

# RULE MAKING ACTIVITIES

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

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

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

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## Department of Audit and Control

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### NOTICE OF ADOPTION

#### Eligible Rollover Distributions

**I.D. No.** AAC-17-12-00006-A

**Filing No.** 799

**Filing Date:** 2012-08-01

**Effective Date:** 2012-08-22

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

**Action taken:** Amendment of section 356.3 of Title 2 NYCRR.

**Statutory authority:** Retirement and Social Security Law, sections 11 and 311

**Subject:** Eligible rollover distributions.

**Purpose:** To conform current regulation with the provisions of the Federal Pension Protection Act of 2006.

**Text or summary was published** in the April 25, 2012 issue of the Register, I.D. No. AAC-17-12-00006-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Jamie Elacqua, Office of the State Comptroller, 110 State Street, Albany, NY 12236, (518) 473-4146, email: [jelacqua@osc.state.ny.us](mailto:jelacqua@osc.state.ny.us)

**Assessment of Public Comment**

The agency received no public comment.

### NOTICE OF ADOPTION

#### Loans to Members of the Retirement System

**I.D. No.** AAC-17-12-00017-A

**Filing No.** 800

**Filing Date:** 2012-08-01

**Effective Date:** 2012-08-22

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

**Action taken:** Amendment of Part 351 of Title 2 NYCRR.

**Statutory authority:** Retirement and Social Security Law, sections 11 and 311

**Subject:** Loans to members of the retirement system.

**Purpose:** To implement the procedural rules necessary to administer the loans provisions of the RSSL for Tiers 5 and 6.

**Text or summary was published** in the April 25, 2012 issue of the Register, I.D. No. AAC-17-12-00017-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Jamie Elacqua, Office of the State Comptroller, 110 State Street, Albany, NY 12236, (518) 473-4146, email: [jelacqua@osc.state.ny.us](mailto:jelacqua@osc.state.ny.us)

**Assessment of Public Comment**

The agency received no public comment.

### NOTICE OF ADOPTION

#### Payment for Military Service Credit

**I.D. No.** AAC-18-12-00004-A

**Filing No.** 801

**Filing Date:** 2012-08-01

**Effective Date:** 2012-08-22

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

**Action taken:** Amendment of section 378.2 of Title 2 NYCRR.

**Statutory authority:** Retirement and Social Security Law, sections 11 and 311

**Subject:** Payment for military service credit.

**Purpose:** Provides that contributions, benefits and service credit shall be provided in accordance with section 414(u) of the IRC of 1986.

**Text or summary was published** in the May 2, 2012 issue of the Register, I.D. No. AAC-18-12-00004-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Jamie Elacqua, Office of the State Comptroller, 110 State Street, Albany, NY 12236, (518) 473-4146, email: [jelacqua@osc.state.ny.us](mailto:jelacqua@osc.state.ny.us)

**Assessment of Public Comment**

The agency received no public comment.

## NOTICE OF ADOPTION

## Identification of Membership Tiers

**I.D. No.** AAC-18-12-00009-A

**Filing No.** 767

**Filing Date:** 2012-08-01

**Effective Date:** 2012-08-22

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

**Action taken:** Amendment of Part 325 of Title 2 NYCRR.

**Statutory authority:** Retirement and Social Security Law, sections 11 and 311

**Subject:** Identification of Membership Tiers.

**Purpose:** Clarifies the separate and distinct levels of membership with respect to members of NYSLERS and NYSPFRS.

**Text or summary was published** in the May 2, 2012 issue of the Register, I.D. No. AAC-18-12-00009-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Jamie Elacqua, Office of the State Comptroller, 110 State Street, Albany, NY 12236, (518) 473-4146, email: jelacqua@osc.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

## NOTICE OF ADOPTION

## Compliance with IRC 01(a) and 415(b)

**I.D. No.** AAC-19-12-00007-A

**Filing No.** 802

**Filing Date:** 2012-08-01

**Effective Date:** 2012-08-22

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

**Action taken:** Addition of Part 379 to Title 2 NYCRR.

**Statutory authority:** Retirement and Social Security Law, sections 11 and 311

**Subject:** Compliance with IRC sections 401(a) and 415(b).

**Purpose:** Requires compliance with IRC sections 401(a) and 415(b).

**Text or summary was published** in the May 9, 2012 issue of the Register, I.D. No. AAC-19-12-00007-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Jamie Elacqua, Office of the State Comptroller, 110 State Street, Albany, NY 12236, (518) 473-4146, email: jelacqua@osc.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

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## Department of Civil Service

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## NOTICE OF ADOPTION

## Jurisdictional Classification

**I.D. No.** CVS-31-11-00008-A

**Filing No.** 766

**Filing Date:** 2012-08-01

**Effective Date:** 2012-08-22

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

**Action taken:** Amendment of Appendix 1 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To classify a position in the exempt class.

**Text or summary was published** in the August 3, 2011 issue of the Register, I.D. No. CVS-31-11-00008-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

## NOTICE OF ADOPTION

## Jurisdictional Classification

**I.D. No.** CVS-31-11-00009-A

**Filing No.** 762

**Filing Date:** 2012-08-01

**Effective Date:** 2012-08-22

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

**Action taken:** Amendment of Appendix 1 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To classify positions in the exempt class.

**Text or summary was published** in the August 3, 2011 issue of the Register, I.D. No. CVS-31-11-00009-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

## NOTICE OF ADOPTION

## Jurisdictional Classification

**I.D. No.** CVS-31-11-00012-A

**Filing No.** 764

**Filing Date:** 2012-08-01

**Effective Date:** 2012-08-22

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

**Action taken:** Amendment of Appendixes 1 and 2 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To classify positions in the exempt and non-competitive classes.

**Text of final rule:** Text of proposed rule should have read:

Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Mental Hygiene under the subheading "Office for People with Developmental Disabilities," by adding thereto the positions of Assistant Chief Investigations (OPWDD) (5); and,

Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Mental Hygiene under the subheading "Office for People with Developmental Disabilities," by adding thereto the positions of Internal Investigator 1 (OPWDD) (65) and Internal Investigator 2 (OPWDD) (13).

Internal Investigator 1 (OPWDD) was previously submitted as adding 66 positions and should have been 65 positions.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in Appendix 2.

**Text of rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us

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

Changes made to the last published rule do not necessitate revision to the previously published RIS, RFA, RAFA and JIS statements.

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION**

**Jurisdictional Classification**

**I.D. No.** CVS-34-11-00015-A  
**Filing No.** 765  
**Filing Date:** 2012-08-01  
**Effective Date:** 2012-08-22

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

**Action taken:** Amendment of Appendix 1 of Title 4 NYCRR.  
**Statutory authority:** Civil Service Law, section 6(1)  
**Subject:** Jurisdictional Classification.

**Purpose:** To delete positions from the exempt class.  
**Text or summary was published** in the August 24, 2011 issue of the Register, I.D. No. CVS-34-11-00015-P.  
**Final rule as compared with last published rule:** No changes.  
**Text of rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us  
**Assessment of Public Comment**  
 The agency received no public comment.

**NOTICE OF ADOPTION**

**Jurisdictional Classification**

**I.D. No.** CVS-34-11-00016-A  
**Filing No.** 763  
**Filing Date:** 2012-08-01  
**Effective Date:** 2012-08-22

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

**Action taken:** Amendment of Appendix 2 of Title 4 NYCRR.  
**Statutory authority:** Civil Service Law, section 6(1)  
**Subject:** Jurisdictional Classification.

**Purpose:** To classify a position in the non-competitive class.  
**Text of final rule:** Text of proposed rule should have read:  
 Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Family Assistance under the subheading "Office of Children and Family Services," by adding thereto the position of Coordinator, Title IV-E Operations (OCFS) (1).

The (1) after the title Coordinator, Title IV-E Operations (OCFS) was previously omitted.  
**Final rule as compared with last published rule:** Nonsubstantive changes were made in Appendix 2.

**Text of rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us  
**Revised Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement**  
 Changes made to the last published rule do not necessitate revision to the previously published RIS, RFA, RAFA and JIS statements.  
**Assessment of Public Comment**  
 The agency received no public comment.

**NOTICE OF EXPIRATION**

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

**Jurisdictional Classification**

I.D. No.	Proposed	Expiration Date
CVS-31-11-00011-P	August 3, 2011	August 2, 2012

**Education Department**

**EMERGENCY  
 RULE MAKING**

**Polysomnographic Technologists**

**I.D. No.** EDU-31-12-00006-E  
**Filing No.** 788  
**Filing Date:** 2012-08-03  
**Effective Date:** 2012-08-03

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

**Action taken:** Addition of section 52.42; and amendment of Subpart 79-4 of Title 8 NYCRR.  
**Statutory authority:** Education Law, sections 207 (not subdivided), 212(3), 6504 (not subdivided), 6506(1), (2), (5), (6), (8), (9), (10), 6507(2)(a), 6508(1), (2), (3), (7) and 8505(5); and L. 2011, ch. 262

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

**Specific reasons underlying the finding of necessity:** The proposed amendment to the Regulations of the Commissioner of Education is necessary to implement Chapter 262 of the Laws of 2011, which amended Education Law section 8505 to authorize the provision of polysomnographic technology services, as defined by the Commissioner of Education, by individuals who meet standards promulgated by the Commissioner.

Because the Board of Regents meets at fixed intervals, and generally does not meet in the month of August, the earliest the proposed amendment can be presented for adoption, after expiration of the 45-day public comment period provided for in State Administrative Procedure Act (SAPA) section 202(1) and (5), is the October 9-10, 2012 Regents meeting. Furthermore, pursuant to SAPA, the earliest effective date of the proposed amendment, if adopted at the September meeting, would be October 31, 2012, the date a Notice of Adoption would be published in the State Register. However, the provisions of Chapter 262 of the Laws of 2011 will become effective on August 3, 2012.

Emergency action is necessary for the preservation of the public health and general welfare in order to enable the State Education Department to establish requirements for the authorized practice of polysomnographic technology, and thereby ensure the timely implementation of Chapter 262 of the Laws of 2011.

It is anticipated that the proposed amendments will be presented for adoption as a permanent rule at the October 2012 meeting of the Board of Regents, after publication in the State Register and expiration of the 45-day public comment period on proposed rule makings required by the State Administrative Procedure Act.

**Subject:** Polysomnographic technologists.

**Purpose:** To establish standards for the provision of polysomnographic technology services.

**Text of emergency rule:** 1. Section 52.42 of the Regulations of the Commissioner of Education is added, effective August 3, 2012, to read as follows:

§ 52.42 Polysomnographic technology.

(a) Definitions. As used in this section:

(1) Professional polysomnographic technology coursework shall mean didactic coursework and supervised clinical experiences. Such coursework and clinical experiences shall include, but shall not be limited to, the following curricular areas:

- (i) polysomnographic procedures and protocols;
- (ii) cardiopulmonary and neurological sciences, diagnostics, interpretation, and monitoring related to sleep disorders.
- (iii) ethics of polysomnographic care;
- (iv) infection control; and
- (v) polysomnographic patient care and patient education related to sleep disorders;

(2) Equivalent shall mean substantially the same, as determined by the department.

(b) Program requirements. In addition to meeting all applicable provisions of this Part, to be registered as a program recognized as leading to the authorization in polysomnographic technology which meets the requirements in section 79-4.2(a) of this chapter, it shall be a program in

polysomnographic technology leading to an associate degree or higher degree and shall meet the following requirements.

(1) An associate degree program in polysomnographic technology shall contain at least 60 semester hours, or the equivalent, including a minimum of 30 semester hours in professional polysomnographic technology coursework, or the equivalent, and additional semester hours in appropriate related basic sciences and clinical sciences related to polysomnographic technology.

(2) A baccalaureate degree program in polysomnographic technology shall contain a minimum of 40 semester hours of professional polysomnographic technology coursework, or the equivalent, and additional semester hours in appropriate related basic sciences and clinical sciences related to polysomnographic technology.

(3) The required semester hours in professional polysomnographic technology content areas shall include supervised clinical experience.

(4) Clinical facilities. A written contract or agreement shall be executed between the educational institution conducting the polysomnographic technology program and the clinical facility or agency which is designated to cooperate in providing the clinical experience. Such contract or agreement shall set forth the responsibilities of each party and shall be signed by the responsible officer of each party.

2. The title of Subpart 79-4 of the Regulations of the Commissioner of Education is amended, effective August 3, 2012, as follows:

Respiratory Therapy, [and] Respiratory Therapy Technician, and Polysomnographic Technologist

3. Sections 79-4.8 through 79-4.17 of the Regulations of the Commissioner of Education are added, effective August 3, 2012, as follows:

§ 79-4.8 Definitions of the practice of polysomnographic technology and use of the title.

(a) Only a person authorized under this Subpart shall participate in the practice of polysomnographic technology as an authorized polysomnographic technologist, and only a person authorized under this Subpart shall use the title "authorized polysomnographic technologist."

(b) The term "practice of polysomnographic technology" shall mean the process of collecting, analyzing, scoring, monitoring and recording physiologic data during sleep and wakefulness to assist the supervising physician in the clinical assessment and diagnosis of sleep/wake disorders and other disorders, syndromes and dysfunctions that either are sleep related, manifest during sleep or disrupt normal sleep/wake cycles and activities. The practice of polysomnographic technology shall include the non-invasive monitoring, diagnostic testing, and initiation and delivery of treatments to determine therapeutic levels of inspiratory and expiratory pressures for individuals suffering from any sleep disorder, as listed in an authoritative classification of sleep disorders acceptable to the department, under the direction and supervision of a licensed physician who is available for consultation at all times during the provision of polysomnographic technology services in any setting. Such services shall not include the use of mechanical ventilators. Such services shall include, but shall not be limited to:

(1) application of electrodes and apparatus necessary to monitor and evaluate sleep disturbances, including application of devices that allow a physician to diagnose and treat sleep disorders, which disorders shall include, but shall not be limited to, insomnia, sleep breathing disorders, movement disorders, disorders of excessive somnolence, and parasomnias, provided, however, that such services shall include the use of oral appliances, but shall not include the use of any artificial airway or the drawing of arterial blood gasses;

(2) implementation of any type of physiologic non-invasive monitoring applicable to polysomnography, including monitoring the therapeutic and diagnostic use on non-ventilated patients of oxygen, continuous positive airway pressure (CPAP) and bi-level positive airway pressure;

(3) implementation of cardiopulmonary resuscitation, maintenance of patient's airway (which does not include endotracheal intubation), and transcription and implementation of physician orders pertaining to the practice of polysomnographic technology;

(4) implementation of non-invasive treatment changes and testing techniques, as described in paragraphs (1) and (2) of this subdivision, and as required for the application of polysomnographic protocols under the direction and supervision of a licensed physician; and

(5) education of patients, family and the public concerning the procedures and treatments used during polysomnographic technology or concerning any equipment or procedure used for the treatment of any sleep disorder.

§ 79-4.9 Requirements and procedures for professional authorization.

To qualify for authorization as a polysomnographic technologist, an applicant shall be at least 18 years of age, file an application together with the applicable fees with the department, and meet the education, experience, examination and moral character requirements set forth in sections 79-4.10, 79-4.11, 79-4.12, and 79-4.13 of this Subpart, respectively.

§ 79-4.10 Professional study of polysomnographic technology.

To meet the professional education requirement for authorization as a polysomnographic technologist in this State, the applicant shall present evidence of:

(a) completion of an associate or higher degree in polysomnographic technology;

(1) in a program registered by the department; or

(2) in a program determined by the department to be substantially equivalent to a registered program; or

(b) completion of a course of study which is substantially equivalent to a program determined to be acceptable pursuant to subdivision (a) of this paragraph and which is satisfactory to the department.

§ 79-4.11 Experience requirements for polysomnographic technologist authorization.

To meet the professional experience requirement for authorization as a polysomnographic technologist in this State, the applicant shall complete such experience as is required in section 52.42 of this Title.

§ 79-4.12 Examination for authorization as a polysomnographic technologist.

(a) Each candidate for authorization as a polysomnographic technologist shall pass an examination that is determined by the department to measure the applicant's knowledge, judgment and skills concerning the practice of polysomnographic technology and such other matters of law and/or ethics as may be deemed appropriate by the department.

(b) Grade retention. The grade retention limitations of section 59.5(f) of this Title shall not be applicable to the examination for authorization to practice polysomnographic technology.

(c) Passing standard. The passing standard for the examination shall be determined by the State Board for Respiratory Therapy.

§ 79-4.13 Moral character for polysomnographic technologist authorization.

Applicants shall be of good moral character, as determined by the department.

§ 79-4.14 Student authorization. The practice of polysomnographic technology as an integral part of a program of study by students enrolled in a polysomnographic technology education program approved by the department shall not be prohibited. All such student practice shall be under the direction and supervision of a licensed physician and under the direct and immediate supervision of an authorized polysomnographic technologists or another health care provider licensed under Title VIII of the Education Law, provided that all tasks or responsibilities supervised by the health care provider are within the scope of his or her practice.

§ 79-4.15 Limited permit authorization. Authorizations limited as to eligibility, practice and duration shall be issued by the department to eligible applicants as follows:

(a) Eligibility. A person who fulfills all requirements for authorization as a polysomnographic technologist except that related to the examination shall be eligible for a limited permit.

(b) Limit of practice. All practice under a limited permit shall be under the direction and supervision of a licensed physician and under the direct and immediate supervision of a health care provider licensed under Title VIII of the Education Law, provided that all tasks or responsibilities supervised by the health care provider are within the scope of his or her practice.

(c) Duration. A limited permit shall be valid for one year and may be renewed for one additional year.

(d) An application for a limited permit in polysomnographic technology shall be submitted on a form provided by the Department and shall be accompanied by a fee of \$70.

§ 79-4.16 Special provisions for authorization for polysomnographic technologists.

Except as otherwise provided in subdivision (d) of this section, an individual who is at least 18 years of age shall be authorized to practice polysomnographic technology without satisfying the education, experience, and examination requirements set forth in sections 79-4.10, 79-4.11 and 79-4.12 of this Subpart; provided that no later than February 3, 2014, such individual shall meet the requirements of subdivisions (a), (b), and (c) of this section. In order to be authorized to practice polysomnographic technology pursuant to this section, the applicant shall:

(a) file an application and pay the appropriate fees to the department; and

(b) be of good moral character, as determined by the department; and  
(c)(1) be certified by a national certifying or accrediting board for polysomnographic technology acceptable to the department, and have practiced polysomnographic technology under the direction and supervision of a licensed physician at least 21 clinical hours per week for not less than 18 months in the three years immediately preceding the receipt of his or her application; or

(2) have practiced polysomnographic technology under the direction and supervision of a licensed physician at least 21 clinical hours per week for not less than three years within the five years immediately preceding the receipt of his or her application.

(d) If at least four licensure qualifying programs in polysomnographic technology have not been registered by the department by February 3, 2014, the applicant shall meet the requirements of subdivisions (a), (b), and (c)(1) of this section prior to the date that a total of four such programs have been registered by the department.

§ 79-4.17 Disciplinary authority for polysomnographic technologists.

Authorized polysomnographic technologists shall be subject to the full disciplinary and regulatory authority of the Board of Regents and the department, as if such authorization were a professional license. Authorized polysomnographic technologists shall be subject to all applicable provisions of the Education Law and of this Title relating to professional misconduct. For purposes of professional misconduct procedures relating to authorized polysomnographic technologists, the State Board for Respiratory Therapy shall serve as the state board responsible for all such procedures.

**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-31-12-00006-P, Issue of August 1, 2012. The emergency rule will expire October 31, 2012.

**Text of rule and any required statements and analyses may be obtained from:** Mary Gammon, State Education Department, Office of Counsel, State Education Building, Room 148, 89 Washington Ave., Albany, NY 12234, (518) 474-6400, 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.

Section 212 of the Education Law authorizes the department to charge fees for certifications or permits for which fees are not otherwise provided.

Section 6504 of the Education Law provides that admission to the professions shall be supervised by the Board of Regents, and administered by the Education Department, assisted by a state board for each profession.

Section 6506 of the Education Law provides that the Board of Regents shall supervise the admission to and the practice of the professions.

Paragraph (a) of subdivision (2) of section 6507 of the Education Law authorizes the Commissioner of Education to promulgate regulations in administering the admission to and practice of the professions.

Section 6508 of the Education Law authorizes the Board of Regents to appoint a board for each profession for the purpose of assisting the board of regents and the department on matters of professional licensing, practice, and conduct.

Subdivision (5) of section 8505 of the Education Law, as added by Chapter 262 of the Laws of 2011, establishes an exemption from the Respiratory Therapy Practice Act for polysomnographic technologists and authorizes the Commissioner to define polysomnographic technology services and to establish standards for authorization to practice as a polysomnographic technologist.

2. LEGISLATIVE OBJECTIVES:

The proposed new section 52.42 of the Regulations of the Commissioner carries out the intent of the aforementioned statutes by outlining the coursework and clinical experience required for registration as a licensure-qualifying polysomnographic technology program.

The proposed amendment of the title of Subpart 79-4 of the Regulations of the Commissioner of Education carries out the intent of the aforementioned statutes by adding the new profession of Polysomnographic Technologist.

Proposed section 79-4.8 of the Regulations of the Commissioner carries out the intent of the aforementioned statutes by defining the practice of polysomnographic technology.

Proposed section 79-4.9 of the Regulations of the Commissioner carries out the intent of the aforementioned statutes by setting forth the general requirements and procedures for professional authorization.

Proposed sections 79-4.10, 79-4.11, and 79-4.12 of the Regulations of the Commissioner establish the educational, experience, and examination requirements, respectively.

Proposed section 79-4.13 of the Regulations of the Commissioner carries out the intent of the aforementioned statutes by mandating that applicants shall be of good moral character, as determined by the Department.

Proposed section 79-4.14 of the Regulations of the Commissioner carries out the intent of the aforementioned statutes by creating a student authorization to allow supervised students in an approved program to obtain clinical experience.

Proposed section 79-4.15 of the Regulations carries out the intent of the aforementioned statutes by creating a limited permit to allow a person who fulfills all requirements for authorization, except exam, to practice under supervision for one year. A limited permit could be renewed for one additional year.

Proposed section 79-4.16 of the Regulations of the Commissioner carries out the intent of the aforementioned statutes by setting forth grandparenting provisions to enable those who began practicing in the field prior to the new law and regulations, to receive authorization to continue to practice if they meet specified requirements, including experience requirements. Individuals applying under these special provisions must meet the grandparenting requirements by February 3, 2014 or by such time as four licensure-qualifying programs in polysomnographic technology have been registered by the Department, whichever is later.

Finally, proposed section 79-4.17 of the Regulations of the Commissioner carries out the intent of the aforementioned statutes by implementing the statutory provision that polysomnographic technologists be subject to the full disciplinary and regulatory authority of the Board of Regents and the Department by designating the State Board for Respiratory Therapy as the responsible state board.

3. NEEDS AND BENEFITS:

The proposed rule is necessary to implement the provisions of Chapter 262 of the Laws of 2011, which creates an exemption to the Respiratory Therapy Practice Act for the provision of polysomnographic technology services by persons authorized by the Department. Chapter 262 authorizes the Department to define, in regulation, the practice of polysomnographic technology and set forth the standards to be met for authorization.

4. COSTS:

(a) Cost to State: None.

(b) Cost to local government: None.

(c) Cost to private regulated parties: In accordance with the requirement that the Commissioner prescribe educational requirements for authorization as a polysomnographic technologist, applicants for authorization, after the expiration of the grandparenting period, will incur the cost of an associate's degree-level education. Chapter 262 of the Laws of 2011 requires an application fee of \$300 and a triennial registration fee of \$300. The proposed rule also imposes a limited permit fee of \$70 to allow a person who fulfills all requirements for authorization, except exam, to practice under supervision for one year.

(d) Costs to the regulatory agency: It is anticipated that the costs to the State Education Department in implementing the requirements of Chapter 262 of the Laws of 2011 will be offset by the application fees, limited permit fees and registration fees discussed above under Costs to Private Regulated Parties.

5. LOCAL GOVERNMENT MANDATES:

The proposed rule does not impose any program, service, duty, or responsibility upon local governments.

6. PAPERWORK:

The proposed rule requires the submission of an application and supporting documentation.

7. DUPLICATION:

The proposed rule is necessary to implement Chapter 262 of the Laws of 2011 and does not duplicate other existing State or Federal requirements.

8. ALTERNATIVES:

Alternatives were considered to various aspects of these regulations, particularly as to the eligibility qualifications for the grandparenting provisions and the duration of the grandparenting period. After discussion with stakeholders, the proposed regulations were modified to ensure a level of experience and qualification necessary for public protection, while not adversely impacting the pipeline of eligible polysomnographic technologists.

9. FEDERAL STANDARDS:

There are no Federal standards regarding the matters addressed by the proposed rule.

10. COMPLIANCE SCHEDULE:

The proposed rule takes effect on August 3, 2012, the effective date of Chapter 262 of the Laws of 2011 and must be complied with on the stated effective date. No additional period of time is necessary to enable regulated parties to comply.

**Regulatory Flexibility Analysis**

1. EFFECT OF RULE:

The purpose of the proposed rule is to implement Chapter 262 of the Laws of 2011, which created an exemption to the Respiratory Therapy Practice Act for the provision of polysomnographic technology services by persons authorized by the Department. Chapter 262 authorized the Department to define in regulation the practice of polysomnographic technology and set forth the standards to be met for authorization.

As of July 2012, the Board of Registered Polysomnographic Technologists website lists 547 registered or certified sleep technologists in New York State who have passed a national certifying examination. The number of uncertified persons currently providing polysomnographic technology services is unknown. Reliable data on the number of individuals providing polysomnographic technology services and employed by a small business or by a local government is not available for New York State, although it is estimated that there are approximately 400 private

sleep centers in New York State, most with fewer than 100 employees. Of these, it is estimated that there may be approximately 1,000 individuals providing polysomnographic technology services.

#### 2. COMPLIANCE REQUIREMENTS:

The proposed rule implements Chapter 262 of the Laws of 2011, which created an exemption to the Respiratory Therapy Practice Act for the provision of polysomnographic technology services by persons authorized by the Department. Chapter 262 authorized the Department to define, in regulation, the practice of polysomnographic technology and set forth the standards to be met for authorization. Those wishing to be authorized to practice polysomnographic technology will be required to file an application and to meet the professional study, experience, and examination requirements specified in the proposed regulation. Those wishing to work after completing all requirements for authorization except the examination requirements will be required to file a limited permit application.

#### 3. PROFESSIONAL SERVICES:

The proposed rule will require small businesses and local governments to use only authorized professionals to perform polysomnographic technology, but is not expected to impact the number of individuals employed to provide such services. It is not anticipated that small businesses or local governments will be required to obtain professional services to comply with the proposed rule.

#### 4. COMPLIANCE COSTS:

The proposed rule does not impose any direct costs on small business or local governments. The proposed rule will require small businesses and local governments to use only authorized professionals to perform polysomnographic technology. In accordance with the requirement that the Commissioner prescribe educational requirements for authorization as a polysomnographic technologist, applicants for authorization, after the expiration of the grandparenting period, will incur the cost of an associate's degree-level education. Chapter 262 of the Laws of 2011 requires an application fee of \$300 and a triennial registration fee of \$300. The proposed rule also imposes a limited permit fee of \$70 to allow a person who fulfills all requirements for authorization, except exam, to practice under supervision for one year.

#### 5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed rule will not impose any technological requirements on regulated parties, including those that are classified as small businesses, and the proposed rule is economically feasible. See above "Compliance Costs" for the economic impact of the regulation.

#### 6. MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to implement the provisions of Chapter 262 of the Laws of 2011, which creates an exemption to the Respiratory Therapy Practice Act for the provision of polysomnographic technology services by persons authorized by the Department. Chapter 262 authorizes the Department to define, in regulation, the practice of polysomnographic technology and set forth the standards to be met for authorization. The proposed fee structure was determined by the legislature to be the minimum needed to support additional costs. It is on a par with fee structures in other professions. It was determined that the authorization of polysomnographic technologists who meet minimum requirements established in the proposed regulations best ensures the protection of the health and safety of the public.

#### 7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:

The New York State Society of Sleep Medicine and the New York State Society for Respiratory Care, which represent physicians specializing in sleep medicine, polysomnographic technologists, respiratory therapists and respiratory therapy technicians, and include members who have experience in a small business environment, were consulted and provided input into the development of the proposed rule. The State Education Department also solicited comments on the proposed rule from the American Academy of Sleep Medicine and the American Association of Sleep Technologists and the comments that were received were considered in the development of the rule.

#### *Rural Area Flexibility Analysis*

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

The proposed rule applies to all polysomnographic technologists and physicians who supervise these professionals who live in the State, including those 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 rule implements Chapter 262 of the Laws of 2011, which created an exemption to the Respiratory Therapy Practice Act for the provision of polysomnographic technology services by persons authorized by the Department. Chapter 262 authorized the Department to define, in regulation, the practice of polysomnographic technology and set forth the standards to be met for authorization. Those wishing to be authorized to

practice polysomnographic technology will be required to file an application and to meet the professional study, experience, and examination requirements specified in the proposed regulation. Those wishing to work after completing all requirements for authorization except the examination requirements will be required to file a limited permit application. It is not anticipated that professional services will be required to comply with the proposed regulation.

#### 3. COSTS:

The proposed rule does not impose any direct costs on small business or local governments. The proposed rule will require small businesses and local governments to use only authorized professionals to perform polysomnographic technology. In accordance with the requirement that the Commissioner prescribe educational requirements for authorization as a polysomnographic technologist, applicants for authorization, after the expiration of the grandparenting period, will incur the cost of an associate's degree-level education. Chapter 262 of the Laws of 2011 requires an application fee of \$300 and a triennial registration fee of \$300. The proposed rule also imposes a limited permit fee of \$70 to allow a person who fulfills all requirements for authorization, except exam, to practice under supervision for one year.

#### 4. MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to implement the provisions of Chapter 262 of the Laws of 2011, which creates an exemption to the Respiratory Therapy Practice Act for the provision of polysomnographic technology services by persons authorized by the Department. Chapter 262 authorizes the Department to define, in regulation, the practice of polysomnographic technology and set forth the standards to be met for authorization. The proposed fee structure was determined by the legislature to be the minimum needed to support additional costs. It is on a par with fee structures in other professions. It was determined that authorization of polysomnographic technologists who meet minimum requirements established in the proposed rule will best ensure the protection of the health and safety of the public. Because these minimum requirements must uniformly apply to authorized polysomnographic technologists across the State in order to ensure public health and safety, it was not possible to prescribe lesser standards for individuals in rural areas, or to exempt them from the provisions of the proposed rule.

#### 5. RURAL AREA PARTICIPATION:

The State Education Department solicited comments on the proposed rule from the New York State Society for Respiratory Care, the New York State Society of Sleep Medicine, the American Academy of Sleep Medicine, and the American Association of Sleep Technologists, and the comments that were received were considered in the development of the rule.

#### *Job Impact Statement*

The proposed rule is required to implement Chapter 262 of the Laws of 2011, authorizing the practice of polysomnographic technology. The proposed rule defines the practice of polysomnographic technology and establish the qualifications for the issuance by the Department of an authorization to provide polysomnographic technology services. It is not anticipated that the proposed proposed rule will increase or decrease the number of jobs to be filled. The proposed rule includes special provisions which will enable most current practitioners to become authorized polysomnographic technologists. Because it is apparent from the nature of the proposed rule that it will not adversely impact the number of jobs, a job impact statement is not required and one has not been prepared.

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## Department of Environmental Conservation

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

#### Amendment of Part 590, Payment of Expenses Upon Acquisition of Real Property, to Comply with the Marriage Equality Act

I.D. No. ENV-34-12-00004-P

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

**Proposed Action:** This is a consensus rule making to amend Part 590 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 3-0301 and 3-0305

**Subject:** Amendment of Part 590, Payment of Expenses Upon Acquisition of Real Property, to comply with the Marriage Equality Act.

**Purpose:** To ensure regulations are gender neutral to comply with the Marriage Equality Act.

**Substance of proposed rule:** The proposed amendments to 6 NYCRR Part 590 have been made to comply with the Marriage Equality Act which requires changing terms such as “husband” to “person”. Other words have been changed to reflect gender neutrality.

**Text of proposed rule and any required statements and analyses may be obtained from:** Keith Matteson, NYS DEC, 625 Broadway, Albany, NY 12233, (518) 402-9442, email: bkmattes@gw.dec.state.ny.us

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

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

**Consensus Rule Making Determination**

The Agency does not believe there will be any objection to the promulgation of this regulation since the language of the regulation has been revised to be gender neutral to comply with the Marriage Equality Act.

**Job Impact Statement**

The proposed regulatory amendment will comply with the Marriage Equality Act which requires regulations to be gender neutral. A job impact statement is not submitted with the proposal because there will be no adverse impact on existing or future jobs and employment opportunities.

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## Department of Financial Services

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### EMERGENCY RULE MAKING

**Assessment of Entities Regulated by the Banking Division of the Department of Financial Services**

**I.D. No.** DFS-34-12-00001-E

**Filing No.** 794

**Filing Date:** 2012-08-03

**Effective Date:** 2012-08-03

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

**Action taken:** Addition of Part 501 to Title 3 NYCRR.

**Statutory authority:** Banking Law, section 17; Financial Services Law, section 206

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

**Specific reasons underlying the finding of necessity:** Pursuant to the Financial Services Law (“FSL”), the New York State Banking Department (“Banking Department”) and the New York State Insurance Department were consolidated, effective October 3, 2011, into the Department of Financial Services (“Department”).

Prior to the consolidation, assessments of institutions subject to the Banking Law (“BL”) were governed by Section 17 of the BL; effective on October 3, 2011, assessments are governed by Section 206 of the Financial Services Law, provided that Section 17 continues to apply to assessments for the fiscal year which commenced April 1, 2011.

Both Section 17 of the Banking Law and Section 206 of the Financial Services Law provide that all expenses (compensation, lease costs and other overhead) of the Department in connection with the regulation and supervision (including examination) of any person or entity licensed, registered, incorporated or otherwise formed pursuant to the BL are to be charged to, and paid by, the regulated institutions subject to the supervision of in the Banking Division of the Department (the “Banking Division”). Under both statutes, the Superintendent is authorized to assess regulated institutions in the Banking Division in such proportions as the Superintendent shall deem just and reasonable.

Litigation commenced in June, 2011 challenged the methodology used by the Banking Department to assess mortgage bankers. On May 3, 2012, the Appellate Division invalidated this methodology for the 2010 State Fiscal Year, finding that the former Banking Department

had not followed the requirements of the State Administrative Procedures Act.

In response to this ruling, the Department has determined to adopt this new rule setting forth the assessment methodology applicable to all entities regulated by the Banking Division for fiscal years beginning with fiscal year 2011.

The emergency adoption of this regulation is necessary to implement the requirements of Section 17 of the Banking Law and Section 206 of the Financial Services Law in light of the determination of the Court and the ongoing need to fund the operations of the Department without interruption.

**Subject:** Assessment of entities regulated by the Banking Division of the Department of Financial Services.

**Purpose:** To set forth the basis for allocating all costs and expenses attributable to the operation of the Banking Division of the Department of Financial Services.

**Text of emergency rule:** Superintendent’s Regulations

Part 501

(BANKING DIVISION ASSESSMENTS)

(Statutory authority: Banking Law § 17; Financial Services Law § 206)

§ 501.1 Background.

Pursuant to the Financial Services Law (“FSL”), the New York Banking Department (“Banking Department”) and the New York State Insurance Department were consolidated on October 3, 2011 into the Department of Financial Services (“Department”).

Prior to the consolidation, assessments of institutions subject to the Banking Law (“BL”) were governed by Section 17 of the BL. Effective October 3, 2011, assessments are governed by Section 206 of the FSL, provided that Section 17 of the BL continues to apply to assessments for the fiscal year commencing on April 1, 2011.

Both Section 17 of the BL and Section 206 of the FSL provide that all expenses (including, but not limited to, compensation, lease costs and other overhead costs) of the Department attributable to institutions subject to the BL are to be charged to, and paid by, such regulated institutions. These institutions (“Regulated Entities”) are now regulated by the Banking Division of the Department. Under both Section 17 of the BL and Section 206 of the FSL, the Superintendent is authorized to assess Regulated Entities for its total costs in such proportions as the Superintendent shall deem just and reasonable.

The Banking Department has historically funded itself entirely from industry assessments of Regulated Entities. These assessments have covered all direct and indirect expenses of the Banking Department, which are activities that relate to the conduct of banking business and the regulatory concerns of the Department, including all salary expenses, fringe benefits, rental and other office expenses and all miscellaneous and overhead costs such as human resource operations, legal and technology costs.

This regulation sets forth the basis for allocating such expenses among Regulated Entities and the process for making such assessments.

§ 501.2 Definitions.

The following definitions apply in this Part:

(a) “Total Operating Cost” means for the fiscal year beginning on April 1, 2011, the total direct and indirect costs of operating the Banking Division. For fiscal years beginning on April 1, 2012, “Total Operating Cost” means the sum of the total operating expenses of the Department that are solely attributable to regulated persons under the Banking Law and (2) the proportion deemed just and reasonable by the Superintendent of the other operating expenses of the Department which under Section 206(a) of the Financial Services Law may be assessed against persons regulated under the Banking Law and other persons regulated by the Department.

(b) “Industry Group” means the grouping to which a business entity regulated by the Banking Division is assigned. There are three Industry Groups in the Banking Division:

(1) The Depository Institutions Group, which consists of all banking organizations and foreign banking corporations licensed by the Department to maintain a branch, agency or representative office in this state;

(2) *The Mortgage-Related Entities Group, which consists of all mortgage brokers, mortgage bankers and mortgage loan servicers; and*

(3) *The Licensed Financial Services Providers Group, which consists of all check cashers, budget planners, licensed lenders, sales finance companies, premium finance companies and money transmitters.*

(c) *“Industry Group Operating Cost” means the amount of the Total Operating Cost to be assessed to a particular Industry Group. The amount is derived from the percentage of the total expenses for salaries and fringe benefits for the examining, specialist and related personnel represented by such costs for the particular Industry Group.*

(d) *“Industry Group Supervisory Component” means the total of the Supervisory Components for all institutions in that Industry Group.*

(e) *“Supervisory Component” for an individual institution means the product of the average number of hours attributed to supervisory oversight by examiners and specialists of all institutions of a similar size and type, as determined by the Superintendent, in the applicable Industry Group, or in the case of institutions or entities that are members of the Licensed Financial Services Institution’s Group, the applicable sub-group, and the average hourly cost of the examiners and specialists assigned to the applicable Industry Group or sub-group.*

(f) *“Industry Group Regulatory Component” means the Industry Group Operating Cost for that group minus the Industry Group Supervisory Component and certain miscellaneous fees such as application fees.*

(g) *“Industry Financial Basis” means the measurement tool used to distribute the Industry Group Regulatory Component among individual institutions in an Industry Group.*

*The Industry Financial Basis used for each Industry Group is as follows:*

(1) *For the Depository Institutions Group: total assets of all institutions in the group;*

(2) *For the Mortgage-Related Entities Group: total gross revenues from New York State operations, including servicing and secondary market revenues, for all institutions in the group; and*

(3) *For the Licensed Financial Services Providers Group: (i.) for budget planners, the number of New York customers; (ii.) for licensed lenders, the dollar amount of New York assets; (iii.) for check cashers, the dollar amount of checks cashed in New York; (iv.) for money transmitters, the dollar value of all New York transactions; (v.) for premium finance companies, the dollar value of loans originated in New York; and (vi.) for sales finance companies, the dollar value of credit extensions in New York.*

(h) *“Financial Basis” for an individual institution is that institution’s portion of the measurement tool used in Section 501.2(g) to develop the Industry Financial Basis. (For example, in the case of the Depository Institutions Group, an entity’s Financial Basis would be its total assets.)*

(i) *“Industry Group Regulatory Rate” means the result of dividing the Industry Group Regulatory Component by the Industry Financial Basis.*

(j) *“Regulatory Component” for an individual institution is the product of the Financial Basis for the individual institution multiplied by the Industry Group Regulatory Rate for that institution.*

#### § 501.3 Billing and Assessment Process.

*The New York State fiscal year begins April 1 and ends March 31 of the following calendar year. Each institution subject to assessment pursuant to this Part is billed five times for a fiscal year: four quarterly assessments (each approximately 25% of the anticipated annual amount) based on the Banking Division’s estimated annual budget at the time of the billing, and a final assessment (or “true-up”), based on the Banking Division’s actual expenses for the fiscal year. Any institution that is a Regulated Entity for any part of a quarter shall be assessed for the full quarter.*

#### § 501.4 Computation of Assessment.

*The total annual assessment for an institution shall be the sum of its Supervisory Component and its Regulatory Component.*

#### § 501.5 Penalties/Enforcement Actions.

*All Regulated Entities shall be subject to all applicable penalties, including late fees and interest, provided for by the BL, the FSL, the State Finance law or other applicable laws. Enforcement actions for nonpayment could include suspension, revocation, termination or other actions.*

#### § 501.6 Effective Date.

*This Part shall be effective immediately. It shall apply to all State Fiscal Years beginning with the Fiscal Year starting on April 1, 2011.*

**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 October 31, 2012.

**Text of rule and any required statements and analyses may be obtained from:** Gene C. Brooks, First Assistant Counsel, Department of Financial Services, One State Street, New York, NY 10004, (212) 709-1641, email: gene.brooks@dfs.ny.gov

#### Regulatory Impact Statement

##### 1. Statutory authority.

Pursuant to the Financial Services Law (“FSL”), the New York State Banking Department (the “Banking Department”) and the New York State Insurance Department were consolidated, effective October 3, 2011, into the Department of Financial Services (the “Department”).

Prior to the consolidation, assessments of institutions subject to the Banking Law (“BL”) were governed by Section 17 of the BL; effective on October 3, 2011, assessments are governed by Section 206 of the Financial Services Law, provided that Section 17 continues to apply to assessments for the fiscal year which commenced April 1, 2011.

Both Section 17 of the BL and Section 206 of the FSL provide that all expenses (compensation, lease costs and other overhead) of the Department in connection with the regulation and supervision of any person or entity licensed, registered, incorporated or otherwise formed pursuant to the BL are to be charged to, and paid by, the regulated institutions subject to the supervision of the Banking Division of the Department (the “Banking Division”). Under both statutes, the Superintendent is authorized to assess regulated institutions in the Banking Division in such proportions as the Superintendent shall deem just and reasonable.

In response to a court ruling, *In the Matter of Homestead Funding Corporation v. State of New York Banking Department et al.*, 944 N.Y.S. 2d 649 (2012) (“Homestead”), that held that the Department should adopt changes to its assessment methodology for mortgage bankers through a formal assessment rule pursuant to the requirements of the State Administrative Procedures Act (“SAPA”), the Department has determined to adopt this new regulation setting forth the assessment methodology applicable to all entities regulated by the Banking Division for fiscal years beginning with fiscal year 2011.

##### 2. Legislative objectives.

The BL and the FSL make the industries regulated by the former Banking Department (and now by the Banking Division of the new Department) responsible for all the costs and expenses of their regulation by the State. The assessments have covered all direct and indirect expenses of the Banking Department, which are activities that relate to the conduct of banking business and the regulatory concerns of the Department, including all salary expenses, fringe benefits, rental and other office expenses and all miscellaneous and overhead costs such as human resource operations, legal and technology costs.

This reflects a long-standing State policy that the regulated industries are the appropriate parties to pay for their supervision in light of the financial benefits it provides to them to engage in banking and other regulated businesses in New York. The statute specifically provides that these costs are to be allocated among such institutions in the proportions deemed just and reasonable by the Superintendent.

While this type of allocation had been the practice of the former Banking Department for many decades, Homestead found that a change to the methodology for mortgage bankers to include secondary market and servicing income should be accomplished through formal regulations subject to the SAPA process. Given the nature of the Bank-

ing Division's assessment methodology - - the calculation and payment of the assessment is ongoing throughout the year and any period of uncertainty as to the applicable rule would be extremely disruptive - - the Department has determined that it is necessary to adopt the rule on an emergency basis so as to avoid any possibility of disrupting the funding of its operations.

### 3. Needs and benefits.

The Banking Division regulates more than 250 state chartered banks and licensed foreign bank branches and agencies in New York with total assets of over \$2 trillion. In addition, it regulates a variety of other entities engaged in delivering financial services to the residents of New York State. These entities include: licensed check cashers; licensed money transmitters; sales finance companies; licensed lenders; premium finance companies; budget planners; mortgage bankers and brokers; mortgage loan servicers; and mortgage loan originators.

Collectively, the regulated entities represent a spectrum, from some of the largest financial institutions in the country to the smallest, neighborhood-based financial services providers. Their services are vital to the economic health of New York, and their supervision is critical to ensuring that these services are provided in a fair, economical and safe manner.

This supervision requires that the Banking Division maintain a core of trained examiners, plus facilities and systems. As noted above, these costs are by statute to be paid by all regulated entities in the proportions deemed just and reasonable by the Superintendent. The new regulation is intended to formally set forth the methodology utilized by the Banking Division for allocating these costs.

### 4. Costs.

The new regulation does not increase the total costs assessed to the regulated industries or alter the allocation of regulatory costs between the various industries regulated by the Banking Division. Indeed, the only change from the allocation methodology used by the Banking Department in the previous state fiscal years is that the regulatory costs assessed to the mortgage banking industry will be divided among the entities in that group on a basis which includes income derived from secondary market and servicing activities. The Department believes that this is a more appropriate basis for allocating the costs associated with supervising mortgage banking entities.

### 5. Local government mandates.

None.

### 6. Paperwork.

The regulation does not change the process utilized by the Banking Division to determine and collect assessments.

### 7. Duplication.

The regulation does not duplicate, overlap or conflict with any other regulations.

### 8. Alternatives.

The purpose of the regulation is to formally set forth the process employed by the Department to carry out the statutory mandate to assess and collect the operating costs of the Banking Division from regulated entities. In light of Homestead, the Department believes that promulgating this formal regulation is necessary in order to allow it to continue to assess all of its regulated institutions in the manner deemed most appropriate by the Superintendent. Failing to formalize the Banking Division's allocation methodology would potentially leave the assessment process open to further judicial challenges.

### 9. Federal standards.

Not applicable.

### 10. Compliance schedule.

The emergency regulations are effective immediately. Regulated institutions will be expected to comply with the regulation for the fiscal year beginning on April 1, 2011 and thereafter.

## **Regulatory Flexibility Analysis**

### 1. Effect of the Rule:

The regulation does not have any impact on local governments.

The regulation simply codifies the methodology used by the Banking Division of the Department of Financial Services (the "Depart-

ment") to assess all entities regulated by it, including those which are small businesses. The regulation does not increase the total costs assessed to the regulated industries or alter the allocation of regulatory costs between the various industries regulated by the Banking Division.

Indeed, the only change from the allocation methodology used by the Banking Department in the previous state fiscal years is that the regulatory costs assessed to the mortgage banking industry will be divided among the entities in that group on a basis which includes income derived from secondary market and servicing activities. The Department believes that this is a more appropriate basis for allocating the costs associated with supervising mortgage banking entities. It is expected that the effect of this change will be that larger members of the mortgage banking industry will pay an increased proportion of the total cost of regulating that industry, while the relative assessments paid by smaller industry members will be reduced.

### 2. Compliance Requirements:

The regulation does not change existing compliance requirements. Both Section 17 of the Banking Law and Section 206 of the Financial Services Law provide that all expenses (compensation, lease costs and other overhead) of the Department in connection with the regulation and supervision of any person or entity licensed, registered, incorporated or otherwise formed pursuant to the Banking Law are to be charged to, and paid by, the regulated institutions subject to the supervision of the Banking Division. Under both statutes, the Superintendent is authorized to assess regulated institutions in the Banking Division in such proportions as the Superintendent shall deem just and reasonable.

### 3. Professional Services:

None.

### 4. Compliance Costs:

All regulated institutions are currently subject to assessment by the Banking Division. The regulation simply formalizes the Banking Division's assessment methodology. It makes only one change from the allocation methodology used by the Banking Department in the previous state fiscal years. That change affects only one of the industry groups regulated by the Banking Division. Regulatory costs assessed to the mortgage banking industry are now divided among the entities in that group on a basis which includes income derived from secondary market and servicing activities. Even within the one industry group affected by the change, additional compliance costs, if any, are expected to be minimal.

### 5. Economic and Technological Feasibility:

All regulated institutions are currently subject to the Banking Division's assessment requirements. The formalization of the Banking Division's assessment methodology in a regulation will not impose any additional economic or technological burden on regulated entities which are small businesses.

### 6. Minimizing Adverse Impacts:

Even within the mortgage banking industry, which is the one industry group affected by the change in assessment methodology, the change will not affect the total amount of the assessment. Indeed, it is anticipated that this change may slightly reduce the proportion of mortgage banking industry assessments that is paid by entities that are small businesses.

### 7. Small Business and Local Government Participation:

This regulation does not impact local governments.

This regulation simply codifies the methodology which the Banking Division uses for determining the just and reasonable proportion of the Banking Division's costs to be charged to and paid by each regulated institution, including regulated institutions which are small businesses. The overall methodology was adopted in 2005 after extensive discussion with regulated entities and industry associations representing groups of regulated institutions, including those that are small businesses.

Thereafter, the Banking Department applied assessments against all entities subject to its regulation. In addition, for fiscal 2010, the Banking Department changed its overall methodology slightly with respect

to assessments against the mortgage banking industry to include income derived from secondary market and servicing activities. Litigation was commenced challenging this latter change, and in a recent decision, *In the Matter of Homestead Funding Corporation v. State of New York Banking Department et al.*, 944 N.Y.S. 2d 649 (2012), the court determined that the Department should adopt a change to its assessment methodology for mortgage bankers through a formal assessment rule promulgated pursuant to the requirements of the State Administrative Procedures Act. The challenged change in methodology had the effect of increasing the proportion of assessments against the mortgage banking industry paid by its larger members, while reducing the assessments paid by smaller participants, including those which are small businesses.

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

##### 1. Effect of the Rule:

The regulation does not have any impact on local governments.

The regulation simply codifies the methodology used by the Banking Division (the "Banking Division") of the Department of Financial Services (the "Department") to assess all entities regulated by it, including those which are located in rural areas. The regulation does not increase the total costs assessed to the regulated industries or alter the allocation of regulatory costs between the various industries regulated by the Banking Division.

Indeed, the only change from the allocation methodology used by the Banking Department in previous state fiscal years is that the regulatory costs assessed to the mortgage banking industry will be divided among the entities in that group on a basis which includes income derived from the secondary market and from mortgage servicing activities. The Department believes that this is a more appropriate basis for allocating the costs associated with supervising mortgage banking entities. It is expected that the effect of this change will be that larger members of the mortgage banking industry will pay an increased proportion of the total cost of regulating that industry, while the relative assessments paid by smaller industry members, which includes those in located in rural areas, will be reduced.

##### 2. Compliance Requirements:

The regulation does not change existing compliance requirements. Both Section 17 of the Banking Law and Section 206 of the Financial Services Law provide that all expenses (compensation, lease costs and other overhead) of the Department in connection with the regulation and supervision of any person or entity licensed, registered, incorporated or otherwise formed pursuant to the Banking Law are to be charged to, and paid by, the regulated institutions subject to the supervision of the Banking Division. Under both statutes, the Superintendent is authorized to assess regulated institutions in the Banking Division in such proportions as the Superintendent shall deem just and reasonable.

##### 3. Professional Services:

None.

##### 4. Compliance Costs:

All regulated institutions are currently subject to assessment by the Banking Division. The regulation simply formalizes the Banking Division's assessment methodology. It makes only one change from the allocation methodology used by the Banking Department in the previous state fiscal years. That change affects only one of the industry groups regulated by the Banking Division. Regulatory costs assessed to the mortgage banking industry are now divided among the entities in that group on a basis which includes income derived from secondary market and servicing activities. Even within the one industry group affected by the change, additional compliance costs, if any, are expected to be minimal.

##### 5. Economic and Technological Feasibility:

All regulated institutions are currently subject to the Banking Division's assessment requirements. The formalization of the Banking Division's assessment methodology in a regulation will not impose any additional economic or technological burden on regulated entities which are located in rural areas.

##### 6. Minimizing Adverse Impacts:

Even within the mortgage banking industry, which is the one

industry group affected by the change in assessment methodology, the adverse impact of that change is expected to be minimal. Indeed, it is anticipated that this change may slightly reduce the proportion of mortgage banking industry assessments that is paid by entities that are located in rural areas.

##### 7. Rural Area Participation:

This regulation does not impact local governments.

This regulation simply codifies the methodology which the Banking Division uses for determining the just and reasonable proportion of the Banking Division's costs to be charged to and paid by each regulated institution, including regulated institutions which are located in rural areas. The overall methodology was adopted in 2005 after extensive discussion with regulated entities and industry associations representing groups of regulated institutions, including those that are located in rural areas.

Thereafter, the Banking Department applied assessments against all entities subject to its regulation. In addition, for fiscal 2010, the Banking Department changed its overall methodology slightly with respect to assessments against the mortgage banking industry to include income derived from secondary market and servicing activities. Litigation was commenced challenging inclusion of this latter change, and in a recent decision, *In the Matter of Homestead Funding Corporation v. State of New York Banking Department et al.*, 944 N.Y.S. 2d 649 (2012), the court determined that the change should have been made in conformity with the State Administrative Procedures Act. The challenged change in methodology had the effect of increasing the proportion of assessments against the mortgage banking industry paid by its larger members, while reducing the assessments paid by smaller participants, including those which are located in rural areas.

#### **Job Impact Statement**

The regulation is not expected to have an adverse effect on employment.

All institutions regulated by the Banking Division (the "Banking Division") of the Department of Financial Services are currently subject to assessment by the Department. The regulation simply formalizes the assessment methodology used by the Banking Division. It makes only one change from the allocation methodology used by the former Banking Department in the previous state fiscal years.

That change affects only one of the industry groups regulated by the Banking Division. It somewhat alters the way in which the Banking Division's costs of regulating mortgage banking industry are allocated among entities within that industry. In any case, the total amount assessed against regulated entities within that industry will remain the same.

## **EMERGENCY RULE MAKING**

### **Public Retirement Systems**

**I.D. No.** DFS-34-12-00002-E

**Filing No.** 795

**Filing Date:** 2012-08-03

**Effective Date:** 2012-08-03

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

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

**Statutory authority:** Financial Services Law, sections 202 and 302; and Insurance Law, sections 301, 314, 7401(a) and 7402(n)

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

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

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

This regulation was previously promulgated on an emergency basis on June 18, 2009, September 16, 2009, January 5, 2010, April 2, 2012, May 28, 2010, July 29, 2010, September 23, 2010, November 19, 2010, January 18, 2011, March 21, 2011, May 19, 2011, August 16, 2011, November 10, 2011, February 7, 2012 and May 7, 2012. The Department is currently working with the Governor's Office to make additional revisions to the regulation.

**Subject:** Public Retirement Systems.

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

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

§ 136-2.2 Definitions.

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

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

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

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

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

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

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

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

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

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

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

[(g)] (h) Placement agent or intermediary shall mean any person or entity, including registered lobbyists, directly or indirectly engaged and compensated by an investment manager (other than [an] a regular employee of the investment manager) to promote investments to or solicit investment by [assist the investment manager in obtaining investments by the fund, or otherwise doing business with] the [fund] Fund, whether compensated on a flat fee, a contingent fee, or any

other basis. Regular employees of an investment manager are excluded from this definition unless they are employed principally for the purpose of securing or influencing the decision to secure a particular transaction or investment by the Fund. [obtaining investments or providing other intermediary services with respect to the fund.] For purpose of this paragraph, the term "employee" shall include any person who would qualify as an employee under the federal Internal Revenue Code of 1986, as amended, but shall not include a person hired, retained or engaged by an investment manager to secure or influence the decision to secure a particular transaction or investment by the Fund.

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

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

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

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

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

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

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

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

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

(g) The Comptroller shall:

(1) file with the superintendent an annual statement in the format

prescribed by Section 307 of the Insurance Law, including the [retirement system's] *Retirement System's* financial statement, together with an opinion of an independent certified public accountant on the financial statement;

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

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

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

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

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

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire October 31, 2012.

**Text of rule and any required statements and analyses may be obtained from:** David Neustadt, New York State Department of Financial Services, One State Street, New York, NY 10004, (212) 709-1691, email: david.neustadt@dfs.ny.gov

#### **Regulatory Impact Statement**

1. Statutory authority: The Superintendent's authority for the adoption of the rule to 11 NYCRR 136 is derived from sections 202 and 302 of the Financial Services Law ("FSL") and sections 301, 314, 7401(a), and 7402(n) of the Insurance Law.

FSL section 202 establishes the office of the Superintendent and designates the Superintendent to be the head of the Department of Financial Services ("DFS").

FSL section 302 and Insurance Law section 301, in material part, authorize the Superintendent to effectuate any power accorded to him by the Insurance Law, the Banking Law, the Financial Services Law, or any other law of this state and to prescribe regulations interpreting the Insurance Law.

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

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

Insurance Law section 7401(a) sets forth the entities, including the public retirement systems, to which Article 74 applies.

Insurance Law section 7402(n) provides that it is a ground for rehabilitation if an entity subject to Article 74 has failed or refused to take such steps as may be necessary to remove from office any officer or director whom the Superintendent has found, after appropriate notice and hearing, to be a dishonest or untrustworthy person.

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

This rule, which in effect bans the use of an investment tool that has been found to be untrustworthy, is consistent with the public policy objectives that the Legislature sought to advance in enacting Insurance Law section 314, which provides the Superintendent with the powers to promulgate standards to protect the New York State Common Retirement Fund (the "Fund").

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

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

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

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

6. Paperwork: No additional paperwork should result from the prohibition imposed by the rule.

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

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

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

Initially, the Superintendent concluded that only an immediate total ban on the use of placement agents could provide sufficient protection of the Fund's members and beneficiaries and safeguard the integrity of the Fund's investments. The proposed rule was published in the *State Register* on March 17, 2010. A Public Hearing was held on April 28, 2010. The following comments were received:

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

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

- A ban on political contributions by any employee of any placement agent seeking to do business with the Fund;

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

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

The Superintendent did consider other ways to limit the influence of placement agents, including a partial ban, increased disclosure requirements, and adopting alternative definitions of placement agent or intermediary. The Department considered limiting the ban to include intent on the part of the party using placement agents, or defining “placement agent” in more general terms. At the time, the Superintendent concluded that only an immediate, total ban on the use of placement agents could provide sufficient protection of the Fund’s members and beneficiaries and safeguard the integrity of the Fund’s investments.

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

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

#### **Regulatory Flexibility Analysis**

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

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

Nevertheless, recent allegations regarding “pay to play” practices, whereby politically connected individuals reportedly sold access to investment opportunities with the Fund, compel the Superintendent to conclude that the mere strengthening of the Fund’s control environment is insufficient to protect the integrity of the state employees’ retirement systems. The Third Amendment to Insurance Regulation 85 will adopt an immediate ban on the use of placement agents to ensure sufficient protection of the Fund’s members and beneficiaries, and safeguard the integrity of the Fund’s investments. Further, the

rule defines “placement agent or intermediary” in a manner that both thwarts evasion of the ban while ensuring that such ban not extend to persons otherwise acting lawfully on behalf of investment managers.

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

This rule will affect investment managers and other intermediaries (other than OSC employees) who provide technical or professional services to the Fund related to Fund investments. The rule will prohibit investment managers from using the services of a placement agent unless such agent is a regular employee of the investment manager and is acting in a broader capacity than just providing specific investment advice to the Fund. In addition, the rule is also directed to placement agents, who as a result of this rule, will no longer be engaged directly or indirectly by investment managers that do business with the Fund. Some investment managers and placement agents may come within the definition of “small business” set forth in section 102(8) of the State Administrative Procedure Act, because they are independently owned and operated, and employ 100 or fewer individuals.

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

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

2. Compliance requirements: None.

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

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

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

6. Minimizing adverse impact: The costs to placement agents are lost opportunities to earn profits in connection with investments by the Fund. The Superintendent considered other ways to limit the influence of placement agents, including a partial ban, increased disclosure requirements, and adopting alternative definitions of placement agent or intermediary. But in the end, the Superintendent concluded that only an immediate total ban on the use of placement agents could provide sufficient protection of the Fund’s members and beneficiaries and safeguard the integrity of the Fund’s investments.

7. Small business and local government participation: In develop-

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

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

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

1. Types and estimated numbers of rural areas: Investment managers, placement agents, consultants or advisors that do business in rural areas as defined under State Administrative Procedure Act Section 102(10) will be affected by this rule. The rule bans the use of placement agents in connection with investments by the New York State Common Retirement Fund ("the Fund"), which may adversely affect the business of placement agents and of other entities that utilize placement agents and are involved in Fund investments.

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

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

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

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

#### **Job Impact Statement**

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

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

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

**I.D. No.** DFS-34-12-00005-P

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

**Proposed Action:** Addition of Part 225 (Regulation 199) to Title 11 NYCRR.

**Statutory authority:** Financial Services Law, sections 202, 301 and 302; Insurance Law, sections 301, 2103, 2104, 2110, 2403 and 4525

**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.

**Text of proposed 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 certificate 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) and shall be a violation of section 2403 of the Insurance Law.*

**Text of proposed rule and any required statements and analyses may be obtained from:** David Neustadt, New York State Department of Financial Services, One State Street, New York, NY 10004, (212) 709-1690, email: david.neustadt@dfs.ny.gov

**Data, views or arguments may be submitted to:** Ruth Gumaer, New York State Department of Financial Services, 25 Beaver Street, New York, NY 10004, (212) 480-4763, email: ruth.gumaer@dfs.ny.gov

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

#### **Regulatory Impact Statement**

1. **Statutory authority:** The Superintendent's authority for promulgation of this rule derives from Sections 202, 301 and 302 of the Financial Services Law ("FSL"), and sections 301, 2103, 2104, 2403, 2110, and 4525 of the Insurance Law.

FSL section 202 establishes the office of the Superintendent and designates the Superintendent to be the head of the Department of Financial Services.

FSL section 301 establishes the powers of the Superintendent generally. FSL section 302 and Insurance Law section 301, in material part, authorize the Superintendent to effectuate any power accorded to the Superintendent by the Insurance Law, the Banking Law, the Financial Services Law, or any other law of this state and to prescribe regulations interpreting the Insurance Law.

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

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

Section 2403 of the Insurance Law 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 of the Insurance Law 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 Department of Financial Services is adopting the NAIC Model, with minimal modifications, as Part 225 to Title 11 NYCRR (Regulation 199). The modifications from the NAIC Model conformed technology and formatting to New York standards as well as added the violations section of the regulation.

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 Department of Financial Services 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 Department of Financial Services 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 Department of Financial Services.

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 Department of Financial Services 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 Department of Financial Services 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, 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 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 Department of Financial Services 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.

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## Department of Health

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### EMERGENCY RULE MAKING

#### **Synthetic Phenethylamines and Synthetic Cannabinoids (SP & SC) Prohibited**

**I.D. No.** HLT-34-12-00010-E

**Filing No.** 798

**Filing Date:** 2012-08-07

**Effective Date:** 2012-08-07

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

**Action taken:** Addition of Part 9 to Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 225

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

**Specific reasons underlying the finding of necessity:** The following chemical compounds are commonly packaged and marketed online, in convenience stores, gas stations and smoke shops as “bath salts,” plant food and other ordinary household goods, and which are not approved by the federal Food and Drug Administration (FDA):

3,4-Methylenedioxyamphetaminone (Methylone);  
4-Methoxyamphetaminone;  
3-Fluoromethamphetaminone;  
4-Fluoromethamphetaminone;  
Ethylpropion (Ethcathinone);  
2-(2,5-Dimethoxy-4-ethylphenyl)ethanamine (2C-E);  
2-(2,5-Dimethoxy-4-methylphenyl)ethanamine (2C-D);  
2-(4-Chloro-2,5-dimethoxyphenyl)ethanamine (2C-C);  
2-(4-Iodo-2,5-dimethoxyphenyl)ethanamine (2C-I);  
2-[4-(Ethylthio)-2,5-dimethoxyphenyl]ethanamine (2C-T-2);  
2-[4-(Isopropylthio)-2,5-dimethoxyphenyl]ethanamine (2C-T-4);  
2-(2,5-Dimethoxyphenyl)ethanamine (2C-H);  
2-(2,5-Dimethoxy-4-nitro-phenyl)ethanamine (2C-N);  
2-(2,5-Dimethoxy-4-(n)-propylphenyl)ethanamine (2C-P); and any compound that has a chemical structure that is substantially similar to these compound.

Those compounds, hereinafter referred to collectively as “synthetic phenethylamines,” and which are commonly referred to as “designer drugs” because they are specifically synthesized with a similar, but slightly modified structure of a Schedule I controlled substance in order to avoid existing drug laws, can be continually chemically modified to avoid legal repercussions, while maintaining their intended effects and usages.

Synthetic phenethylamines are prevalent drugs of abuse. From January 2011 through April 2012, poison control centers throughout the United States have received over 7,000 of calls regarding instances of poisoning

from products containing synthetic phenethylamines, including instances resulting in accidental death and suicide. Calls received by poison control centers generally reflect only a small percentage of actual instances of poisoning and, and many additional New York residents are likely to have been harmed as a result of using products containing synthetic phenethylamines. In addition, between January 1, 2011 and August 2, 2012, there were approximately 230 emergency department visits in New York (not including New York City) in which effects from consuming a product with synthetic phenethylamines or “bath salts” were the patient’s chief complaint. One hundred twenty of these visits occurred in June and July, 2012, indicating that usage of these substances are increasing at a remarkable rate.

Poison center experts, who have first-hand knowledge of the devastation that synthetic phenethylamines wreak on individuals and their families, say these substances are among the worst they have ever seen. They report that people high on these compounds can get very agitated and violent, exhibit psychosis and severe behavior changes, and have harmed themselves and others. Some have been admitted to psychiatric hospitals and have experienced continued neurological and psychological effects.

“Synthetic cannabinoids” encompass a wide variety of chemicals that are synthesized and marketed to mimic the action of the cannabinoid 9-tetrahydrocannabinol (THC). Synthetic cannabinoids have been linked to severe adverse reactions, including death and acute renal failure, and reported side effects include: tachycardia (increased heart rate); paranoid behavior, agitation and irritability; nausea and vomiting; confusion; drowsiness; headache; hypertension; electrolyte abnormalities; seizures; and syncope (loss of consciousness).

Synthetic cannabinoids are frequently applied to plant materials and then packaged and marketed online, and in convenience stores, gas stations and smoke shops as incense, herbal mixtures or potpourri, and often carry a “not for human consumption” label, and are not approved for medical use in the United States.

Products containing synthetic cannabinoids are, in actuality, produced, distributed, marketed and sold, as a supposed “legal alternative” to marijuana and for the purpose of being consumed by an individual, most often by smoking, either through a pipe, a water pipe, or rolled in cigarette papers.

Products containing synthetic cannabinoids have become prevalent drugs of abuse, especially among teens and young adults. Calls to New York State Poison Control centers relating to the consumption of synthetic cannabinoids have increased dramatically, with a total of 105 reported incidents of exposure to these substances having been reported since 2011, compared to four reported instances in 2009 and 2010. Over half of the calls to the Upstate Poison Control Center this year involved children under the age of 19 years of age which is consistent with the results of a 2011 Monitoring the Future national survey of youth drug-use trends that showed that 11.4% of 12th graders used a synthetic cannabinoid during the twelve months prior to the survey, making it the second most commonly used illicit drug among high school seniors. Nationally, poison control centers have received over 10,000 calls relating to exposure to these substances from January 2011 to June 2012. Calls received by poison control centers generally reflect only a small percentage of actual instances of poisoning. Therefore, it is clear that many additional New York residents have been harmed as a result of using products containing synthetic cannabinoids.

On May 20, 2011, pursuant to Public Health Law § 16, the Commissioner issued an Order for Summary Action that, among other things, prohibited the sale or distribution of bath salts. Thereafter, on March 28, 2012, pursuant to Public Health Law § 16, the Commissioner issued an Order for Summary Action that, among other things, prohibited the sale or distribution of synthetic cannabinoids. However, abuse of bath salts synthetic cannabinoids has continued in New York State, and therefore stronger measures are required to protect the public from the dangerous effects of these substances.

Thus, to protect the public from the ongoing threat posed by synthetic phenethylamines and synthetic cannabinoids, the Commissioner of Health and the Public Health and Health Planning Council have determined it necessary to file these regulations on an emergency basis. Public Health Law § 225, in conjunction with State Administrative Procedure Act § 202(6) empowers the Council and the Commissioner to adopt emergency regulations when necessary for the preservation of the public health, safety or general welfare and that compliance with routine administrative procedures would be contrary to the public interest.

**Subject:** Synthetic Phenethylamines and Synthetic Cannabinoids (SP & SC) Prohibited.

**Purpose:** To prohibit possession, manufacture, distribution, sale or offer of sale of some substances and products containing SP & SC.

**Text of emergency rule:** A new Part 9 is added to read as follows:

Part 9

*Synthetic Phenethylamines and Synthetic Cannabinoids Prohibited*

## § 1.0 Definitions.

(a) *Synthetic Phenethylamine* means any of the following chemical compounds, that are not listed as a controlled substance in Schedules I through V of § 3306 of the Public Health Law, and are not approved by the federal Food and Drug Administration ("FDA"):

3,4-Methylenedioxyamphetaminone (Methylone);

4-Methoxyamphetaminone;

3-Fluoromethamphetaminone;

4-Fluoromethamphetaminone;

Ethylpropion (Ethcathinone);

2-(2,5-Dimethoxy-4-ethylphenyl)ethanamine (2C-E)

2-(2,5-Dimethoxy-4-methylphenyl)ethanamine (2C-D)

2-(4-Chloro-2,5-dimethoxyphenyl)ethanamine (2C-C)

2-(4-Iodo-2,5-dimethoxyphenyl)ethanamine (2C-I)

2-[4-(Ethylthio)-2,5-dimethoxyphenyl]ethanamine (2C-T-2)

2-[4-(Isopropylthio)-2,5-dimethoxyphenyl]ethanamine (2C-T-4)

2-(2,5-Dimethoxyphenyl)ethanamine (2C-H)

2-(2,5-Dimethoxy-4-nitro-phenyl)ethanamine (2C-N)

2-(2,5-Dimethoxy-4-(n)-propylphenyl)ethanamine (2C-P); and any compound that has a chemical structure that is substantially similar to these compounds.

(b) *Synthetic Cannabinoid* means any chemical compound that is a cannabinoid receptor agonist and includes, but is not limited to any material, compound, mixture, or preparation that is not listed as a controlled substance in Schedules I through V of § 3306 of the Public Health Law, and not approved by the federal Food and Drug Administration (FDA), and contains any quantity of the following substances, their salts, isomers (whether optical, positional, or geometric), homologues (analogs), and salts of isomers and homologues (analogs), unless specifically exempted, whenever the existence of these salts, isomers, homologues (analogs), and salts of isomers and homologues (analogs) is possible within the specific chemical designation:

i) *Naphthoylindoles*. Any compound containing a 3-(1-Naphthoyl)indole structure with substitution at the nitrogen atom of the indole ring by an alkyl, haloalkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl, 1-(N-methyl-2-piperidinyl)methyl, or 2-(4-morpholinyl)ethyl group, whether or not further substituted in the indole ring to any extent and whether or not substituted in the naphthyl ring to any extent. (Other names in this structural class include but are not limited to: JWH 015, JWH 018, JWH 019, JWH 073, JWH 081, JWH 122, JWH 200, JWH 210, JWH 398, AM 2201, and WIN 55 212).

ii) *Naphthylmethylindoles*. Any compound containing a 1-H-indol-3-yl-(1-naphthyl)methane structure with substitution at the nitrogen atom of the indole ring by an alkyl, haloalkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl, 1-(N-methyl-2-piperidinyl)methyl, or 2-(4-morpholinyl)ethyl group, whether or not further substituted in the indole ring to any extent and whether or not substituted in the naphthyl ring to any extent. (Other names in this structural class include but are not limited to: JWH-175, and JWH-184).

iii) *Naphthoylpyrroles*. Any compound containing a 3-(1-naphthoyl)pyrrole structure with substitution at the nitrogen atom of the pyrrole ring by an alkyl, haloalkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl, 1-(N-methyl-2-piperidinyl)methyl, or 2-(4-morpholinyl)ethyl group, whether or not further substituted in the pyrrole ring to any extent and whether or not substituted in the naphthyl ring to any extent. (Other names in this structural class include but are not limited: JWH 307).

iv) *Naphthylmethylindenes*. Any compound containing a naphthylmethylindene structure with substitution at the 3-position of the indene ring by an alkyl, haloalkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl, 1-(N-methyl-2-piperidinyl)methyl, or 2-(4-morpholinyl)ethyl group, whether or not further substituted in the indene ring to any extent and whether or not substituted in the naphthyl ring to any extent. (Other names in this structural class include but are not limited: JWH-176).

v) *Phenylacetylindoles*. Any compound containing a 3-phenylacetylindole structure with substitution at the nitrogen atom of the indole ring by an alkyl, haloalkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl, 1-(N-methyl-2-piperidinyl)methyl, or 2-(4-morpholinyl)ethyl group, whether or not further substituted in the indole ring to any extent and whether or not substituted in the phenyl ring to any extent. (Other names in this structural class include but are not limited to: RCS-8 (SR-18), JWH 250, JWH 203, JWH-251, and JWH-302).

vi) *Cyclohexylphenols*. Any compound containing a 2-(3-hydroxycyclohexyl)phenol structure with substitution at the 5-position of the phenolic ring by an alkyl, haloalkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl, 1-(N-methyl-2-piperidinyl)methyl, or 2-(4-

morpholinyl)ethyl group, whether or not substituted in the cyclohexyl ring to any extent. (Other names in this structural class include but are not limited to: CP 47,497 (and homologues (analogs)), cannabicyclohexanol, and CP 55,940).

vii) *Benzoylindoles*. Any compound containing a 3-(benzoyl)indole structure with substitution at the nitrogen atom of the indole ring by an alkyl, haloalkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl, 1-(N-methyl-2-piperidinyl)methyl, or 2-(4-morpholinyl)ethyl group, whether or not further substituted in the indole ring to any extent and whether or not substituted in the phenyl ring to any extent. (Other names in this structural class include but are not limited to: AM 694, Pravadoline (WIN 48,098), RCS 4, and AM-679).

viii) [2,3-Dihydro-5-methyl-3-(4-morpholinylmethyl)pyrrolo [1,2,3-de]-1,4-benzoxazin-6-yl]-1-naphthalenylmethanone. (Other names in this structural class include but are not limited to: WIN 55,212-2).

ix) (6aR,10aR)-9-(hydroxymethyl)-6,6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo[c]chromen-1-ol. (Other names in this structural class include but are not limited to: HU-210).

x) (6aS,10aS)-9-(hydroxymethyl)-6,6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo[c]chromen-1-ol (Dezaminol or HU-211).

xi) *Adamantoylindoles*. Any compound containing a 3-(1-adamantoyl)indole structure with substitution at the nitrogen atom of the indole ring by an alkyl, haloalkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl, 1-(N-methyl-2-piperidinyl)methyl, or 2-(4-morpholinyl)ethyl group, whether or not further substituted in the adamantyl ring system to any extent. (Other names in this structural class include but are not limited to: AM-1248).

xii) Any other synthetic chemical compound that is a cannabinoid receptor agonist that is not listed in Schedules I through V of § 3306 of the Public Health Law, or is not an FDA approved drug

(c) *Possession* means to have physical possession or otherwise to exercise dominion or control over synthetic phenethylamine or synthetic cannabinoid, or a product containing the same. For purposes of this definition, among other circumstances not limited to these examples, the following individuals and/or entities shall be deemed to possess synthetic phenethylamine or synthetic cannabinoid, or a product containing the same:

(1) any individual or entity that has an ownership interest in a retail, distribution or manufacturing establishment that possesses, distributes, sells or offers for sale a synthetic phenethylamine or synthetic cannabinoid, or a product containing the same; and

(2) any clerk, cashier or other employee or staff of a retail establishment, which establishment possesses, distributes, sells or offers for sale a synthetic phenethylamine or synthetic cannabinoid, or a product containing the same, who interacts with customers or other members of the public.

§ 1.1 Possession, Manufacture, Distribution, Sale or Offer of Sale of Synthetic Phenethylamines and Synthetic Cannabinoids Prohibited. It shall be unlawful for any individual or entity to possess, manufacture, distribute, sell or offer to sell any synthetic phenethylamine or synthetic cannabinoid or product containing the same, except as expressly exempted by this Part.

§ 1.2 Exemptions. The provisions of this Part prohibiting the possession of any synthetic phenethylamine or synthetic cannabinoid, or product containing the same shall not apply to:

(a) public officers or their employees in the lawful performance of their official duties requiring possession of synthetic phenethylamines or synthetic cannabinoids, or products containing the same;

(b) temporary or incidental possession by employees or agents of persons lawfully entitled to possession, or persons whose possession is for the purpose of aiding public officers in performing their official duties;

(c) a person in the employ of the United States government or of any state, territory, district, county, municipal or insular government, obtaining or possessing synthetic phenethylamines or synthetic cannabinoids, or products containing the same, by reason of his or her official duties;

(d) common carriers or warehousemen, while engaged in lawfully transporting or storing synthetic phenethylamines or synthetic cannabinoids, or products containing the same, or to any employee of the same within the scope of his or her employment;

(e) laboratories with a federal Drug Enforcement Administration ("DEA") license to purchase and use schedule I controlled substances for research and/or analytical testing; and

(f) manufacturers that are registered with the DEA to synthesize and distribute controlled substances.

§ 1.3 Penalties. A violation of any provision of this Part is subject to all civil and criminal penalties as provided for by law. For purposes of civil

penalties, each packet, individual container or other separate unit of synthetic phenethylamine or synthetic cannabinoid, or product containing the same, that is possessed, manufactured, distributed, sold, or offered for sale, shall constitute a separate violation under this Part.

§ 1.4 Commissioner's Order. The Commissioner has authority to issue orders to address dangers to the health of the people as set forth in Public Health Law § 16. The Commissioner can exercise such authority to address a violation of this Part if, in his or her opinion, such a danger exists. It is hereby recognized that, dependent upon the opinion and discretion of the Commissioner as applied to each circumstance, he or she may issue such an order in the event of a continuing or repeat violation of this Article at or by a retail establishment when the entity and/or its owner(s) or employee(s) knew or should have known of the violation. As determined by the Commissioner, such an order could require the closure of the retail establishment, among other relief. Although not required, this section serves as notice that such an order could be issued. The circumstances and relief described in this notice are only examples and in no way bind the Commissioner or limit his or her authority to issue such an order, or the relief set forth in such an order, under any circumstance whatsoever.

§ 1.5 Severability. If any provisions of this Part or the application thereof to any person or entity or circumstance is adjudged invalid by a court of competent jurisdiction, such judgment shall not affect or impair the validity of the other provisions of this Part or the application thereof to other persons, entities, and circumstances.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire November 4, 2012.

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

#### Regulatory Impact Statement

##### Statutory Authority:

The Public Health and Health Planning Council (PHHPC) is authorized by Section 225 of the Public Health Law (PHL) to establish, amend and repeal sanitary regulations to be known as the State Sanitary Code (SSC) subject to the approval of the Commissioner of Health. PHL Section 225(5)(a) provides that the SSC may deal with any matter affecting the security of life and health of the people of the State of New York.

##### Legislative Objectives:

This rulemaking is in accordance with the legislative objective of PHL Section 225(4) authorizing the PHHPC, in conjunction with the Commissioner of Health, to protect public health and safety by amending the SSC to address issues that jeopardize health and safety. Specifically, this regulation prohibits the possession, manufacture, distribution, sale or offer of sale of substances and products containing synthetic phenethylamines and synthetic cannabinoids, chemical compounds which are causing serious adverse health outcomes and particularly affecting New York State teenagers and young adults.

##### Needs and Benefits:

This regulation pertains to synthetic phenethylamines that are commonly packaged and marketed online, in convenience stores, gas stations and smoke shops as "bath salts," plant food and other ordinary household goods, and which are not approved by the federal Food and Drug Administration ("FDA"). The compounds stimulate the body's central nervous system, and cause effects similar to those caused by cocaine and amphetamines, including but not limited to increased heart rate and blood pressure, hallucinations, paranoia, suicidal thoughts, violent behavior, nausea and vomiting. Some synthetic phenethylamines are also commonly referred to as "designer drugs" because they are specifically synthesized with a similar, but slightly modified structure of a Schedule I controlled substance in order to avoid existing drug laws, and can be continually chemically modified to avoid legal repercussions, while maintaining their intended effects and usages. Certain synthetic phenethylamines are prevalent drugs of abuse.

From January 2011 through April 2012, poison control centers throughout the United States have received over 7,000 of calls regarding instances of poisoning from products containing synthetic phenethylamines, including instances resulting in accidental death and suicide. Calls received by poison control centers generally reflect only a small percentage of actual instances of poisoning and, and many additional New York residents are likely to have been harmed as a result of using products containing synthetic phenethylamines. In addition, between January 1, 2011 and August 2, 2012, there were approximately 230 emergency department visits in New York (not including New York City) in which effects from consuming a product with synthetic phenethylamines or "bath salts" were the patient's chief complaint. One hundred twenty of these visits occurred

in June and July, 2012, indicating that usage of these substances is increasing at a remarkable rate.

Poison control center experts, who have first-hand knowledge of the devastation that synthetic phenethylamines wreak on individuals and their families, say these substances are among the worst they have ever seen. They report that people high on these compounds can get very agitated and violent, exhibit psychosis and severe behavior changes, and have harmed themselves and others. Some have been admitted to psychiatric hospitals and have experienced continued neurological and psychological effects.

"Synthetic cannabinoids" encompass a wide variety of chemicals that are synthesized and marketed to mimic the action of the cannabinoid 9-tetrahydrocannabinol (THC). Synthetic cannabinoids have been linked to severe adverse reactions, including death and acute renal failure, and reported side effects include: tachycardia (increased heart rate); paranoid behavior, agitation and irritability; nausea and vomiting; confusion; drowsiness; headache; hypertension; electrolyte abnormalities; seizures; and syncope (loss of consciousness).

Synthetic cannabinoids are frequently applied to plant materials and then packaged and marketed online and in convenience stores, gas stations and smoke shops as incense, herbal mixtures or potpourri. They often carry a "not for human consumption" label, and are not approved for medical use in the United States.

Products containing synthetic cannabinoids are, in actuality, produced, distributed, marketed and sold, as a supposed "legal alternative" to marijuana and for the purpose of being consumed by an individual, most often by smoking, either through a pipe, a water pipe, or rolled in cigarette papers.

Products containing synthetic cannabinoids have become prevalent drugs of abuse, especially among teens and young adults. Calls to New York State Poison Control centers relating to the consumption of synthetic cannabinoids have increased dramatically, with a total of 105 reported incidents of exposure to these substances having been reported since 2011, compared to four reported instances in 2009 and 2010. Over half of the calls to the Upstate Poison Control Center this year involved children under the age of 19 years of age which is consistent with the results of a 2011 "Monitoring the Future" national survey of youth drug-use trends that showed that 11.4% of 12th graders used a synthetic cannabinoid during the twelve months prior to the survey, making it the second most commonly used illicit drug among high school seniors. Nationally, poison control centers have received over 10,000 calls relating to exposure to these substances from January 2011 to June 2012. Calls received by poison control centers generally reflect only a small percentage of actual instances of poisoning. Therefore, it is clear that many additional New York residents have been harmed as a result of using products containing synthetic cannabinoids.

On May 20, 2011, pursuant to Public Health Law § 16, the Commissioner issued an Order for Summary Action that, among other things, prohibited the sale or distribution of bath salts. Thereafter, on March 28, 2012, pursuant to Public Health Law § 16, the Commissioner issued an Order for Summary Action that, among other things, prohibited the sale or distribution of synthetic cannabinoids. However, abuse of synthetic phenethylamines and synthetic cannabinoids has escalated in New York State, and stronger measures therefore are required to protect the public from the dangerous effects of these substances.

##### Costs:

##### Costs to Private Regulated Parties:

The regulation imposes no new costs for private regulated parties.

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

State and local governments will incur costs for enforcement. Exact costs cannot be predicted at this time because the extent of the need for enforcement cannot be fully determined. Some of the cost however may be offset by fines and penalties imposed pursuant to the Public Health Law. Costs will be offset further by a reduction in occasions needing emergency response, law enforcement involvement, as well as a reduction in health care and other State and local resources currently being used to respond to and address the negative effects of usage of the substances at issue.

##### Local Government Mandates:

The SSC establishes a minimum standard for regulation of health and sanitation. Local governments can, and often do, establish more restrictive requirements that are consistent with the SSC through a local sanitary code. PHL § 228. Local governments have the power and duty to enforce the provisions of the State Sanitary Code, including this new Part, utilizing both civil and criminal options available. PHL §§ 228, 229, 309(1)(f) and 324(1)(e).

##### Paperwork:

The regulation imposes no new reporting or filing requirements.

##### Duplication:

On May 20, 2011, the Commissioner of Health of the State of New

York issued an Order for Summary Action banning the sale and distribution of certain products containing synthetic cathinone (a category of phenethylamines). On March 28, 2012, the Commissioner of Health of the State of New York issued an Order for Summary Action banning the sale and distribution of products containing synthetic cannabinoids. These Commissioner's Orders, unlike this regulation, are not enforceable by local governments or criminal authorities, and the sole enforcement mechanism for violations of the Order is a civil enforcement proceeding for an injunction and civil penalties through the State Attorney General. In addition, the Commissioner's Orders do not prohibit possession or manufacture of some synthetic phenethylamines and/or synthetic cannabinoids. Further, the Commissioner's Orders are only binding on and enforceable against those individuals and entities who received personal service of the Commissioner's Orders.

On July 9, 2012 President Barack Obama signed a Bill (S.3187) into law which, in relevant part, enacted the federal Synthetic Drug Abuse Prevention Act of 2012. The law banned the sale and distribution of products containing most of the types of synthetic phenethylamines and synthetic cannabinoids identified in this regulation by placing them on the federal schedule I list of substances under the federal Controlled Substances Act (21 U.S.C. § 812[c]). This regulation does not conflict because the federal law does not provide for state and local authority enforcement.

**Alternatives:**

The alternative of continued sole reliance on the May 20, 2011 and March 28, 2012 Commissioner's Orders was considered. Promulgating this regulation, however, was decided upon in order to provide enhanced enforcement authority and regulatory authority for state and local governments to more effectively address this emergent and expanding public health threat.

**Federal Standards:**

The New York regulation is broader than the recent federal Synthetic Drug Abuse Prevention Act of 2012 in that it covers additional classes of stimulant compounds. Further, it anticipates future synthesis of stimulant compounds not yet developed, specifically cannabinoid receptor agonists. Analysis methodologies will need to be developed as additional related compounds are synthesized.

**Compliance Schedule:**

Regulated parties should be able to comply with these regulations effective upon filing with the Secretary of State.

**Regulatory Flexibility Analysis**

**Effect of Rule:**

The rule will affect only the small businesses which are engaged in selling products containing certain harmful substances known as synthetic phenethylamines and synthetic cannabinoids. At this time, it is not possible to determine the number of small businesses that sell these products. However, in 2011 and 2012, Commissioner's Orders were issued banning certain synthetic phenethylamines and synthetic cannabinoids and resulted in approximately 7,000 establishments being served with one or both of such Orders by public health authorities.

This regulation affects local governments by establishing a minimum standard regarding the possession, manufacture, distribution, sale or offer of sale of synthetic phenethylamines and synthetic cannabinoids. Local governments have the power and duty to enforce the provisions of the State Sanitary Code, including this new Part, utilizing any civil and criminal remedies that may be available. PHL §§ 228, 229, 309(1)(f) and 324(e).

Pursuant to PHL § 228, the State Sanitary Code establishes a minimum standard for health and sanitation. Under that same authority, local governments are empowered to establish a local sanitary code that is more restrictive than the State Sanitary Code. Many local governments already have local sanitary codes that are more restrictive than the State Sanitary Code.

**Compliance Requirements:**

Small businesses must comply by not engaging in any possession, manufacturing, distribution, sale or offer of sale of synthetic phenethylamines and synthetic cannabinoids.

Local governments must comply by enforcing the State Sanitary Code. Local boards of health may impose civil penalties for a violation of this regulation of up to \$2,000 per violation, pursuant to PHL § 309(1)(f). Pursuant to PHL § 229, local law enforcement may seek criminal penalties for a first offense of up to \$250 and 15 days in prison, and for each subsequent offense up to \$500 and 15 days in prison.

**Professional Services:**

Small businesses will need no additional professional services to comply.

Local governments, in certain instances where local governments enforce, will need to secure laboratory services for testing of substances.

**Compliance Costs:**

**Costs to Private Regulated Parties:**

The regulation imposes no new costs for private regulated parties.

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

Any enforcement costs incurred by State and local governments cannot be predicted, but are likely to be offset by fines and penalties imposed pursuant to Public Health Law. Moreover, any such costs will be further offset by a reduction in emergency responder, law enforcement, health care and other State and local resources currently being used to respond to and address the negative effects of usage of the prohibited substances.

**Economic and Technological Feasibility:**

Although there will be an impact on small businesses that sell these products, the prohibition is justified by the extremely dangerous nature of these products.

Although the costs of local enforcement are not precisely known at this time, the benefits to public health are anticipated to outweigh any such costs. Regarding technical feasibility, as new designer drugs become available, new tests will need to be developed.

This regulation is necessary to protect public health. It is as narrowly tailored as possible while still addressing the public health threat.

**Minimizing Adverse Impact:**

The New York State Department of Health will assist local government, e.g. consultation, coordination and providing information and updates on its website.

**Small Business and Local Government Participation:**

Local governments are aware of and have been involved in notifying certain small businesses regarding prior Commissioner's Orders on this same matter.

**Cure Period:**

Violation of this regulation can result in civil and criminal penalties. In light of the magnitude of the public health threat posed by these substances, the risk that some small businesses will not comply with regulations and continue to make or sell or distribute the substance justifies the absence of a cure period.

**Rural Area Flexibility Analysis**

Pursuant to Section 202-bb of the State Administrative Procedure Act (SAPA), a rural area flexibility analysis is not required. These provisions apply uniformly throughout New York State, including all rural areas.

The proposed rule will not impose an adverse economic impact on rural areas, nor will it impose any additional reporting, record keeping or other compliance requirements on public or private entities in rural areas.

**Job Impact Statement**

**Nature of the Impact:**

The Department of Health does not expect there to be a positive or negative impact on jobs or employment opportunities.

**Categories and Numbers Affected:**

The Department anticipates no negative impact on jobs or employment opportunities as a result of the amended rule.

**Regions of Adverse Impact:**

The Department anticipates no negative impact on jobs or employments opportunities in any particular region of the state.

**Minimizing Adverse Impact:**

Not applicable.

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## Office of Medicaid Inspector General

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### NOTICE OF ADOPTION

**Withholding of Payments; Incorporation by Reference**

**I.D. No.** MED-21-12-00001-A

**Filing No.** 797

**Filing Date:** 2012-08-06

**Effective Date:** 2012-08-22

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

**Action taken:** Amendment of sections 518.7 and 518.9 of Title 18 NYCRR.

**Statutory authority:** Public Health Law, section 32

**Subject:** Withholding of payments; Incorporation by reference.

**Purpose:** To amend regulations governing the withholding of Medicaid payments in accordance with federal requirements.

**Text of final rule:** Section 518.7 of title 18 of NYCRR is amended to read as follows:

518.7 Withholding of payments.

(a) *Basis for withholding.*

(1) The department may withhold payments under the program, in whole or in part, when it has [reliable information that] *determined* that a provider [is involved in fraud or willful misrepresentation involving claims submitted to the program; or] has abused the program or has committed an unacceptable practice. [Reliable information] *The department's determination that a provider has abused the program, or has committed an unacceptable practice* may consist of preliminary findings by the department's audit or utilization review staff of unacceptable practices or significant overpayments, information from a State professional licensing or certifying agency of an ongoing investigation of a provider involving fraud, abuse, professional misconduct or unprofessional conduct, or information from a State investigating or prosecutorial agency or other law enforcement organization [agency] of an ongoing investigation of a provider for fraud or criminal conduct involving the program. The department may withhold payment of current and future claims to the provider and any affiliate.

(2) *The department must withhold payments under the program, in whole or in part, when it has determined or has been notified that a provider is the subject of a pending investigation of a credible allegation of fraud unless the department finds good cause not to withhold payments in accordance with 42 C.F.R. 455.23. A credible allegation of fraud is an allegation that has indicia of reliability and has been verified by the department, or the Medicaid fraud control unit, or another State agency, or law enforcement organization.*

(i) *Whenever the department initiates a withholding, in whole or in part, in relation to a pending investigation of a credible allegation of fraud, the department must make a fraud referral to the Medicaid fraud control unit. If the Medicaid fraud control unit does not accept the referral, then the department may refer the matter to another law enforcement organization.*

(ii) *The fraud referral made under this paragraph must be in writing and provided to the Medicaid fraud control unit or other law enforcement organization not later than the next business day after the withhold is enacted.*

(b) Notice of the withholding will [usually] be given [prior to or contemporaneously with the withholding; however, in no event will notice of the withholding be given more than] *within* five days of [after the withholding of payments] *taking such action unless requested in writing by a law enforcement organization to delay such notice.* The notice will describe the reasons for the action, but need not include specific information concerning an ongoing investigation.

## (c) The notice of withholding must:

(1)(i) state that the payments are being withheld in accordance with [42 C.F.R. 455.23 and] this section; *and*

(ii) *in cases where there is a pending investigation of a credible allegation of fraud state that the payments are being withheld in accordance with 42 C.F.R. 455.23;*

(2) state that the withholding is for a temporary period only and recite the circumstances under which the withholding will be terminated;

(3) specify whether the withholding applies to all or only some claims and identify which claims if not all claims are involved; and

(4) advise of the right to submit written arguments and documentation in opposition to the withholding and how to submit them *in accordance with subdivision (e) of this section.*

## (d) The withholding may continue only temporarily.

(1) When initiated by the department prior to issuance of a draft audit report or notice of proposed agency action, the withholding will not continue for more than 90 days unless a written draft audit report or notice of proposed agency action is sent to the provider. Issuance of the draft report or notice of proposed action may extend the withholding until an amount reasonably calculated to satisfy the overpayment is withheld, pending a final determination on the matter.

(2) When initiated by the department after issuance of a draft audit report or notice of proposed agency action, the withholding will not continue for more than 90 days unless a written final audit report or notice of agency action is sent to the provider. Issuance of the report or notice of action may extend the withholding until an amount reasonably calculated to satisfy the overpayment is withheld, pending a final determination on the matter.

(3) When initiated by another State agency or law enforcement organization, the withholding may continue until the agency or prosecuting authority determines that there is insufficient evidence to support an action against the provider or its affiliate, or until the agency or criminal proceedings are completed.

(4) *When initiated by the department when it has determined or has been notified that a provider is the subject of a pending investigation of a credible allegation of fraud all withholding actions will be temporary and will not continue after either of the following:*

(i) *The department, or the Medicaid fraud control unit, or other*

*law enforcement organization determines that there is insufficient evidence of fraud by the provider.*

(ii) *Legal proceedings related to the provider's alleged fraud are completed.*

(e) *Appeals.*

(1) *A provider or its affiliate that is the subject of the withholding is not entitled to an administrative hearing, but may, within 30 days of the date of the notice, submit written arguments and documentation that the withhold should be removed.*

(2) *Within 60 days of receiving written arguments or documentation in response to a withhold, the department will review the determination and notify the provider or its affiliate of the results of that review. After the review, the determination to impose a withhold may be affirmed, reversed or modified, in whole or in part.*

(3) *A decision by the department to affirm, reverse or modify a withhold on appeal shall not be a determination of the merits of any investigation initiated by another State agency, the Medicaid fraud control unit, or other law enforcement organization.*

Section 518.9 of title 18 of NYCRR is amended to read as follows:

## 518.9 Incorporation by reference.

The provisions of the Code of Federal Regulations which have been incorporated by reference in this Part have been filed in the Office of the Secretary of State of the State of New York, the publication so filed being the booklet entitled: Code of Federal Regulations, title 42, Parts 455.23, revised as of October 1, [2008] 2011, published by the Office of the Federal Register, National Archives and Records Administration, as a special edition of the Federal Register. The regulations incorporated by reference may be examined at the Office of the Department of State, 99 Washington Ave, Albany, NY 12231 at the law libraries of the New York State Supreme Court and the New York State, and at the Office of the Medicaid Inspector General, Office of Counsel, 800 N. Pearl Street, Albany, New York 12204. They may also be purchased from the Superintendent of Documents, Government Printing Office Washington, DC 20402. Copies of the Code of Federal Regulations are also available at many public libraries and bar association libraries.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in section 518.7(a)(1).

**Text of rule and any required statements and analyses may be obtained from:** Michael D'Allaird, Esq., Office of the Medicaid Inspector General, 800 North Pearl Street, Albany, New York 12204, (518) 402-1434, email: Michael.D'Allaird@omig.ny.gov

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

The change made to the last published rule does not necessitate a revision to the RIS, RFA, RAFA or JIS because it was a non-substantial change made for the purposes of correcting a technical error in the publication of the proposed rule, and does not require any changes to the RIS, RFA, RAFA, or JIS.

**Assessment of Public Comment**

The Office of the Medicaid Inspector General (OMIG) received comments from seven (7) organizations on its proposed rulemaking amending 18 NYCRR § 518.7 & § 518.9 to conform with federal requirements. Comments were highly detailed. Criticisms centered mainly on (1) the definition of a "credible allegation of fraud" not expressly referencing the department's commitment to review each allegation carefully, judiciously and on a case-by-case basis; (2) assertions that the proposed rulemaking went beyond the federal regulations and guidance; (3) the sufficiency of notice provisions; (4) the lack of an administrative hearing right on the withhold; and (5) the sufficiency of parameters in the regulation relative to the Medicaid Fraud Control Unit's (MFCU) or other law enforcement organization's investigation of the credible allegation of fraud. The OMIG acknowledges these concerns. However, in drafting this rulemaking the OMIG verified that its provisions are consistent with federal regulations and relevant guidance. To clarify, the OMIG will review and verify all of the facts and circumstances of an allegation of fraud carefully, judiciously and on a case-by-case basis before initiating a withholding pursuant to this rulemaking. The OMIG will consider all relevant factors when evaluating a pending investigation of a credible allegation of fraud and the application of good cause exceptions. The OMIG will coordinate with the MFCU, other law enforcement organizations and agency partners with regard to enforcement of this rulemaking. We believe this rulemaking as written comports with due process and complies with federal regulations and associated guidance. The OMIG made no substantive changes to this rulemaking as a result of reviewing and assessing the public comments. However, the OMIG did make a non-substantive technical correction to 18 NYCRR § 518.7(a)(1). To clarify the term "law enforcement agency" has been deleted and replaced with the term "law

enforcement organization". A full assessment of public comments will be posted on the OMIG's website at the following address: <http://www.omig.ny.gov>.

## Office of Mental Health

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

#### Medical Assistance Payments for Comprehensive Psychiatric Emergency Programs (CPEP)

**I.D. No.** OMH-34-12-00003-EP

**Filing No.** 796

**Filing Date:** 2012-08-06

**Effective Date:** 2012-08-06

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

**Proposed Action:** Amendment of Part 591 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.09(b) and 31.04(a)

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

**Specific reasons underlying the finding of necessity:** The proposed rule implements an increase in the Medicaid fees paid to Comprehensive Psychiatric Emergency Programs (CPEPs) operated by hospitals licensed by the Office of Mental Health pursuant to Article 31 of the Mental Hygiene Law, and by the Department of Health pursuant to Article 28 of the Public Health Law. The Medicaid fee increase is effective July 1, 2012. This increase will preserve program funding and will enable CPEPs to sustain programs and continue to provide assistance to individuals in need of emergency psychiatric services. Since this proposed regulation has significant impact upon public health, safety and general welfare, the proposed rule warrants emergency filing.

**Subject:** Medical Assistance Payments for Comprehensive Psychiatric Emergency Programs (CPEP).

**Purpose:** To increase Medicaid fees paid to CPEPs effective July 1, 2012.

**Text of emergency/proposed rule:** Section 591.5 of Title 14 NYCRR is amended to read as follows:

Effective [April 1, 2011] *July 1, 2012*, reimbursement for comprehensive psychiatric emergency programs under the medical assistance program shall be in accordance with the following fee schedule:

Brief emergency visit	\$[83.71] <i>181.00</i>
Full emergency visit	[491.59] <i>1,060.00</i>
Crisis outreach service visit	[491.59] <i>1,060.00</i>
Interim crisis service visit	[491.59] <i>1,060.00</i>

**This notice is intended:** to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire November 3, 2012.

**Text of rule and any required statements and analyses may be obtained from:** Sue Watson, NYS Office of Mental Health, 44 Holland Avenue, Albany, NY 12229, (518) 474-1331, email: [Sue.Watson@omh.ny.gov](mailto:Sue.Watson@omh.ny.gov)

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

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

#### Regulatory Impact Statement

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

Subdivision (a) of Section 31.04 of the Mental Hygiene Law empowers the Commissioner to issue regulations setting standards for licensed programs for the provision of services for persons with mental illness.

2. Legislative objectives: Articles 7 and 31 of the Mental Hygiene Law reflect the Commissioner's authority to establish regulations regarding mental health programs. Comprehensive Psychiatric Emergency Programs (CPEPs) provide a full range of psychiatric emergency services in a safe

and comfortable environment to persons in need of such services. CPEPs are operated by hospitals licensed by the Office of Mental Health (Office) pursuant to Article 31 of the Mental Hygiene Law, and by the Department of Health pursuant to Article 28 of the Public Health Law. The proposed rule furthers the legislative intent under Article 7 by assuring the delivery of mental health services to persons with mental illness and facilitating financing procedures and mechanisms to support such a service delivery system.

3. Needs and benefits: The proposed amendments increase the Medicaid fees paid to CPEPs effective July 1, 2012. This increase is due to the conversion of Medicaid Disproportionate Share Funding and State Aid paid to CPEP programs to "base" Medicaid, and has been approved by the Director of the Division of Budget. It is anticipated that the increase in Medicaid fees paid to CPEPs will aid in program viability and enable CPEPs to continue to serve individuals in need of emergency psychiatric services.

4. Costs:

(a) Cost to State government: These regulatory amendments are not expected to result in any additional costs to State government. The estimated full annual impact of these regulatory amendments is estimated to be \$11,981,223 (State share of \$5,990,612), but these costs are expected to be offset by the conversions of Medicaid Disproportionate Share Funding and State Aid to "base" Medicaid.

(b) Cost to local government: These regulatory amendments are not expected to result in any additional costs to local government.

(c) Cost to regulated parties: These regulatory amendments are not expected to result in any additional costs to regulated parties.

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

6. Paperwork: This rule should not result in an increase in the paperwork requirements of providers.

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

8. Alternatives: The only alternative to the regulatory amendment which was considered was inaction. This alternative was rejected due to the need for the conversion of Medicaid Disproportionate Share Funding and State Aid to "base" Medicaid.

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

10. Compliance schedule: These regulatory amendments will be effective upon their adoption, and shall be deemed to have been effective on and after July 1, 2012.

#### Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this notice because the amended rule will not have an adverse economic impact upon small businesses or local governments. The purpose of the proposed rule is to increase the Medicaid fees paid to Comprehensive Psychiatric Emergency Programs (CPEPs) operated by hospitals licensed by the Office of Mental Health pursuant to Article 31 of the Mental Hygiene Law, and by the Department of Health pursuant to Article 28 of the Public Health Law. It is anticipated that the increase in Medicaid fees paid to CPEPs will aid in program viability and enable CPEPs to continue to serve individuals in need of emergency psychiatric services.

#### Rural Area Flexibility Analysis

The amendments to 14 NYCRR Part 591 are necessary to increase the Medicaid fees paid to Comprehensive Psychiatric Emergency Programs (CPEPs) operated by hospitals licensed by the Office of Mental Health pursuant to Article 31 of the Mental Hygiene Law, and by the Department of Health pursuant to Article 28 of the Public Health Law. It is anticipated that the increase in Medicaid fees paid to CPEPs will aid in program viability and enable CPEPs to continue to serve individuals in need of emergency psychiatric services. The proposed rule will not impose any adverse economic impact on rural areas; therefore, a Rural Area Flexibility Analysis is not submitted with this notice.

#### Job Impact Statement

A Job Impact Statement is not submitted with this notice because the purpose of the proposed rule is to increase the Medicaid fees paid to Comprehensive Psychiatric Emergency Programs (CPEPs) operated by hospitals licensed by the Office of Mental Health pursuant to Article 31 of the Mental Hygiene Law, and by the Department of Health pursuant to Article 28 of the Public Health Law. It is anticipated that the increase in Medicaid fees paid to CPEPs will aid in program viability and enable CPEPs to continue to serve individuals in need of emergency psychiatric services. There will be no adverse impact on jobs and employment opportunities as a result of this proposed rule.

## Public Service Commission

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

#### Consolidation of Gas Supply Areas and Changes to Capacity Release, Balancing and Other Gas Charges

I.D. No. PSC-34-12-00006-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 an August 3, 2012 filing from New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation proposing consolidation of gas supply areas and changes to capacity release, balancing and other gas charges.

**Statutory authority:** Public Service Law, sections 65(1), (2), (3), 66(1), (2), (3), (5), (8), (9), (10) and (12)

**Subject:** Consolidation of gas supply areas and changes to capacity release, balancing and other gas charges.

**Purpose:** To consider consolidation of gas supply areas and changes to capacity release, balancing and other gas charges.

**Substance of proposed rule:** The Public Service Commission is considering an August 3, 2012 filing from New York State Electric & Gas Corporation (NYSEG) and Rochester Gas and Electric Corporation proposing consolidation of gas supply areas and changes to capacity release, balancing and other gas charges, procedures and practices. The Commission may adopt, reject or modify, in whole or in part, the relief proposed.

**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.ny.gov/f96dir.htm>. For questions, contact:** Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann.ayer@dps.ny.gov

**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.ny.gov

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

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

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

(09-G-0716SP3)

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

#### Consolidation of Tariff Schedules P.S.C. Nos. 4, 5 and 6 into One Tariff Schedule, P.S.C. No. 7—Gas

I.D. No. PSC-34-12-00007-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 tariff filing by Corning Natural Gas Corporation to consolidate their tariff schedules into one tariff schedule, P.S.C. No. 7—Gas, to become effective September 1, 2012.

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

**Subject:** Consolidation of tariff schedules P.S.C. Nos. 4, 5 and 6 into one tariff schedule, P.S.C. No. 7—Gas.

**Purpose:** Consolidation of tariff schedules P.S.C. Nos. 4, 5 and 6 into one tariff schedule, P.S.C. No. 7—Gas.

**Substance of proposed rule:** The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by Corning Natural Gas Corporation to consolidate their tariff schedules P.S.C. Nos. 4, 5, and 6 into one tariff schedule, P.S.C. No. 7 - Gas. This filing is in accordance with the Commission's Order issued and effective April 20, 2012 in Case 11-G-0280. The proposed filing has an effective date of September 1, 2012. The Commission may resolve related matters, and may take this action for 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.ny.gov/f96dir.htm>. For questions, contact:** Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann.ayer@dps.ny.gov

**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.ny.gov

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

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

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

(11-G-0280SP4)

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

#### Tariff Language

I.D. No. PSC-34-12-00008-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 filing by Rochester Gas and Electric Corporation (RG&E) proposing revisions to the Company's rules and regulations contained in P.S.C. Nos. 18 and 19—Electricity and P.S.C. No. 16—Gas.

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

**Subject:** Tariff Language.

**Purpose:** To make tariff language consistent between RG&E and NYSEG where both Companies processes are the same.

**Substance of proposed rule:** The Commission is considering whether to approve, modify or reject, in whole or in part, a proposal filed by Rochester Gas and Electric Corporation (RG&E) to make revisions to its electric and gas tariff schedules, P.S.C. Nos. 18 and 19—Electricity and P.S.C. No. 16—Gas. RG&E proposes to make tariff language consistent between RG&E and New York State Electric & Gas Corporation's electric and gas tariff schedules for certain terms and conditions where the Companies' processes are consistent. The filing has a proposed effective date of December 1, 2012. The Commission may resolve related matters and may apply its decision here to other companies.

**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.ny.gov/f96dir.htm>. For questions, contact:** Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann.ayer@dps.ny.gov

**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.ny.gov

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

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

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

(12-M-0353SP2)

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

#### Tariff Language

I.D. No. PSC-34-12-00009-P

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

**Proposed Action:** The Commission is considering a filing by New York State Electric & Gas Corporation (NYSEG) proposing revisions to the Company's rules and regulations contained in P.S.C. Nos. 119, 120 and 121—Electricity and P.S.C. Nos. 88 and 90 Gas.

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

**Subject:** Tariff Language.

**Purpose:** To make tariff language consistent between NYSEG and RG&E where both Companies processes are the same.

**Substance of proposed rule:** The Commission is considering whether to approve, modify or reject, in whole or in part, a proposal filed by New York State Electric & Gas Corporation (NYSEG) to make revisions to its electric and gas tariff schedules, P.S.C. Nos. 119, 120 and 120—Electricity and P.S.C. Nos. 88 and 90—Gas. NYSEG proposes to make tariff language consistent between NYSEG and Rochester Gas and Electric Corporation's electric and gas tariff schedules for certain terms and conditions where the Companies' processes are consistent. The filing has a proposed effective date of December 1, 2012. The Commission may resolve related matters and may apply its decision here to other companies.

**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.ny.gov/f96dir.htm>. For questions, contact:** Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: [leann.ayer@dps.ny.gov](mailto:leann.ayer@dps.ny.gov)

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

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

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

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

(12-M-0353SP1)