. Customers to the Village of Briarcliff Manor

I.D. No. PSC-28-11-00009-P

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

Proposed Action: The Commission is considering whether to grant, deny or modify the petition of the Village of Briarcliff Manor to transfer the billing responsibility for 39 customers from United Water New Rochelle, Inc. to the Village of Briarcliff Manor.

Statutory authority: Public Service Law, section 89(h)

Subject: The transfer of billing responsibility for 39 United Water New Rochelle, Inc. customers to the Village of Briarcliff Manor.

Purpose: To transfer of billing responsibility for 39 United Water New Rochelle, Inc. customers to the Village of Briarcliff Manor.

Substance of proposed rule: The Public Service Commission (Commission) is considering whether to grant, deny or modify, in whole or part, the petition filed by the Village of Briarcliff Manor (Village) to transfer billing responsibility for 39 customers from United Water New Rochelle, Inc. (UWNR) to the Village.

In 2001, the Commission authorized the transfer of water system assets, known as the Bayliss System, from UWNR to the Village. A condition of the authorization was that the 39 UWNR customers, located in the Town of Mount Pleasant and served by the Bayliss System, would not experience a decline in service. The Commission required that the 39 customers continued to be billed by UWNR while the Village assumed responsibility for providing service.

The Village now requests that billing responsibility for the 39 customers be transferred from UWNR. The Village states that it is now capable of providing water service to these customers and requests the billing transfer because the rate currently paid by the 39 customers is significantly lower than that paid by other Village customers; the Village receives the payments from UWNR annually, which disrupts its system's cash flow; and the conditions that required the current arrangement no longer exist.

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

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

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

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

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

(11-W-0308SP1)

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

Whether to Permit the Use of the Mercury Instruments IP Cellular Modem for use in Commercial Gas Meter Applications

I.D. No. PSC-28-11-00010-P

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

Proposed Action: The Public Service Commission is considering whether to approve, deny or modify, in whole or in part, a petition filed by Corning Natural Gas Corporation for the approval to use the Mercury Instruments IP Cellular Modem.

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

Subject: Whether to permit the use of the Mercury Instruments IP Cellular modem for use in commercial gas meter applications.

Purpose: To permit gas utilities in New York State to use the Mercury Instruments IP Cellular Modem.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Corning Natural Gas Corporation, to use the Mercury Instruments IP Cellular Modem in commercial natural gas meter applications.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 10007, (518) 486-2655, email: leann_ayer@dps.state.ny.us

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Secretary, Public Service Commission, Three Empire State Plaza, Albany, NY 10007, (518) 474-6530, email: Secretary@dps.state.ny.us

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

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

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

(11-G-0340SP1)

Office of Victim Services

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

Submission of Claim Applications and Changes of Contact Information to the Office of Victim Services

I.D. No. OVS-28-11-00003-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 add section 525.4(a)(1) and (2); and amend section 525.15(b) of Title 9 NYCRR.

Statutory authority: Executive Law, sections 623(3), 625(3), 633(1); and Public Officers Law, art. 6, sections 94(1)(c), (d), 94(2), (3), (6), 95 and 96(1)

Subject: Submission of claim applications and changes of contact information to the Office of Victim Services.

Purpose: To specify where and how claim applications and changes in contact information may be delivered to the Office.

Text of proposed rule: New paragraphs (1) and (2) are added to subdivision (a) of section 525.4 of Title 9 of the New York Codes Rules and Regulations to read as follows:

525.4 Filing of claims. In addition to the provisions contained in section 625 of the Executive Law: (a) Claim applications shall be filed with the office in person, by mail, or electronically via facsimile, electronic mail or any other manner the office may make available for the filing of claims pursuant to subdivision one of section 305 of the

New York State Technology Law. (1) *If mailed, such application shall be directed to:*

Office of Victim Services

One Columbia Circle, Suite 200

Albany, New York 12203

(2) *Emergency award claim applications may be sent via facsimile, to a number the office may make available.*

Subdivision (b) of section 525.15 of Title 9 of the New York Codes Rules and Regulations is amended to read as follows:

(b) A claimant shall notify the office of any change of contact information [by letter. Such notification shall include the new contact information, the claim number and an original signature of the claimant] *in person, by mail, or electronically via facsimile, electronic mail or any other manner the office may make available for the change of contact information pursuant to subdivision one of section 305 of the New York State Technology Law.* [Such] (1) *If mailed, such notification shall be directed to:*

Office of Victim Services

One Columbia Circle, Suite 200

Albany, New York 12203

(2) *Change of contact information may be sent via facsimile, to a number the office may make available.*

Text of proposed rule and any required statements and analyses may be obtained from: John Watson, General Counsel, Office of Victim Services, One Columbia Circle, Suite 200, Albany, New York 12203-8727, (518) 457-8066, email: john.watson@ovs.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

This rule is being proposed as a consensus rule because, in accordance with State Administrative Procedure Act § 102 (11)(c), it makes technical changes and is otherwise non-controversial.

Subdivision 3 of section 625 of the Executive Law permits a claim to be filed by a person eligible to receive an award in person, by mail or electronically, in such manner as the Office may prescribe. Current statutory language is silent on how a claimant may go about notifying the Office of any change in contact information.

Subdivision (a) of section 525.4 of the current OVS regulations mirror the statutory language of subdivision 3 of section 625 of the Executive Law, with no further information about the address to where claim applications may be mailed or how and to where claim applications may be sent to the Office electronically. Subdivision (b) of section 525.15 of the current OVS regulations requires that a claimant notify the Office of any change of contact information by letter, which is to include an original signature of the claimant.

The proposed rule simply adds information in subdivision (a) of section 525.4 of the OVS regulations for the benefit of potential claimants. This new information will specify where claim applications may be mailed and how and to where claim applications may be sent to the Office electronically. In addition, the proposed rule changes the manner in which an existing claimant may convey to the Office a change of contact information, in a similar fashion as the proposed changes to filing a claim. These provisions are implemented for the benefit of potential claimants and existing claimants, so the use of current technology is available under certain circumstances. No person is likely to object to the rule as written.

Job Impact Statement

The Office of Victim Services (the Office) projects there will be no adverse impact on jobs or employment opportunities in the State of New York as a result of this proposed rule change. This proposed rule change simply codifies how claim applications and changes to claimant contact information may be delivered to the Office. Since nothing in this proposed rule change will create any adverse impacts on jobs or employment opportunities in the state, no further steps were needed to ascertain these facts and none were taken. As apparent from the nature and purpose of this proposed rule change, a full Job Impact Statement is not required and therefore one has not been prepared.