

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.

Department of Agriculture and Markets

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Standards of Identity for Grade A Maple Syrup and Processing Grade Maple Syrup

I.D. No. AAM-52-12-00008-P

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

Proposed Action: This is a consensus rule making to repeal Part 175; and add Part 270 to Title 1 NYCRR.

Statutory authority: Agriculture and Markets Law, sections 16, 18, 160-u, 203 and 214-b

Subject: Standards of identity for Grade A maple syrup and Processing Grade maple syrup.

Purpose: To ensure that grades of maple syrup meet appropriate compositional requirements to promote public confidence and fair dealing.

Text of proposed rule: Part 175 of 1 NYCRR is repealed.

1 NYCRR is amended by adding thereto a new Part 270, to read as follows:

Part 270. Maple Syrup

Section 270.1 Maple Syrup: identities; label statements

(a) Definitions: For the purpose of this section, the following terms shall have the following meanings, unless the context clearly indicates otherwise:

1. *Light transmittance* means the fraction of incident light at a specified wavelength that passes through a representative sample of a particular sub-grade of Grade A maple syrup.

2. *Soluble solids, expressed as a percentage, means the proportion of maple sap solids in the applicable solvent.*

3. *T_c means the percentage of light transmission through maple syrup, measurable by a spectrophotometer, using matched square optical cells having a 10-millimeter light path at a wavelength of 560 nanometers, the color values being expressed in percent of light transmission as compared to A.R. Glycerol fixed at 100% transmission.*

(b) Standards of identity.

1. *Maple syrup is the liquid made by the evaporation of pure sap or sweet water obtained by tapping a maple tree. Maple syrup contains minimum soluble solids of 66.0% and maximum soluble solids of 68.9%. Maple syrup includes, and is either, Grade A Maple Syrup or Processing Grade Maple Syrup, as defined in paragraphs (2) and (3) of this subdivision.*

2. *Grade A maple syrup means maple syrup that is not fermented, is not turbid, and contains or has no objectionable odors, off-flavors or sediment. Grade A maple syrup must fall within one of the color and taste sub-grades of Grade A maple syrup set forth in subparagraphs (a), (b), (c), or (d) of this paragraph.*

a. *Grade A golden color and delicate taste maple syrup has a uniform light golden color, a delicate to mild taste, and a light transmittance of 75% T_c or more.*

b. *Grade A amber color and rich taste maple syrup has a uniform amber color, a rich or full-bodied taste, and a light transmittance of 50% - 74.9% T_c.*

c. *Grade A dark color and robust taste maple syrup has a uniform dark color, a robust or strong taste, and a light transmittance of 25% - 49.9% T_c.*

d. *Grade A very dark and strong taste maple syrup has a uniform very dark color, a very strong taste, and a light transmittance of less than 25% T_c.*

3. *Processing Grade Maple Syrup means maple syrup that does not meet the requirements for Grade A maple syrup set forth in paragraph (2) of this subdivision. Processing Grade Maple Syrup may not be sold, offered for sale or distributed in retail food stores or directly to consumers for household use.*

(c) Nomenclature label statement.

1. *The name of the food defined in paragraph 2 of subdivision (b) of this section is "Grade A Maple Syrup". The name "Grade A Maple Syrup" must conspicuously appear on the principal display panel of the food's label, and the words "golden color and delicate taste", "amber color and rich taste", "dark color and robust taste", or "very dark color and strong taste", as appropriate, must also conspicuously appear on the food's principal display panel in close proximity to the food's name and in a size reasonably related to the size of the name of the food.*

2. *The name of the food defined in paragraph (3) of subdivision (b) of this section is "Processing Grade Maple Syrup". The name "Processing Grade Maple Syrup" must conspicuously appear on the principal display panel of the food's label, and the words "For Food Processing Only" and "Not for Retail Sale" must also conspicuously appear on the food's principal display panel in close proximity to the food's name and in a size reasonably related to the size of the name of the food.*

Text of proposed rule and any required statements and analyses may be obtained from: Steve Stich, NYS Dept. of Agriculture and Markets, 10B Airline Drive, Albany, NY 12235, (518) 457-4492, email: stephen.stich@agriculture.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.

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

Consensus Rule Making Determination

The proposed rule will amend 1 NYCRR by repealing Part 175 and by adding a new Part 270. Part 175 currently sets forth grades of maple syrup and Part 270 will set forth new grades that more accurately reflect consumer expectations and industry practices.

The proposed rule is non-controversial. The new maple syrup grades set forth in the proposed rule ("the proposed new grades") are consistent with the grades for maple syrup proposed in a document entitled Regulatory Proposal to Standardize the Grades and Nomenclature for Pure Maple Syrup in the North American and World Marketplace, published in September, 2011 by the International Maple Syrup Institute ("IMSI"), an organization comprised of and representing the major Canadian and American producers and sellers of maple syrup. Because it is anticipated that surrounding states and provinces will adopt the IMSI's proposed maple syrup grades, the proposed rule, if adopted, should facilitate trade in New York produced maple syrup not only in New York but also in surrounding states and provinces.

The proposed rule will not, therefore, have any adverse impact upon regulated parties and is, therefore, non-controversial.

Job Impact Statement

The proposed rule will not have an adverse impact upon employment opportunities.

The proposed rule will adopt new grades of maple syrup. New York State presently has approximately 500 maple syrup producers and the proposed rule, by requiring maple syrup to be labeled by grades that meet contemporary consumer expectations, may very well increase demand for New York produced maple syrup because consumers will be better assured that they are buying the type of maple syrup that they want and that is best suited to their needs. As such, the proposed rule will have no adverse impact upon jobs.

Department of Corrections and Community Supervision

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Albion Correctional Facility

I.D. No. CCS-52-12-00002-P

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

Proposed Action: This is a consensus rule making to amend section 100.94(c) of Title 7 NYCRR.

Statutory authority: Correction Law, section 70

Subject: Albion Correctional Facility.

Purpose: To include alcohol and substance treatment correctional annex to functions of the facility.

Text of proposed rule: Amend subdivision (c) of section 100.94, 7 NYCRR, as follows:

(a) There shall be in the department an institution to be known as Albion Correctional Facility, which shall be located in Albion, Orleans County, New York, and which shall consist of the property under the jurisdiction of the department at that location.

(b) Albion Correctional Facility shall be a facility for females 16 years of age or older.

(c) Albion Correctional Facility shall be classified as a medium security correctional facility to be used for the following functions:

- (1) general confinement facility;
- (2) work release facility; [and]
- (3) residential treatment facility[.]; and
- (4) alcohol and substance treatment correctional annex.

Text of proposed rule and any required statements and analyses may be obtained from: Maureen E. Boll, Deputy Commissioner and Counsel, NYS Department of Corrections and Community Supervision, 1220 Washington Avenue - Harriman State Campus - Building 2, Albany, NY 12226-2050, (518) 457-4951, email: Rules@dccs.ny.gov

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

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

Consensus Rule Making Determination

The Department of Corrections and Community Supervision has determined that no person is likely to object to the proposed action. The amendment of this section reflects the addition of the current alcohol and substance treatment program. See SAPA section 102(11)(a).

The proposed rule change amends 7 NYCRR § 100.94 to reflect the ad-

dition of the alcohol and substance treatment correctional annex at Albion Correctional Facility. The Department's authority resides in section 70 of Correction Law, which mandates that each correctional facility must be designated in the rules and regulations of the Department and assigns the Commissioner the duty to classify each facility with respect to the type of security maintained and the function as specified. See Correction Law § 70(6).

Job Impact Statement

A job impact statement is not submitted because this proposed rule will have no adverse impact on jobs or employment opportunities. This proposal reflects the addition of the alcohol and substance treatment correctional annex at Albion Correctional Facility.

Education Department

EMERGENCY RULE MAKING

Administration of Acute Herpes Zoster (Shingles) Vaccinations by Pharmacists

I.D. No. EDU-40-12-00006-E

Filing No. 1221

Filing Date: 2012-12-11

Effective Date: 2012-12-17

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

Action taken: Amendment of section 63.9 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 6504 (not subdivided), 6506(1), 6507(2)(a), 6527(7), 6801(5), 6802(23) and 6909(7); and L. 2012, ch. 116

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 116 of the Laws of 2012, which amends Education Law sections 6527, 6801, 6802 and 6909, to authorize pharmacists who have been certified to administer immunizations to also administer vaccinations to prevent acute herpes zoster.

The proposed amendment was adopted as an emergency rule at the September 10-11, 2012 meeting of the Board of Regents, effective October 16, 2012, and has now been adopted as a permanent rule at the December 10-11, 2012 Regents meeting. Pursuant to SAPA § 203(1), the earliest effective date of the proposed amendment is December 26, 2012, the date a Notice of Adoption will be published in the State Register. However, the September emergency rule expires on December 16, 2012, 90 days after its filing with the Department of State on September 18, 2012. A lapse in the rule would disrupt the administration of herpes zoster vaccinations by qualified pharmacists.

Emergency action is therefore necessary for the preservation of the public health and general welfare to ensure that the emergency rule adopted at the September Regents meetings remains continuously in effect until the effective date of the permanent rule.

Subject: Administration of acute herpes zoster (Shingles) vaccinations by pharmacists.

Purpose: To implement chapter 116 of the Laws of 2012 to authorize qualified pharmacists to administer acute herpes zoster vaccinations.

Text of emergency rule: Paragraphs (1) and (2) of subdivision (b) of section 63.9 of the Regulations of the Commissioner of Education are amended, effective December 17, 2012, as follows:

(1) Pursuant to section 6801 of the Education Law, a pharmacist with a certificate of administration issued by the department pursuant to paragraph (3) of this subdivision shall be authorized to administer immunization agents prescribed in paragraph (2) of this subdivision to patients therein specified, [pursuant to either a patient specific order or a non-patient specific order and protocol] provided that:

(i) the pharmacist meets the requirements for a certificate of administration prescribed in paragraph (3) of this subdivision and the order and protocol meet the requirements set forth in paragraph (5) of this subdivision; and

(ii) with respect to non-patient specific orders:

(a) the immunization is prescribed or ordered by a licensed physician or certified nurse practitioner with a practice site in the county in which the immunization is administered; or

(b) if the immunization is administered in a county with a population of 75,000 or less, the immunization shall be prescribed or ordered by a licensed physician or certified nurse practitioner with a practice site in the county in which the immunization is administered or in an adjoining county.

(2) Authorized immunization agents. A certified pharmacist who meets the requirements of this section shall be authorized to administer:

(i) immunizing agents to prevent influenza or pneumococcal disease to patients 18 years of age or older, *pursuant to a patient specific order or a non-patient specific order*; and

(ii) immunizing agents to prevent acute herpes zoster, *pursuant to a patient specific order*.

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-40-12-00006-EP, Issue of October 3, 2012. The emergency rule will expire February 8, 2013.

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

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

Paragraph (b) of subdivision (7) of section 6527 of the Education Law, as added by Chapter 116 of the Laws of 2012, authorizes physicians to issue patient-specific orders for herpes zoster vaccine to pharmacists.

Paragraph (b) of subdivision (7) of section 6909 of the Education Law, as added by Chapter 116 of the Laws of 2012, authorizes nurse practitioners to issue patient-specific orders for herpes zoster vaccine to pharmacists.

Subdivision (22) of section 6802 of the Education Law, as amended by Chapter 116 of the Laws of 2012, adds vaccination to prevent acute herpes zoster to the list of immunizations certified pharmacists may administer.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment carries out the intent of the aforementioned statutes that the Department shall supervise the regulation of the practice of the professions for the benefit of the public. The proposed amendment will conform Regulations of the Commissioner of Education to Chapter 116 of the Laws of 2012 which authorizes certain qualified pharmacists to administer vaccinations to prevent herpes zoster pursuant to patient-specific prescriptions.

3. NEEDS AND BENEFITS:

The proposed amendment is necessary to conform the Regulations of the Commissioner of Education to Chapter 116 of the Laws of 2012. Authorizing qualified pharmacists to administer vaccinations to prevent herpes zoster will expand the availability of such vaccinations.

Section 6802(22) of the Education Law provides that non-patient specific immunization orders authorized to be executed by pharmacists may be issued only by physicians and nurse practitioners with a practice site in the county in which the immunization is administered or, if the population of that county is not more than 75,000, in an adjoining county. It is proposed that section 63.9(b)(1)(ii) of the Regulations of the Commissioner be amended to clarify that such restriction applies only to non-patient specific orders. The current regulation imposes the county limitation on all immunizations by pharmacists. The statutory language, however, appears to place that limitation only on immunizations administered pursuant to non-patient specific orders. The proposed amendment is consistent with the statutory language and would enable patients who have a direct relationship with a physician or nurse practitioner to receive the appropriate immunizations pursuant to patient specific orders without regard to the county limitation.

4. COSTS:

(a) Costs to State government: There are no additional costs to state government.

(b) Costs to local government: There are no additional costs to local government.

(c) Cost to private regulated parties: The proposed amendment will not increase costs, and may provide cost-savings to patients and the health-

care system. Therefore, there will be no additional costs to private regulated parties.

(d) Cost to regulating agency for implementation and continued administration of this rule: There are no additional costs to the regulating agency.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment relates solely to the administration of vaccinations to prevent influenza, pneumococcal disease, and herpes zoster and does not impose any program, service, duty, or responsibility upon local governments.

6. PAPERWORK:

The proposed amendment imposes no new reporting or other paperwork requirements.

7. DUPLICATION:

The proposed amendment does not duplicate other existing state or federal requirements, and is necessary to implement Chapter 116 of the Laws of 2012.

8. ALTERNATIVES:

The proposed amendment is necessary to conform the Regulations of the Commissioner of Education to Chapter 116 of the Laws of 2012. There are no significant alternatives to the proposed amendment and none were considered.

9. FEDERAL STANDARDS:

Since there are no applicable federal standards, the proposed amendment does not exceed any minimum federal standards for the same or similar subject areas.

10. COMPLIANCE SCHEDULE:

The proposed amendment is necessary to conform the Regulations of the Commissioner of Education to Chapter 116 of the Laws of 2012. The proposed amendment will become effective on October 16, 2012, which is also the effective date of Chapter 116. It is anticipated that licensees certified to administer immunizations will be able to comply with the proposed amendments by the effective date.

Regulatory Flexibility Analysis

The proposed amendment to the Regulations of the Commissioner of Education authorizes pharmacists who are certified to administer immunizations against influenza and pneumococcal disease to also administer vaccinations to prevent acute herpes zoster. The proposed amendment also clarifies that the requirement that the issuer of orders for immunizations to be performed by pharmacists have a practice site in the county in which the immunizations are issued (or, if that county has a population of less than 75,000, in an adjoining county) applies only to non-patient specific orders. The amendment will not impose any new reporting, recordkeeping, or other compliance requirements, or have any adverse economic impact, on small businesses or local governments. Because it is evident from the nature of the proposed amendment that it will not adversely affect small businesses or local governments, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses and local governments is not required, and one has not been prepared.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment will apply to 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. Of the 23,314 pharmacists registered by the State Education Department, 2,914 pharmacists report their permanent address of record is in a rural county.

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

The proposed amendment is necessary to conform the Commissioner's Regulations with Education Law sections 6527, 6801, 6802 and 6909, as amended by Chapter 116 of the Laws of 2012. These provisions allow pharmacists, certified to administer immunizations, to also be able to administer vaccinations to prevent acute herpes zoster. The proposed amendment does not impose any additional reporting, recordkeeping or other compliance requirements, or professional services requirements, on entities in rural areas.

3. COSTS:

The proposed amendment does not impose any additional costs on regulated parties, including those in rural areas.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to conform the Commissioner's Regulations with Education Law sections 6527, 6801, 6802 and 6909, as amended by Chapter 116 of the Laws of 2012. Following discussions, including obtaining input from practicing professionals, the State Board of Pharmacy has considered the terms of the proposed amendment to Regulations of the Commissioner of Education and has recommended the change. Additionally, the measures have been shared with educational institutions,

professional associations, and practitioners representing the profession of pharmacy. The amendments are supported by representatives of these sectors. The proposals make no exception for individuals who live in rural areas. The Department has determined that such requirements should apply to all pharmacists, no matter their geographic location, to ensure a uniform standard of practice across the State. Because of the nature of the proposed rule, alternative approaches for rural areas were not considered.

5. RURAL AREA PARTICIPATION:

Comments on the proposed amendment were solicited from statewide organizations representing all parties having an interest in the practice of pharmacy. Included in this group were members of the State Board of Pharmacy, educational institutions and professional associations representing the pharmacy profession, such as the Pharmacists Society of the State of New York and the New York State Council of Health System Pharmacists. These groups, which have representation in rural areas, have been provided notice of the proposed rule making and opportunity to comment on the proposed amendment.

Job Impact Statement

The proposed amendment to the Regulations of the Commissioner of Education authorizes pharmacists who are certified to administer immunizations against influenza and pneumococcal disease to also administer vaccinations to prevent acute herpes zoster. The proposed amendment also clarifies that the requirement that the issuer of orders for immunizations to be performed by pharmacists have a practice site in the county in which the immunizations are issued (or, if that county has a population of less than 75,000, in an adjoining county) applies only to non-patient specific orders. The amendment will not have a substantial adverse impact on jobs and employment opportunities. Because it is evident from the nature of the proposed amendments that they will not affect job and employment opportunities, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required, and one has not been prepared.

EMERGENCY RULE MAKING

Licensure of Non-Degree Granting Private Proprietary Schools

I.D. No. EDU-45-12-00013-E

Filing No. 1224

Filing Date: 2012-12-11

Effective Date: 2012-12-15

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

Action taken: Amendment of Part 126 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 305(1), 5001 through 5010; and L. 2012, ch. 381

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

Specific reasons underlying the finding of necessity: The proposed amendment to the Regulations of the Commissioner of Education is necessary to implement Chapter 381 of the Laws of 2012, which amends Education Law sections 5001 through 5010, to amend the licensure requirements for non-degree granting schools. Because the Board of Regents meets at fixed intervals, the earliest the proposed amendment can be presented for adoption, after expiration of the required 45-day public comment period provided for in State Administrative Procedure Act (SAPA) section 202(1) and (5), would be the January 14-15, 2012 Regents meeting. Furthermore, pursuant to SAPA section 203(1), the earliest effective date of the proposed amendment, if adopted at the January meeting, would be January 30, 2013, the date a Notice of Adoption would be published in the State Register. However, the provisions of Chapter 381 of the Laws of 2012 will become effective on December 15, 2012.

Emergency action is necessary for the preservation of the general welfare in order to enable the State Education Department to immediately establish requirements to timely implement Chapter 381 of the Laws of 2012, in order to implement the provisions of the new law by its stated effective date.

It is anticipated that the proposed amendment will be presented for adoption as a permanent rule at the January 14-15, 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: Licensure of non-degree granting private proprietary schools.

Purpose: To implement the provisions of chapter 381 of the Laws of 2012.

Substance of emergency rule: The Commissioner of Education proposes

to amend Part 126 of the Commissioner's Regulations to implement Education Law sections 5001 through 5010, as amended by Chapter 381 of the Laws of 2012, effective December 15, 2012.

The following is a summary of the major provisions of the proposed rule.

The title of this Part has been amended to read "Licensed Private Career Schools or Licensed Private Schools".

Section 126.1 is amended to clarify the definitions for curriculum, course, gross tuition, school, reviewed financial statement, audited financial statement and Certified English as a Second Language School to be consistent with the new law. This section also adds new definitions for practical experience and occupationally required credential.

Section 126.2 (d) is amended to clarify that scholarship funds must be collected and applied according to the disbursement method as set forth in Section 5002 (1)(b-1) of the Education Law.

Section 126.3 is amended to eliminate the references to registration.

Section 126.4 (a) is amended to make clear that where the department retains an expert or outside consultant to review the curriculum of a school, the school shall bear the expense, in addition to any curriculum or course application fee.

Section 126.6 (a) is amended to indicate that each applicant instead of the school shall submit teaching and management personnel applications. Section 126.6 (c) of the Commissioner's Regulations is amended to indicate that all teacher licenses issued after December 15, 2012 would no longer be restricted to a single school location as private career schools licenses presently are.

Section 126.6 (d) of the Commissioner's Regulations is amended to allow a school director to apply for a private school agent certificate without incurring the agent application fees. This section also clarifies the preparation requirements for directors; eliminates the references to registered business schools consistent with the new law; and eliminates the references to directors whose education and practical experience were approved prior to July 1, 1973.

Section 126.6(e) eliminates the reference to registered schools.

Section 126.6(f) sets forth the requirements for teacher licenses and permits in licensed private career schools, as appropriate, and eliminates the requirements for registered business schools/computer training facilities.

Section 126.6(n) indicates that in cases where the curricula/courses offered require the assistance of a vendor demonstrator, the need for a demonstrator must be included and approved in the specific course or curriculum approval.

Section 126.7 is amended to require that the enrollment agreement include a provision for the method or methods of payment, including, as appropriate, the disbursement schedule for each type of financial assistance available which shall meet the requirements set forth in section 5002(1)(b-1) of the Education Law.

Section 126.8 (a) is amended to indicate that schools that are not financially viable are subject to having their licenses suspended or revoked, or the Commissioner may require the cessation of student enrollment. This section is also amended to eliminate the prior requirements and to require schools to submit to the Commissioner an annual financial statement that requires schools that receive \$500,000 or more or whose combined State and Federal student financial aid is \$100,000 or more to submit an audited financial statement. For schools which receive less than \$500,000 and less than \$100,000 in combined Federal and State student financial aid in a school fiscal year shall submit an unaudited reviewed financial statement or an audited financial statement to the commissioner for that fiscal year, provided that a reviewed financial statement cannot be submitted for two consecutive fiscal years. An audited financial statement must also be filed for the year following the fiscal year for which a reviewed financial statement was filed.

Section 126.9 is amended to require schools to include in their catalog a weekly tuition chart for each program that indicates the amount of a refund due a student upon withdrawal and the disbursement schedule for each type of financial assistance available. It also eliminates the option of allowing a school to submit an attestation that the catalog or bulletin meets all of the requirements.

Section 126.10 is amended to delete the references to registration and the requirement that the commissioner shall act on an initial application for a license or registration within 120 days of receipt of a complete application. This section also requires that upon transfer or assignment of any interest totaling 25 percent or more, the school shall be deemed a new school required to submit a new school application and obtain a new license pursuant to the requirements of this Part. The previous school license shall remain in effect until the new license is issued or denied or the previous license expires or is revoked, whichever comes first. This section also requires any school which received \$500,000 or more in gross tuition in a school fiscal year to submit to the commissioner an annual audited statement of revenue prepared in accordance with generally ac-

cepted accounting principles for that fiscal year. In addition, this section clarifies the requirements for an English as a Second Language school.

Section 126.12 is amended to reflect that the certificate will be effective for three years instead of two and to require a \$200 fee instead of \$100, except that the school director may apply for an agent's certificate without incurring the application fee.

Section 126.17 is amended to provide that new schools, which did not operate in the year prior to licensure, will have no gross tuition upon which to be assessed until either the end of their first fiscal year or March 31 of the year after the school was licensed, whichever comes first. For schools whose fiscal year end comes before March 31 of the year after the school was licensed, the school shall submit a complete financial statement in compliance with the provisions set forth in Education Law section 5001(4)(e) is required. For schools whose fiscal year ends later than March 31 after their initial licensure date, the school shall submit an unaudited reviewed income statement for the time period between initial licensure and March 31 detailing the amount of gross tuition received during that period. Thereafter, complete financial statements shall be required.

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-45-12-00013-P, Issue of November 7, 2012. The emergency rule will expire March 10, 2013

Text of rule and any required statements and analyses may be obtained from: Mary Gammon, New York State Education Department, 89 Washington Avenue, Albany, NY 12234, (518) 474-6400, email: legal@mail.nysed.gov

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

Subdivision (1) of section 305 of the Education Law empowers the Commissioner of Education to be the chief executive officer of the state system of education and authorizes the Commissioner to execute educational policies determined by the Regents.

Article 101 of the Education Law (Sections 5001 through 5010 of the Education Law), as amended by Chapter 381 of the Laws of 2012, authorizes the State Education Department to license and regulate non-degree granting proprietary schools consistent with the requirements in Article 101 of the Education Law.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment carries out the legislative objectives of the above-referenced statutes by implementing the requirements of Chapter 381 of the Laws of 2012.

3. NEEDS AND BENEFITS:

Chapter 381 of the Laws of 2012 amended Article 101 of the Education Law (sections 5001 through 5010) to eliminate the distinction between licensed private schools and registered business schools, replace the phrase "licensed private schools" with the more descriptive "licensed private career schools", adjust fees, which have not changed since 1990, and establish a candidate school category that would allow a school to operate legally while it is in the process of obtaining a non-degree-granting proprietary school license.

Section 5001 of the Education Law provides for the consolidation of registered business schools and licensed private schools into one designation, eliminating the artificial distinction between these types of schools and reflecting the current heterogeneous nature of training programs offered at these schools. This section also clarifies the exemptions for certain schools from the licensure requirements and exempts conferences, trade shows, workshops and such other courses of study from the licensing requirements. Candidate school status is also allowed as a practical means for prospective schools to operate legally prior to meeting all the requirements of full licensure. This section also amends the specific fees for initial and renewal applications for such licensure. Renewal fees are increased to reflect the State Education Department's current cost of supervising these schools and to meet the prospective costs for reimbursing tuition for a significant number of students when these students' schools close due to fiscal failure or non-compliance. Initial application fees are set at certain amounts and fees for renewal are based on the school's gross annual tuition income. Renewal fees are accrued to the credit of the proprietary vocational school supervision account.

Section 5001 sets forth procedures for working with schools that are not financially viable to protect the tuition reimbursement account. The method of assessing schools is changed from more complicated regular and special assessment formulas to one based on the number of quarterly assessments paid, whereby newer schools with the potential to fail would pay a higher assessment than schools with a history of satisfactory licensed operation. Section 5001(4)(e), relating to annual audited financial statements, is amended to change the gross tuition criteria for submission of

such statements to the commissioner and the filing schedule for such statements to bring the non-degree sector into parity with schools in the degree-granting and public school sectors. This section also authorizes the commissioner to deny, suspend, revoke or decline to renew any license if the Commissioner determines that a school's financial condition may result in the interruption or cessation of instruction or jeopardize student tuition funds. If the Commissioner determines that the financial condition may result in interruption or cessation of instruction or jeopardize student tuition funds, the Commissioner may place the school on probation for a period of no more than one year and the school shall be required to submit a report on its financial condition to the Commissioner.

Section 5002 is amended to restrict the amount of private loan payments for tuition that a school could receive on behalf of a student prior to their completing a program, thereby limiting students' loan liability as well as the tuition reimbursement account's liability for payment of loan funds for tuition payments, which is the most significant portion of the loan. This section also increases the maintenance of record requirement from 6 to 7 years. Section 5002(1)(d)(1) also relates admission of students under the ability to benefit provision is amended to authorize the Commissioner to accept other entrance requirement documentation, such as prerequisite coursework, professional or vendor certifications, personal interviews and/or attestations of equivalent knowledge in lieu of the examination requirement. Section 5002(3) (h) is amended to require schools to submit for approval a school catalog that contains a weekly tuition liability chart for each program that indicates the amount of refund due a student upon withdrawal. This section emphasizes that in addition to paying the curriculum application fee, schools will be required to pay the cost of an expert or independent consultant for an outside evaluation of a particular course or facility of the school. This section is also amended to establish a curriculum/course application fee to fund the State Education Department's curriculum unit. Fees from school and personnel license applications do not cover the cost of curriculum review, as some schools have only a handful of courses or curricula that require approval while others have between 400 and 700. Schools requiring the most evaluation would pay more, those with few programs would pay less. Section 5002(6) is also amended so that all teacher licenses would no longer be restricted to a single school location, as private career school teacher licenses currently are. This will result in a more mobile and efficient teacher pool for schools to draw from for faculty members, reduced expense for processing teacher applications and a reduced workload for the State Education Department's Bureau of Proprietary School Supervision ("the Bureau").

Section 5003 is amended to establish more practical timeframes for disciplinary proceedings by prescribing procedures for handling written complaints by students attending candidacy schools alleging failure of the school to disclose its candidacy status and the implications and to obtain the required attestation from the student. If such a violation is found, the school is required to provide the student a full refund of all monies received from the student. Section 5003(6) is also amended to increase the fines established in 1990 so they reflect the State Education Department's current cost of school oversight and expands the list of violations that may result in the imposition of a civil penalty, including failure to offer an approved course or program.

Section 5004 is amended to increase the amount of gifts and other non-monetary consideration a school may provide to students or former students from \$25 to \$75. Subdivision 4 of section 5004 would be amended to increase private school agent fees from \$100 to \$200, while extending the term of a private school agent's certificate from 2 years to 3 years.

Section 5006 is amended to allow the State Education Department to intervene more effectively when a private career education school ceases instruction. Currently, schools that are closing are required to develop teachout plans that arrange to have students continue to receive instruction from other private career schools upon closure of the school. The State Education Department's experience is that schools that must close have little incentive to establish teachouts, so authorizing the State Education Department to arrange for a teachout plan would provide greater protection for students. This section also authorizes the Commissioner to prescribe the educational qualifications and practical experience for teachers and directors in these schools.

Section 5007 is amended to expand the expenses eligible for reimbursement for students whose schools are closing. This section provides refunds of tuition, fees and book charges paid by or on behalf of the students in cash or through loans, excluding funding obtained through government agencies and authorizes the Commissioner to refund expenditures for fees, books and tuition to students of schools that have closed. The provisions for special assessments for new schools in section 5007(10) are also amended to be consistent with the assessment changes in section 5001, and to reflect the State Education Department's experience with assessing schools that have not been in operation for an entire year. The requirement in section 5007(11) for an annual fund audit of the tuition reimbursement account would be changed to mandate a two-year audit.

The proposed amendment implements these provisions.

4. COSTS:

(a) Costs to State government: The amendment will not impose any additional costs on State government including the State Education Department beyond those imposed by statute.

(b) Costs to local governments: The amendment will not impose any additional costs on local governments.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any mandatory program, service, duty, or responsibility upon local government, including school districts or BOCES.

6. PAPERWORK:

There are no additional paperwork requirements beyond those imposed by statute.

7. DUPLICATION:

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

8. ALTERNATIVES:

The proposed amendment implements Chapter 381 of the Laws of 2012. Therefore, no alternatives were considered.

9. FEDERAL STANDARDS:

There are no Federal standards that establish requirements for the certification of teacher assistants for service in the State's public schools.

10. COMPLIANCE SCHEDULE:

It is anticipated that the proposed amendment will be adopted at the January Regents meeting and will become effective on January 30, 2013.

Regulatory Flexibility Analysis

(a) Small Businesses:

1. EFFECT OF THE RULE: This rule will affect all private, non-degree granting proprietary schools that seek to be licensed by the State Education Department pursuant to Article 101 of the Education Law. Approximately 200 schools are pending licensure under this section. It is anticipated that almost all will be small businesses. In addition, the rule will affect all certified English as a Second Language (ESL) schools, most of which are small businesses.

2. COMPLIANCE REQUIREMENTS: There are no compliance requirements beyond those imposed by Chapter 381 of the Laws of 2012.

Chapter 381 of the Laws of 2012 amended Article 101 of the Education Law (sections 5001 through 5010) to eliminate the distinction between licensed private schools and registered business schools, replace the phrase "licensed private schools" with the more descriptive "licensed private career schools", adjust fees, which have not changed since 1990, and establish a candidate school category that would allow a school to operate legally while it is in the process of obtaining a non-degree-granting proprietary school license.

Section 5001 of the Education Law provides for the consolidation of registered business schools and licensed private schools into one designation, eliminating the artificial distinction between these types of schools and reflecting the current heterogeneous nature of training programs offered at these schools. This section also clarifies the exemptions for certain schools from the licensure requirements and exempts conferences, trade shows, workshops and such other courses of study from the licensing requirements. Candidate school status is also allowed as a practical means for prospective schools to operate legally prior to meeting all the requirements of full licensure. This section also amends the specific fees for initial and renewal applications for such licensure. Renewal fees are increased to reflect the State Education Department's current cost of supervising these schools and to meet the prospective costs for reimbursing tuition for a significant number of students when these students' schools close due to fiscal failure or non-compliance. Initial application fees are set at certain amounts and fees for renewal are based on the school's gross annual tuition income. Renewal fees are accrued to the credit of the proprietary vocational school supervision account.

Section 5001 sets forth procedures for working with schools that are not financially viable to protect the tuition reimbursement account. The method of assessing schools is changed from more complicated regular and special assessment formulas to one based on the number of quarterly assessments paid, whereby newer schools with the potential to fail would pay a higher assessment than schools with a history of satisfactory licensed operation. Section 5001(4)(e), relating to annual audited financial statements, is amended to change the gross tuition criteria for submission of such statements to the commissioner and the filing schedule for such statements to bring the non-degree sector into parity with schools in the degree-granting and public school sectors. This section also authorizes the commissioner to deny, suspend, revoke or decline to renew any license if the Commissioner determines that a school's financial condition may result in the interruption or cessation of instruction or jeopardize student tuition funds. If the Commissioner determines that the financial condition may result in interruption or cessation of instruction or jeopardize student tuition funds, the Commissioner may place the school on probation for a pe-

riod of no more than one year and the school shall be required to submit a report on its financial condition to the Commissioner.

Section 5002 is amended to restrict the amount of private loan payments for tuition that a school could receive on behalf of a student prior to their completing a program, thereby limiting students' loan liability as well as the tuition reimbursement account's liability for payment of loan funds for tuition payments, which is the most significant portion of the loan. This section also increases the maintenance of record requirement from 6 to 7 years. Section 5002(1)(d)(1) also relates admission of students under the ability to benefit provision is amended to authorize the Commissioner to accept other entrance requirement documentation, such as pre-requisite coursework, professional or vendor certifications, personal interviews and/or attestations of equivalent knowledge in lieu of the examination requirement. Section 5002(3) (h) is amended to require schools to submit for approval a school catalog that contains a weekly tuition liability chart for each program that indicates the amount of refund due a student upon withdrawal. This section emphasizes that in addition to paying the curriculum application fee, schools will be required to pay the cost of an expert or independent consultant for an outside evaluation of a particular course or facility of the school. This section is also amended to establish a curriculum/course application fee to fund the State Education Department's curriculum unit. Fees from school and personnel license applications do not cover the cost of curriculum review, as some schools have only a handful of courses or curricula that require approval while others have between 400 and 700. Schools requiring the most evaluation would pay more, those with few programs would pay less. Section 5002(6) is also amended so that all teacher licenses would no longer be restricted to a single school location, as private career school teacher licenses currently are. This will result in a more mobile and efficient teacher pool for schools to draw from for faculty members, reduced expense for processing teacher applications and a reduced workload for the State Education Department's Bureau of Proprietary School Supervision ("the Bureau").

Section 5003 is amended to establish more practical timeframes for disciplinary proceedings by prescribing procedures for handling written complaints by students attending candidacy schools alleging failure of the school to disclose its candidacy status and the implications and to obtain the required attestation from the student. If such a violation is found, the school is required to provide the student a full refund of all monies received from the student. Section 5003(6) is also amended to increase the fines established in 1990 so they reflect the State Education Department's current cost of school oversight and expands the list of violations that may result in the imposition of a civil penalty, including failure to offer an approved course or program.

Section 5004 is amended to increase the amount of gifts and other non-monetary consideration a school may provide to students or former students from \$25 to \$75. Subdivision 4 of section 5004 would be amended to increase private school agent fees from \$100 to \$200, while extending the term of a private school agent's certificate from 2 years to 3 years.

Section 5006 is amended to allow the State Education Department to intervene more effectively when a private career education school ceases instruction. Currently, schools that are closing are required to develop teachout plans that arrange to have students continue to receive instruction from other private career schools upon closure of the school. The State Education Department's experience is that schools that must close have little incentive to establish teachouts, so authorizing the State Education Department to arrange for a teachout plan would provide greater protection for students. This section also authorizes the Commissioner to prescribe the educational qualifications and practical experience for teachers and directors in these schools.

Section 5007 is amended to expand the expenses eligible for reimbursement for students whose schools are closing. This section provides refunds of tuition, fees and book charges paid by or on behalf of the students in cash or through loans, excluding funding obtained through government agencies and authorizes the Commissioner to refund expenditures for fees, books and tuition to students of schools that have closed. The provisions for special assessments for new schools in section 5007(10) are also amended to be consistent with the assessment changes in section 5001, and to reflect the State Education Department's experience with assessing schools that have not been in operation for an entire year. The requirement in section 5007(11) for an annual fund audit of the tuition reimbursement account would be changed to mandate a two-year audit.

The proposed amendment implements these provisions.

3. PROFESSIONAL SERVICES: The proposed amendment will not require schools to obtain professional services in order to comply, beyond those imposed by the statute.

4. COMPLIANCE COSTS: The proposed amendment will not impose any additional costs beyond those imposed by Chapter 381 of the Laws of 2012, except that the proposed amendment increases the application for teachers' permits and licenses, directors' permits and licenses, renewals thereof, and amendments of temporary permits and licenses from \$50 to \$100.

5. **ECONOMIC AND TECHNOLOGICAL FEASIBILITY:** The proposed amendment does not impose any additional technological requirements on small businesses.

6. **MINIMIZING ADVERSE IMPACT:** The proposed amendment implements Chapter 381 of the Laws of 2012 relating to the licensure of private non-degree proprietary schools. The statutory amendments make no exception for schools that are located in rural areas of the State. Moreover, the State Education Department believes that uniform requirements are needed, regardless of the location of the school, to ensure that all proprietary schools comply with the current best practices for this sector and to preserve the tuition reimbursement account in accordance with Chapter 381 of the Laws of 2012. Because of the nature of the proposed rule, alternative approaches for small businesses were not considered.

7. **SMALL BUSINESS PARTICIPATION:** The State Education Department posted the proposed regulation on its website and will ask for comments from all interested parties, including representatives from non-degree granting proprietary schools that may represent small businesses.

(b) **Local Governments:**

The proposed amendment relates to the licensure of private proprietary schools. It is clear from the nature of the proposed amendment that it does not impose any adverse economic impact, reporting, recordkeeping or other compliance requirements on local governments. No further steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for local governments is not required and none has been prepared.

Rural Area Flexibility Analysis

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

The proposed rule will apply to all rural areas, including 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. This rule will apply to all licensed private career schools. Currently, there are more than 450 licensed, registered or certified schools. Of these, approximately 20 are located in a rural area of the state.

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

Chapter 381 of the Laws of 2012 amended Article 101 of the Education Law (sections 5001 through 5010) to eliminate the distinction between licensed private schools and registered business schools, replace the phrase "licensed private schools" with the more descriptive "licensed private career schools", adjust fees, which have not changed since 1990, and establish a candidate school category that would allow a school to operate legally while it is in the process of obtaining a non-degree-granting proprietary school license.

Section 5001 of the Education Law provides for the consolidation of registered business schools and licensed private schools into one designation, eliminating the artificial distinction between these types of schools and reflecting the current heterogeneous nature of training programs offered at these schools. This section also clarifies the exemptions for certain schools from the licensure requirements and exempts conferences, trade shows, workshops and such other courses of study from the licensing requirements. Candidate school status is also allowed as a practical means for prospective schools to operate legally prior to meeting all the requirements of full licensure. This section also amends the specific fees for initial and renewal applications for such licensure. Renewal fees are increased to reflect the State Education Department's current cost of supervising these schools and to meet the prospective costs for reimbursing tuition for a significant number of students when these students' schools close due to fiscal failure or non-compliance. Initial application fees are set at certain amounts and fees for renewal are based on the school's gross annual tuition income. Renewal fees are accrued to the credit of the proprietary vocational school supervision account.

Section 5001 sets forth procedures for working with schools that are not financially viable to protect the tuition reimbursement account. The method of assessing schools is changed from more complicated regular and special assessment formulas to one based on the number of quarterly assessments paid, whereby newer schools with the potential to fail would pay a higher assessment than schools with a history of satisfactory licensed operation. Section 5001(4)(e), relating to annual audited financial statements, is amended to change the gross tuition criteria for submission of such statements to the commissioner and the filing schedule for such statements to bring the non-degree sector into parity with schools in the degree-granting and public school sectors. This section also authorizes the commissioner to deny, suspend, revoke or decline to renew any license if the Commissioner determines that a school's financial condition may result in the interruption or cessation of instruction or jeopardize student tuition funds. If the Commissioner determines that the financial condition may result in interruption or cessation of instruction or jeopardize student tuition funds, the Commissioner may place the school on probation for a period of no more than one year and the school shall be required to submit a report on its financial condition to the Commissioner.

Section 5002 is amended to restrict the amount of private loan payments for tuition that a school could receive on behalf of a student prior to their completing a program, thereby limiting students' loan liability as well as the tuition reimbursement account's liability for payment of loan funds for tuition payments, which is the most significant portion of the loan. This section also increases the maintenance of record requirement from 6 to 7 years. Section 5002(1)(d)(1) also relates admission of students under the ability to benefit provision is amended to authorize the Commissioner to accept other entrance requirement documentation, such as prerequisite coursework, professional or vendor certifications, personal interviews and/or attestations of equivalent knowledge in lieu of the examination requirement. Section 5002(3) (h) is amended to require schools to submit for approval a school catalog that contains a weekly tuition liability chart for each program that indicates the amount of refund due a student upon withdrawal. This section emphasizes that in addition to paying the curriculum application fee, schools will be required to pay the cost of an expert or independent consultant for an outside evaluation of a particular course or facility of the school. This section is also amended to establish a curriculum/course application fee to fund the State Education Department's curriculum unit. Fees from school and personnel license applications do not cover the cost of curriculum review, as some schools have only a handful of courses or curricula that require approval while others have between 400 and 700. Schools requiring the most evaluation would pay more, those with few programs would pay less. Section 5002(6) is also amended so that all teacher licenses would no longer be restricted to a single school location, as private career school teacher licenses currently are. This will result in a more mobile and efficient teacher pool for schools to draw from for faculty members, reduced expense for processing teacher applications and a reduced workload for the State Education Department's Bureau of Proprietary School Supervision ("the Bureau").

Section 5003 is amended to establish more practical timeframes for disciplinary proceedings by prescribing procedures for handling written complaints by students attending candidacy schools alleging failure of the school to disclose its candidacy status and the implications and to obtain the required attestation from the student. If such a violation is found, the school is required to provide the student a full refund of all monies received from the student. Section 5003(6) is also amended to increase the fines established in 1990 so they reflect the State Education Department's current cost of school oversight and expands the list of violations that may result in the imposition of a civil penalty, including failure to offer an approved course or program.

Section 5004 is amended to increase the amount of gifts and other non-monetary consideration a school may provide to students or former students from \$25 to \$75. Subdivision 4 of section 5004 would be amended to increase private school agent fees from \$100 to \$200, while extending the term of a private school agent's certificate from 2 years to 3 years.

Section 5006 is amended to allow the State Education Department to intervene more effectively when a private career education school ceases instruction. Currently, schools that are closing are required to develop teachout plans that arrange to have students continue to receive instruction from other private career schools upon closure of the school. The State Education Department's experience is that schools that must close have little incentive to establish teachouts, so authorizing the State Education Department to arrange for a teachout plan would provide greater protection for students. This section also authorizes the Commissioner to prescribe the educational qualifications and practical experience for teachers and directors in these schools.

Section 5007 is amended to expand the expenses eligible for reimbursement for students whose schools are closing. This section provides refunds of tuition, fees and book charges paid by or on behalf of the students in cash or through loans, excluding funding obtained through government agencies and authorizes the Commissioner to refund expenditures for fees, books and tuition to students of schools that have closed. The provisions for special assessments for new schools in section 5007(10) are also amended to be consistent with the assessment changes in section 5001, and to reflect the State Education Department's experience with assessing schools that have not been in operation for an entire year. The requirement in section 5007(11) for an annual fund audit of the tuition reimbursement account would be changed to mandate a two-year audit.

The proposed amendment implements these provisions.

3. **COSTS:**

The proposed amendment will not impose any additional costs beyond those imposed by Chapter 381 of the Laws of 2012, except that the proposed amendment increases the application for teachers' permits and licenses, directors' permits and licenses, renewals thereof, and amendments of temporary permits and licenses from \$50 to \$100.

4. **MINIMIZING ADVERSE IMPACT:**

The proposed amendment implements Chapter 381 of the Laws of 2012 relating to the licensure of proprietary schools. The amendments make no exception for schools that are located in rural areas on the State. The State

Education Department believes that uniform requirements are needed, regardless of the location of the school, to ensure that all proprietary schools comply with the current best practices for this sector and to preserve the tuition reimbursement account in accordance with Chapter 381 of the Laws of 2012. Because of the nature of the proposed rule, alternative approaches for schools located in rural areas were not considered.

5. RURAL AREA PARTICIPATION:

The State Education Department has posted the proposed regulation on its website and will ask for comments from all interested parties, including proprietary schools located in the rural areas of the State.

Job Impact Statement

The purpose of the proposed amendment is to amend the licensure requirements for private, non-degree granting proprietary schools to implement Chapter 381 of the Laws of 2012. Because it is evident from the nature of the proposed amendment that it will have no impact on jobs and employment opportunities, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

NOTICE OF ADOPTION

Special Education Services for Students with Disabilities

I.D. No. EDU-39-12-00007-A

Filing No. 1225

Filing Date: 2012-12-11

Effective Date: 2013-01-02

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

Action taken: Amendment of sections 200.2, 200.3, 200.4 and 200.5 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 305(1), (2) and (20), 4402(1)(b)(1)(b) and (7)(a), 4403(3) and 4410(13); and L. 2012, chs. 276 and 279

Subject: Special education services for students with disabilities.

Purpose: To conform to chapters 276 and 279 of the Laws of 2012 regarding additional parent member of CSE and electronic access to IEPs.

Text or summary was published in the September 26, 2012 issue of the Register, I.D. No. EDU-39-12-00007-P.

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

Text of rule and any required statements and analyses may be obtained from: 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

Revised Regulatory Impact Statement

Since publication of the Notice of Proposed Rule Making in the September 26, 2012 issue of the State Register, the Regulatory Impact Statement published therewith has been deemed inadequate or incomplete. Specifically, the Local Government Mandates section of the Regulatory Impact Statement included incorrect citations within section 200.5(c)(2). Accordingly, the Local Government Mandates section is restated to read as follows:

LOCAL GOVERNMENT MANDATES:

The proposed amendment is necessary to conform the Commissioner's Regulations to Chapters 276 and 279 of the Laws of 2012 and does not impose any additional program, service, duty or responsibility upon local governments beyond those imposed by federal and State statutes and regulations.

Consistent with Chapter 276, section 200.3(a)(1)(iii) is amended to repeal the provision that the additional parent member is a required member of the CSE unless the parents of the student request that he/she not participate in the meeting; and add that the additional parent member of the CSE would be a required member of the CSE if requested by the parent, the student or the district in writing at least 72 hours prior to the meeting. Section 200.5(c)(2)(iv) is amended to provide that the meeting notice for CSE meetings must inform parents of their right to request, in writing at least 72 hours prior to the meeting, the attendance of an additional parent member at any CSE meeting and that the meeting notice must include a statement, prepared by the State Education Department, explaining the role of having the additional parent attend the meeting. Section 200.5(c)(2)(iv) is revised to clarify that a parent's right to decline the participation of the additional parent member pertains only to meetings of the committee on preschool special education; and corrects a cross reference to Education Law.

Consistent with Chapter 279, section 200.2(i)(11)(i) is amended to provide that, in lieu of providing a paper of electronic copy of the IEP, school district policy may provide that student's teachers, related service providers and other service providers have access to a copy of the student's IEP electronically; and that if the policy provides that the IEP is to be accessed electronically, the policy must ensure that the individuals responsible for the implementation of the IEP are notified and trained on how to access the IEP electronically. Section 200.4(e)(3)(i) is amended to provide that school districts may allow a student's teachers, related service providers and other service providers to access a student's IEP electronically; provided that if a school district adopts a policy that provides that a student's IEP is to be accessed electronically, such policy must also ensure that the individuals responsible for the implementation of the IEP are notified and trained on how to access such IEP electronically.

Assessment of Public Comment

Since publication of a Notice of Proposed Rule Making in the State Register on September 26, 2012, the State Education Department (SED) received the following substantive comments on the proposed amendment.

Electronic Access to Individualized Education Programs: § § 200.2 and 200.3

COMMENT:

Regulations or guidance must be in place to ensure that teachers, related service providers and other service providers have the tools, time and resources at their disposal to readily access students' IEPs prior to implementation. State regulations or policy must clearly inform school districts that they must provide paper copies of IEPs to teachers, related service providers and other service providers if conditions for electronic access are not met. Districts must also have necessary equipment and supplies to support the issuance of print copies if electronic versions are unavailable.

DEPARTMENT RESPONSE:

Comments will be considered for SED guidance.

COMMENT:

The proposed amendment is deficient in that it does not explicitly address electronic access to IEPs by supplementary school personnel. State law explicitly uses the term "access" in circumstances where a school board adopts a policy that students' IEPs are to be accessed electronically, and State regulations must reflect that supplementary school personnel with IEP implementation responsibilities have the same access to their students' IEPs as teachers, related service providers and "other school personnel" as currently defined in section 200.2(b)(11)(i)(a) of the Commissioner's Regulations.

DEPARTMENT RESPONSE:

The proposed amendment does not make any changes to the requirement that districts ensure that supplementary school personnel (i.e., teaching assistants or teacher aides) have the opportunity to review a copy of the student's IEP, prior to the implementation of the IEP, and that they have ongoing access to a copy of the IEP, which may be the copy provided to the student's special education teacher or the teacher or related service provider under whose direction the individual works.

COMMENT:

Clear guidance is needed which states that electronic notification does not replace the requirement in section 200.4(e)(3)(iii) that school personnel with IEP implementation responsibilities must be informed of their specific responsibilities prior to implementation of the IEP. Notice of the availability of an electronic version of an IEP and providing training to access the document would not satisfy the intent of section 200.4(e)(3)(iii).

DEPARTMENT RESPONSE:

The proposed amendment does not make any changes to section 200.4(e)(3)(iii) of the Regulations of the Commissioner of Education. Therefore, districts must continue to ensure the appropriate personnel have been informed, prior to the implementation of the IEP, of his or her responsibility to implement the IEP as specified in section 200.4(e)(3)(iii) of the Regulations of the Commissioner of Education.

COMMENT:

School district policy must ensure not only the provision of appropriate notification of individuals responsible for the implementation of student IEPs, but also the necessary training to allow for electronic access.

DEPARTMENT RESPONSE:

The proposed amendment requires that individual's responsible for the implementation of a student's IEP be notified and provided with training on how to access the IEPs electronically.

Additional Parent Member of the CSE: § § 200.3 and 200.5

COMMENT:

We recognize that these regulations must be adopted for conformance to law.

DEPARTMENT RESPONSE:

No response is necessary since comment is supportive in nature.

COMMENT:

Parent member should be totally eliminated as mandated member of the

committee on special education (CSE). It is difficult for districts to find parent members and the parent member is not required by federal law. Obtaining an additional parent member may cause a delay in scheduling the CSE meeting.

DEPARTMENT RESPONSE:

While the additional parent member on the CSE is not required by federal law, it is required by State statute [see Education Law section 4402(1)(b)(1)(a)(viii)], and therefore the above comment is beyond the scope of this rulemaking, which merely conforms the Commissioner's regulations to the State statute, as amended by Chapter 276 of the Laws of 2012. To ensure timely meetings, school districts must maintain a list of sufficient numbers of additional parent members, which may include a parent from a neighboring school district or the parent of a student who has been declassified or who has graduated within a period not to exceed five years.

COMMENT:

Less administrative time is spent trying to find a parent member when email is utilized.

DEPARTMENT RESPONSE:

Nothing in the proposed amendment addresses procedures for districts to contact additional parent members to participate in CSE meetings.

COMMENT:

Obtaining services for a child with a disability can be a lonely and confusing experience for a parent. Parent members provide parent with support and objectivity during CSE meetings. Parent member is the only unbiased member of the committee.

DEPARTMENT RESPONSE:

SED agrees that having another member of the CSE be a parent of a student with a disability can be a source of support for a parent. The role of the additional parent member is to bring another perspective as a parent of a child with a disability to the discussions and decision-making process. This individual can also help parents to understand and participate in the meeting by explaining procedures, asking questions and clarifying information.

COMMENT:

The implementation of this new requirement could limit the support for parents of students with disabilities as provided by the additional parent member on the CSE, particularly if the meeting notice requirement is not fulfilled appropriately and in a timely manner, especially for parents whose dominant language is other than English.

DEPARTMENT RESPONSE:

SED has revised its State-mandated meeting notice form to include notice to parents of their right to request, in writing, that the district include the additional parent member in the meeting and to explain the role of the additional parent member. The Department is translating the required meeting notice form into several languages.

COMMENT:

The Department will need to commit to actively monitor school district compliance with this regulation, particularly with the provision of timely written prior notice detailing the parental right to request the attendance of an additional parent member and including a statement on the role of the additional parent member. This would include reviewing written requests for the attendance of an additional parent member within 72 hours prior to the meeting and whether parents were given adequate opportunity to make such requests.

DEPARTMENT RESPONSE:

This requirement will be enforced consistent with the State's current monitoring and general supervision system.

COMMENT:

Should allow longer than 72 hours to obtain an additional parent member, as this is not enough time to find volunteers for this position. If requested by the parent, the school district should have five days to secure a parent member.

DEPARTMENT RESPONSE:

The proposed amendment conforms to changes to Chapter 276 of the Laws of 2012, which state that the parents, persons in a parental relation of the student in question, student or member of the CSE may request in writing, at least 72 hours prior to a meeting, the attendance of an additional parent. School districts must maintain a list of sufficient numbers of additional parent members, which may include a parent from a neighboring school district or the parent of a student who has been declassified or who has graduated within a period not to exceed five years; and when establishing the schedule of CSE meetings, should anticipate the need for additional parent members to be available for the meeting in the event their participation is requested by the parent so that these arrangements may be made in a timely manner.

COMMENT:

Clarify if the proposed change to no longer require an additional parent member pertains to committees on preschool special education (CPSE).

DEPARTMENT RESPONSE:

No changes were made to the Education Law, or have been included in the proposed rule, regarding the additional parent membership on a CPSE. Education Law section 4410(3)(a)(1)(v) continues to require that the CPSE include an additional parent member.

COMMENT:

Regulation should be the same for preschool and school age. Federal regulations do not support New York's requirement that an additional parent member participate in CPSE meetings.

DEPARTMENT RESPONSE:

The proposed amendment conforms to changes to Chapter 276 of the Laws of 2012, which specifies revisions pertaining to the attendance of an additional parent member at CSE meetings. Education Law section 4410(3)(a)(1)(v) continues to require that the CPSE include an additional parent member. Federal law establishes that certain individuals must participate on the Committee, but does not preclude states from requiring additional members.

COMMENT:

Clarify if a district can choose to include a parent representative, but excuse that person at the parent's request.

DEPARTMENT RESPONSE:

If the district requests the participation of the additional parent member, it may later decide that the participation of the additional parent member is not necessary in accordance with section 200.3(f).

COMMENT:

Clarify what happens if a parent does not provide proper notice of his/her desire to have the additional parent member (i.e., Can CSE meeting still be held in direct opposition to the parent's wish to have a parent member attend, or is the district obligated to reschedule the meeting?).

DEPARTMENT RESPONSE:

If a parent does not request, in writing, at least 72 hours prior to the meeting, that the district include the additional parent member at a CSE meeting, the school district is not required by law or regulation to include the additional parent member and there is no requirement that the district reschedule the meeting, provided that the district provide the required meeting notice as developed by SED to the parent at least five days before the meeting). Also, a district could agree to reschedule the meeting at another mutually agreed on time and place so that the additional parent member could be in attendance. If the district chooses to reschedule the CSE meeting, it would still be obligated to ensure that all the required timelines are met. Districts have similar experience and responsibilities regarding the participation of the school physician when requested of the district by the parent 72 hours in advance of the meeting.

COMMENT:

The proposal provides little actual mandate relief and may result in added work for districts to reschedule CSE/CPSE meetings and schedule the requested additional parent member after the agenda for the meeting has been set.

DEPARTMENT RESPONSE:

The agenda for a CSE meeting should not be adjusted based on whether an additional parent member will attend. There are no changes to the CPSE requirements relating to the additional parent member.

COMMENT:

Do not cut State funding for special education programs.

DEPARTMENT RESPONSE:

Nothing in the proposed amendment would result in a cut to State funding for special education programs.

NOTICE OF ADOPTION

Administration of Acute Herpes Zoster (Shingles) Vaccinations by Pharmacists

I.D. No. EDU-40-12-00006-A

Filing No. 1222

Filing Date: 2012-12-11

Effective Date: 2012-12-26

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

Action taken: Amendment of section 63.9 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 6504 (not subdivided), 6506(1), 6507(2)(a), 6527(7), 6801(5), 6802(23) and 6909(7); and L. 2012, ch. 116

Subject: Administration of acute herpes zoster (Shingles) vaccinations by pharmacists.

Purpose: To implement chapter 116 of the Laws of 2012 to authorize qualified pharmacists to administer acute herpes zoster vaccinations.

Text or summary was published in the October 3, 2012 issue of the Register, I.D. No. EDU-40-12-00006-EP.

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

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

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Teacher and School Building Leader Certification Examinations

I.D. No. EDU-40-12-00007-A

Filing No. 1223

Filing Date: 2012-12-11

Effective Date: 2013-01-02

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

Action taken: Amendment of sections 80-1.5, 80-3.3, 80-3.4, 80-3.9, 80-3.10, 80-5.13, 80-5.14 and 80-5.22 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207, 305(1), 3001(2), 3006(1)(b) and 3009(1)

Subject: Teacher and school building leader certification examinations.

Purpose: To establish the timeframes and what new certification examinations will be required for each certificate title.

Substance of final rule: Since publication of the Notice of Proposed Rule Making in the State Register on October 3, 2012, a non-substantial revision was made to the proposed amendment as set forth in the Revised Regulatory Impact Statement submitted herewith.

Below is a summary of the revised rule:

Section 80-1.5 of the Commissioner's regulations provides that a school shall not prohibit an individual who is a current or prospective applicant for certification from videotaping a classroom to meet requirements of the teacher performance assessment (TPA).

Section 80-3.3 requires candidates who have completed all requirements for initial certification on or before April 30, 2014 and who apply for certification on or before April 30, 2014 to shall submit evidence of passing the liberal arts and sciences test (LAST), the academic skills and writing test (ATSW), and the content specialty test (CST) on or before April 30, 2014, except that a candidate seeking an initial certificate in the title of Speech and Language Disabilities (all grades) shall not be required to achieve a satisfactory level of performance on the CST. Instead of meeting the examination requirements of this subdivision, a candidate applying for certification on or before April 30, 2014 may achieve a satisfactory level of performance on the set of certification examinations described in subdivision (b) of this section.

For candidates applying for certification on or after May 1, 2014 or candidates who applied for certification on or before April 30, 2014 but did not meet all the requirements for an initial certificate on or before April 30, 2014, such candidates shall submit evidence of having achieved a satisfactory level of performance on the TPA, the EAS, the ALST and the CST(s), except that a candidate seeking an initial certificate in the title of Speech and Language Disabilities (all grades) shall not be required to pass the CST.

For candidates with a graduate degree in STEM and two years of post-secondary teaching experience in the area of the certificate sought who are seeking an initial certificate in earth science, biology, chemistry, physics, mathematics or in a closely related field and who is applying for an initial certificate through individual evaluation on or before April 30, 2014 and who has completed all other requirements for initial certification under such section on or before April 30, 2014 shall only be required to pass the LAST. Candidates applying on or after May 1, 2014 or candidates who applied for certification on or before April 30, 2014 but did not meet all the requirements for an initial certificate through individual evaluation on or before April 30, 2014, shall only be required to pass the EAS and the ALST.

A candidate applying for a career and technical certificate through Option A (completion of an associate degree program or its equivalent) who has completed all requirements for initial certification on or before April 30, 2014 and who applies for certification on or before April 30, 2014, shall submit evidence of passing the ATSW on or before April 30, 2014 or passing the TPA and the EAS. A candidate who applies for certification on or after May 1, 2014 or a candidate who applies for certification on or before April 30, 2014 but does not meet all the requirements for an initial certificate on or before April 30, 2014, shall submit evidence of passing the TPA and the EAS.

A candidate applying for a career and technical certificate under Option B (through completion of a program of coursework that does not lead to an associate or higher degree) who has completed all requirements for initial certification on or before April 30, 2014 and who applies for certification on or before April 30, 2014, shall submit evidence of passing the CQST and the ATSW on or before April 30, 2014 or evidence of passing the CQST, the TPA and the EAS. A candidate who applies for certification on or after May 1, 2014 or a candidate who applies for certification on or before April 30, 2014 but does not meet all the requirements for an initial certificate on or before April 30, 2014, shall submit evidence of passing the CQST, the TPA and the EAS.

Section 80-3.4 is amended to require candidates seeking a professional certificate, except in certain career and technical subject areas, who hold a transitional C certificate for career changers and others holding a graduate academic or graduate professional degree and who have completed all requirements for professional certification on or before April 30, 2014, or have completed all requirements for professional certification with the exception of completion of their registered Transitional C program, and who apply for certification on or before April 30, 2014 to submit evidence of passing the ATSW on before April 30, 2014 or the TPA. Candidates apply for certification on or after May 1, 2014 or candidates who apply for professional certification on or before April 30, 2014 but do not meet all the requirements for a professional certificate on or before April 30, 2014 shall submit evidence of passing the TPA.

Candidates who seek a professional certificate in a specific career and technical subject through Option A (candidates hold an associate degree or its equivalent) and who apply for certification on or before April 30, 2014, shall submit evidence of passing the LAST on or before April 30, 2014 or the ALST. A candidate who applies for certification on or after May 1, 2014 or who applies for certification on or before April 30, 2014 but does not meet all the requirements for a professional certificate on or before April 30, 2014, shall submit evidence of passing the ALST.

Candidates who seek a professional certificate in a specific career and technical subject through Option B (do not possess an associate degree or its equivalent) and who have completed all other requirements for a professional certificate and who apply for certification on or before April 30, 2014, shall submit evidence of passing the LAST on before April 30, 2014 or the ALST. A candidate who applies for certification on or after May 1, 2014 or who applies for certification on or before April 30, 2014 but does not meet all the requirements for a professional certificate on April 30, 2014, shall submit evidence of passing the ALST.

Section 80-3.9 requires a candidate issued an initial certificate under the requirements of subdivision (a) of this section to meet the following requirements for a professional certificate as a teacher of speech and language disabilities (all grades): a candidate who has completed all other requirements for the professional certificate on or before April 30, 2014 and who applies for certification on or before April 30, 2014, must pass the LAST on before April 30, 2014 or pass the ALST. A candidate who applies for certification on or after May 1, 2014 or a candidate who applies for certification on or before April 30, 2014 but does not meet all the requirements for a professional certificate on or before April 30, 2014 must pass the ALST.

Section 80-3.10 requires a candidate seeking a certificate in the educational leadership service to pass the assessment for school building leadership. In addition, for candidates applying for certification on or after May 1, 2014 or candidates who apply for certification on or before April 30, 2014 but do not meet all the requirements for an initial certificate on or before April 30, 2014, the candidate shall also achieve a satisfactory level of performance on the EAS.

Section 80-5.13 requires a candidate who applies for a Transitional B certificate on or before April 30, 2014 and who meets all the requirements for a Transitional B certificate on or before April 30, 2014 to submit evidence of having achieved a satisfactory level of performance on the LAST, and the CST(s) in the area of the certificate, where such CST is required for the certificate title on or before April 30, 2014. Successful completion of the CST in the area of the certificate shall not be required for certain certificate holders. A candidate who applies for a Transitional B certificate on or after May 1, 2014 or a candidate who applies for a Transitional B certificate on or before April 30, 2014 but does not meet all the requirements for a Transitional B certificate on April 30, 2014 shall submit evidence of having achieved a satisfactory level of performance on the ALST, the EAS and the CST(s) in the area of the certificate, where such CST is required for the certificate title. Successful completion of the CST in the area of the certificate shall not be required for certain certificate holders. Instead, the candidate shall submit evidence of having achieved a satisfactory level of performance on a New York State teacher certification examination CST prescribed by the Commissioner or a teaching certificate in the classroom teaching service.

Section 80-5.13 requires a candidate who applies for an initial certificate on or before April 30, 2014, and who has completed all other require-

ments for an initial certificate or who has completed all requirements for an initial certificate except completion of their registered Transitional B program, on or before April 30, 2014 shall submit evidence of having achieved a satisfactory level of performance on the ATSW, and any other required examinations on or before April 30, 2014 or a satisfactory level of performance on the TPA, and any other required examinations. A candidate who applies for an initial certificate on or after May 1, 2014 or who applies for an initial certificate on or before April 30, 2014 but does not meet all the requirements for an initial certificate on or before April 30, 2014, shall submit evidence of having achieved a satisfactory level of performance on the TPA, and any other required exam.

Section 80-5.14 requires a candidate who applies for a Transitional C certificate on or before April 30, 2014 and who has completed all other requirements for a Transitional C certificate on or before April 30, 2014, to submit evidence of passing the LAST, and CST(s) in the area of the certificate on or before April 30, 2014, or a satisfactory level of performance on the ALST, the EAS and the CST(s) in the area of the certificate. Candidates who apply for a Transitional C certificate on or after May 1, 2014 or who apply for a Transitional C certificate on or before April 30, 2014 but do not meet all the requirements for an initial certificate on or before April 30, 2014, shall submit evidence of passing the ALST, the EAS and the CST.

Section 80-5.22 is amended to require a candidate who applies for a Transitional G certificate on or before April 30, 2014 and who meets all the requirements for a Transitional G certificate on or before April 30, 2014 to submit evidence of having achieved a satisfactory level of performance on the LAST on or before April 30, 2014 or achieve a satisfactory level of performance on the ALST. A candidate who applies for a Transitional G certificate on or after May 1, 2014 or who applies for a Transitional G certificate on or before April 30, 2014 but does not meet all the requirements for a Transitional G certificate on or before April 30, 2014 shall submit evidence of having achieved a satisfactory level of performance on the ALST.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 80-3.3(b)(2).

Text of rule and any required statements and analyses may be obtained from: Mary Gammon, New York State Education Department, 89 Washington Avenue, Albany, NY 12234, (518) 474-6400, email: legal@mail.nysed.gov

Revised Regulatory Impact Statement

Since publication of the Notice of Proposed Rule Making in the State Register on October 3, 2012, a non-substantial revision was made in 80-3.3(b)(2)(i)(c) to delete the phrase (grades 5-9) in two places to conform to the grade level configurations for candidates with a graduate degree in science, technology, engineering or mathematics and have years of post-secondary teaching experience in the certificate area to be taught or in a closely related subject area through the individual evaluation pathway as referenced in 80-3.7(a)(3)(ii)(c).

This change requires that the Needs and Benefits section of the previously published Regulatory Impact Statement be revised to read as follows:

3. NEEDS AND BENEFITS:

The proposed amendment makes the following major changes to the certification examinations for teachers and school building leaders.

Timeline for Initial Certificates for Teachers in all fields other than Career and Technical Education (CTE)

Candidates who have completed all requirements for initial certification on or before April 30, 2014 and who apply for certification on or before April 30, 2014, will need to pass the LAST (Liberal Arts and Sciences Test), ATS-W (Assessment of Teaching Skills-Written), and CST (Content Specialty Test) in the area of the certificate on or before April 30, 2014. Instead of meeting the old examination requirements, a candidate applying for certification on or before April 30, 2014 may achieve a satisfactory level of performance on the new set of examinations (edTPA, EAS, ALST, CST). Candidates will not be permitted to mix and match examinations from the old and new tests.

Candidates applying for certification on or after May 1, 2014 or candidates who applied for certification on or before April 30, 2014 but did not meet all the requirements for an initial certificate on or before April 30, 2014, will be required to pass the edTPA (Teacher Performance Assessment), EAS (Educating All Students test), ALST (Academic Literacy Skills Test), and CST.

Timeline for STEM Certification Candidates

Any candidate seeking an initial certificate in earth science, biology, chemistry, physics, mathematics or in a closely related field as determined by the Department in grades 7-12 and who is applying for an initial certificate on or before April 30, 2014 and who has completed all other requirements for initial certification under such section on or before April 30, 2014 is only required to achieve a satisfactory level of performance on the LAST.

Any candidate seeking an initial certificate in earth science, biology, chemistry, physics, mathematics or in a closely related field as determined by the Department in grades 7-12 and who is applying for an initial certificate on or after May 1, 2014 or candidates who applied for certification on or before April 30, 2014 but did not meet all the requirements for an initial certificate on or before April 30, 2014, shall only be required to pass the EAS and ALST.

Timeline for Initial Certificates in CTE Fields - Option A

Candidates who have completed an associate's degree and have two years work experience in a field related to their certification are eligible to apply for certification under the Option A pathway. A candidate who has completed all requirements for initial certification on or before April 30, 2014 and who applies for certification on or before April 30, 2014, is required to pass the ATS-W on or before April 30, 2014 or achieve a satisfactory level of performance on the edTPA and EAS.

A candidate who applies for certification on or after May 1, 2014 or a candidate who applies for certification on or before April 30, 2014 but does not meet all the requirements for an initial certificate on or before April 30, 2014, is required to pass the edTPA and EAS.

Timeline for Initial Certificates in CTE Fields - Option B

Candidates who have a high school diploma and four years work experience in a field related to their certificate are eligible to apply for certification under the Option B pathway. A candidate who has completed all requirements for initial certification on or before April 30, 2014 and who applies for certification on or before April 30, 2014, is required to pass the Communication and Quantitative Skills Test (CQST) and ATS-W on or before April 30, 2014 or submit evidence of having achieved a satisfactory level of performance on the CQST, edTPA and EAS.

A candidate who applies for certification on or after May 1, 2014 or a candidate who applies for certification on or before April 30, 2014 but does not meet all the requirements for an initial certificate on or before April 30, 2014, is required to pass the CQST, edTPA and EAS.

Timeline for Candidates Applying for Transitional B or C Certificates

A candidate who applies for a Transitional B or C certificate on or before April 30, 2014 and who meets all the requirements for a Transitional B or C certificate on or before April 30, 2014, is required to take the LAST and the CST in the area of the certificate, where such CST is required for the certificate title on or before April 30, 2014. Successful completion of the CST in the area of the certificate shall not be required for the transitional B certificate authorizing the teaching of English to speakers of other languages, students with disabilities, students who are deaf or hard-of-hearing, students who are blind or visually impaired, or students with speech and language disabilities, or for an extension of a transitional B certificate in bilingual education. Instead, the candidate shall submit evidence of having achieved a satisfactory level of performance on a CST prescribed by the Commissioner.

A candidate who applies for a Transitional B or C certificate on or after May 1, 2014 or a candidate who applies for a Transitional B or C certificate on or before April 30, 2014 but does not meet all the requirements for a Transitional B or C certificate on April 30, 2014 is required to pass the ALST, EAS, and the CST in the area of the certificate, where such CST is required for the certificate title. Successful completion of the CST in the area of the certificate shall not be required for the Transitional B certificate authorizing the teaching of English to speakers of other languages, students with disabilities, students who are deaf or hard-of-hearing, students who are blind or visually impaired, or students with speech and language disabilities, or for an extension of a Transitional B certificate in bilingual education. Instead, the candidate shall submit evidence of having achieved a satisfactory level of performance on a CST prescribed by the Commissioner or a teaching certificate in the classroom teaching service.

Timeline for Transitional B or C Candidates Applying for Certification

Candidates for certification via the Transitional B or C ("alternative") pathways would be subject to the following requirements. A candidate who applies for an initial certificate on or before April 30, 2014, and who has completed all other requirements for an initial certificate or who has completed all requirements for an initial certificate except completion of their registered Transitional B program, on or before April 30, 2014, is required to take the ATS-W and any other examination required for the provisional or initial certificate, as applicable, and/or a bilingual education extension of such certificate, as applicable, on or before April 30, 2014 or a satisfactory level of performance on the edTPA and any other examination required for the provisional or initial certificate, as applicable, and/or a bilingual education extension of such certificate, as applicable.

A candidate who applies for an initial certificate on or after May 1, 2014 or who applies for an initial certificate on or before April 30, 2014 but does not meet all the requirements for an initial certificate on or before April 30, 2014, shall submit evidence of having achieved a satisfactory level of performance on the edTPA and any other examination required for the provisional or initial certificate, as applicable, and/or a bilingual education extension of such certificate, as applicable.

Timeline for Transitional G Candidates

A candidate applying for a Transitional G certificate (only available to individuals who hold a graduate degree and are college professors) on or before April 30, 2014 and who meets all the requirements for a Transitional G certificate on or before April 30, 2014 is required to pass the LAST on or before April 30, 2014 or achieve a satisfactory level of performance on the ALST.

A candidate who applies for a Transitional G certificate on or after May 1, 2014 or who applies for a Transitional G certificate on or before April 30, 2014 but does not meet all the requirements for a Transitional G certificate on or before April 30, 2014 will be required to pass the ALST.

Timeline for School Building Leader Candidates

A candidate applying for a school building leader certificate shall submit evidence of having achieved a satisfactory level of performance on the New York State assessment for school building leadership. In addition, for candidates applying for certification on or after May 1, 2014 or candidates who apply for certification on or before April 30, 2014 but do not meet all the requirements for an initial certificate on or before April 30, 2014, the candidate shall also achieve a satisfactory level of performance on the EAS.

Revised Regulatory Flexibility Analysis

Since publication of the Notice of Proposed Rule Making in the State Register on October 3, 2012, a non-substantial revision was made to the proposed rule as set forth in the Revised Regulatory Impact Statement set forth herewith.

This change requires that the Compliance Requirements section of the previously published Regulatory Flexibility Analysis be revised to read as follows:

2. COMPLIANCE REQUIREMENTS:

The proposed amendment makes the following major changes to the teacher and school building leader certification examinations:

Timeline for Initial Certificates for Teachers in all fields other than Career and Technical Education (CTE)

Candidates who have completed all requirements for initial certification on or before April 30, 2014 and who apply for certification on or before April 30, 2014, will need to pass the LAST (Liberal Arts and Sciences Test), ATS-W (Assessment of Teaching Skills-Written), and CST (Content Specialty Test) in the area of the certificate on or before April 30, 2014. Instead of meeting the old examination requirements, a candidate applying for certification on or before April 30, 2014 may achieve a satisfactory level of performance on the new set of examinations (edTPA (Teacher Performance Assessment), EAS (Educating All Students test), ALST (Academic Literacy Skills Test), CST). Candidates will not be permitted to mix and match examinations from the old and new tests.

Candidates applying for certification on or after May 1, 2014 or candidates who applied for certification on or before April 30, 2014 but did not meet all the requirements for an initial certificate on or before April 30, 2014, will be required to pass the edTPA, EAS, ALST, and CST.

Timeline for STEM Certification Candidates

Any candidate seeking an initial certificate in earth science, biology, chemistry, physics, mathematics or in a closely related field as determined by the Department in grades 7-12 and who is applying for an initial certificate on or before April 30, 2014 and who has completed all other requirements for initial certification under such section on or before April 30, 2014 is only required to achieve a satisfactory level of performance on the LAST.

Any candidate seeking an initial certificate in earth science, biology, chemistry, physics, mathematics or in a closely related field as determined by the Department in grades 7-12 and who is applying for an initial certificate on or after May 1, 2014 or candidates who applied for certification on or before April 30, 2014 but did not meet all the requirements for an initial certificate on or before April 30, 2014, shall only be required to pass the EAS and ALST.

Timeline for Initial Certificates in CTE Fields - Option A

Candidates who have completed an associate's degree and have two years work experience in a field related to their certification are eligible to apply for certification under the Option A pathway. A candidate who has completed all requirements for initial certification on or before April 30, 2014 and who applies for certification on or before April 30, 2014, is required to pass the ATS-W on or before April 30, 2014 or achieve a satisfactory level of performance on the edTPA and EAS.

A candidate who applies for certification on or after May 1, 2014 or a candidate who applies for certification on or before April 30, 2014 but does not meet all the requirements for an initial certificate on or before April 30, 2014, is required to pass the edTPA and EAS.

Timeline for Initial Certificates in CTE Fields - Option B

Candidates who have a high school diploma and four years work experience in a field related to their certificate are eligible to apply for certification under the Option B pathway. A candidate who has completed all requirements for initial certification on or before April 30, 2014 and who

applies for certification on or before April 30, 2014, is required to pass the Communication and Quantitative Skills Test (CQST) and ATS-W on or before April 30, 2014 or submit evidence of having achieved a satisfactory level of performance on the CQST, edTPA and EAS.

A candidate who applies for certification on or after May 1, 2014 or a candidate who applies for certification on or before April 30, 2014 but does not meet all the requirements for an initial certificate on or before April 30, 2014, is required to pass the CQST, edTPA and EAS.

Timeline for Candidates Applying for Transitional B or C Certificates

A candidate who applies for a Transitional B or C certificate on or before April 30, 2014 and who meets all the requirements for a Transitional B or C certificate on or before April 30, 2014, is required to take the LAST and the CST in the area of the certificate, where such CST is required for the certificate title on or before April 30, 2014. Successful completion of the CST in the area of the certificate shall not be required for the transitional B certificate authorizing the teaching of English to speakers of other languages, students with disabilities, students who are deaf or hard-of-hearing, students who are blind or visually impaired, or students with speech and language disabilities, or for an extension of a transitional B certificate in bilingual education. Instead, the candidate shall submit evidence of having achieved a satisfactory level of performance on a CST prescribed by the Commissioner.

A candidate who applies for a Transitional B or C certificate on or after May 1, 2014 or a candidate who applies for a Transitional B or C certificate on or before April 30, 2014 but does not meet all the requirements for a Transitional B or C certificate on April 30, 2014 is required to pass the ALST, EAS, and the CST in the area of the certificate, where such CST is required for the certificate title. Successful completion of the CST in the area of the certificate shall not be required for the Transitional B certificate authorizing the teaching of English to speakers of other languages, students with disabilities, students who are deaf or hard-of-hearing, students who are blind or visually impaired, or students with speech and language disabilities, or for an extension of a Transitional B certificate in bilingual education. Instead, the candidate shall submit evidence of having achieved a satisfactory level of performance on a CST prescribed by the Commissioner or a teaching certificate in the classroom teaching service.

Timeline for Transitional B or C Candidates Applying for Certification

Candidates for certification via the Transitional B or C ("alternative") pathways would be subject to the following requirements. A candidate who applies for an initial certificate on or before April 30, 2014, and who has completed all other requirements for an initial certificate or who has completed all requirements for an initial certificate except completion of their registered Transitional B program, on or before April 30, 2014, is required to take the ATS-W and any other examination required for the provisional or initial certificate, as applicable, and/or a bilingual education extension of such certificate, as applicable, on or before April 30, 2014 or a satisfactory level of performance on the edTPA and any other examination required for the provisional or initial certificate, as applicable, and/or a bilingual education extension of such certificate, as applicable.

A candidate who applies for an initial certificate on or after May 1, 2014 or who applies for an initial certificate on or before April 30, 2014 but does not meet all the requirements for an initial certificate on or before April 30, 2014, shall submit evidence of having achieved a satisfactory level of performance on the edTPA and any other examination required for the provisional or initial certificate, as applicable, and/or a bilingual education extension of such certificate, as applicable.

Timeline for Transitional G Candidates

A candidate applying for a Transitional G certificate (only available to individuals who hold a graduate degree and are college professors) on or before April 30, 2014 and who meets all the requirements for a Transitional G certificate on or before April 30, 2014 is required to pass the LAST on or before April 30, 2014 or achieve a satisfactory level of performance on the ALST.

A candidate who applies for a Transitional G certificate on or after May 1, 2014 or who applies for a Transitional G certificate on or before April 30, 2014 but does not meet all the requirements for a Transitional G certificate on or before April 30, 2014 will be required to pass the ALST.

Timeline for School Building Leader Candidates

A candidate applying for a school building leader certificate shall submit evidence of having achieved a satisfactory level of performance on the New York State assessment for school building leadership. In addition, for candidates applying for certification on or after May 1, 2014 or candidates who apply for certification on or before April 30, 2014 but do not meet all the requirements for an initial certificate on or before April 30, 2014, the candidate shall also achieve a satisfactory level of performance on the EAS.

The proposed amendment also provides that a school or school system shall not prohibit an individual who is a current or prospective applicant for certification from videotaping a classroom for the purpose of meeting the requirements of the teacher performance assessment for certification as a teacher in the classroom teaching service.

Revised Rural Area Flexibility Analysis

Since publication of the Notice of Proposed Rule Making in the State Register on October 3, 2012, a non-substantial revision was made to the proposed amendment as set forth in the Revised Regulatory Impact Statement submitted herewith.

This change requires that the Reporting, Recordkeeping, and Other Compliance Requirements; and Professional Services section of the previously published Rural Area Flexibility Analysis be revised to read as follows:

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

The proposed amendment makes the following major changes to the teacher and school building leader certification examinations:

Timeline for Initial Certificates for Teachers in all fields other than Career and Technical Education (CTE)

Candidates who have completed all requirements for initial certification on or before April 30, 2014 and who apply for certification on or before April 30, 2014, will need to pass the LAST (Liberal Arts and Sciences Test), ATS-W (Assessment of Teaching Skills-Written), and CST (Content Specialty Test) in the area of the certificate on or before April 30, 2014. Instead of meeting the old examination requirements, a candidate applying for certification on or before April 30, 2014 may achieve a satisfactory level of performance on the new set of examinations (edTPA (Teacher Performance Assessment), EAS (Educating All Students test), ALST Academic Literacy Skills Test), CST). Candidates will not be permitted to mix and match examinations from the old and new tests.

Candidates applying for certification on or after May 1, 2014 or candidates who applied for certification on or before April 30, 2014 but did not meet all the requirements for an initial certificate on or before April 30, 2014, will be required to pass the edTPA, EAS, ALST, and CST.

Timeline for STEM Certification Candidates

Any candidate seeking an initial certificate in earth science, biology, chemistry, physics, mathematics or in a closely related field as determined by the Department in grades 7-12 and who is applying for an initial certificate on or before April 30, 2014 and who has completed all other requirements for initial certification under such section on or before April 30, 2014 is only required to achieve a satisfactory level of performance on the LAST.

Any candidate seeking an initial certificate in earth science, biology, chemistry, physics, mathematics or in a closely related field as determined by the Department in grades 7-12 and who is applying for an initial certificate on or after May 1, 2014 or candidates who applied for certification on or before April 30, 2014 but did not meet all the requirements for an initial certificate on or before April 30, 2014, shall only be required to pass the EAS and ALST.

Timeline for Initial Certificates in CTE Fields - Option A

Candidates who have completed an associate's degree and have two years work experience in a field related to their certification are eligible to apply for certification under the Option A pathway. A candidate who has completed all requirements for initial certification on or before April 30, 2014 and who applies for certification on or before April 30, 2014, is required to pass the ATS-W on or before April 30, 2014 or achieve a satisfactory level of performance on the edTPA and EAS.

A candidate who applies for certification on or after May 1, 2014 or a candidate who applies for certification on or before April 30, 2014 but does not meet all the requirements for an initial certificate on or before April 30, 2014, is required to pass the edTPA and EAS.

Timeline for Initial Certificates in CTE Fields - Option B

Candidates who have a high school diploma and four years work experience in a field related to their certificate are eligible to apply for certification under the Option B pathway. A candidate who has completed all requirements for initial certification on or before April 30, 2014 and who applies for certification on or before April 30, 2014, is required to pass the Communication and Quantitative Skills Test (CQST) and ATS-W on or before April 30, 2014 or submit evidence of having achieved a satisfactory level of performance on the CQST, edTPA and EAS.

A candidate who applies for certification on or after May 1, 2014 or a candidate who applies for certification on or before April 30, 2014 but does not meet all the requirements for an initial certificate on or before April 30, 2014, is required to pass the CQST, edTPA and EAS.

Timeline for Candidates Applying for Transitional B or C Certificates

A candidate who applies for a Transitional B or C certificate on or before April 30, 2014 and who meets all the requirements for a Transitional B or C certificate on or before April 30, 2014, is required to take the LAST and the CST in the area of the certificate, where such CST is required for the certificate title on or before April 30, 2014. Successful completion of the CST in the area of the certificate shall not be required for the transitional B certificate authorizing the teaching of English to speakers of other languages, students with disabilities, students who are deaf or hard-of-hearing, students who are blind or visually impaired, or students with

speech and language disabilities, or for an extension of a transitional B certificate in bilingual education. Instead, the candidate shall submit evidence of having achieved a satisfactory level of performance on a CST prescribed by the Commissioner.

A candidate who applies for a Transitional B or C certificate on or after May 1, 2014 or a candidate who applies for a Transitional B or C certificate on or before April 30, 2014 but does not meet all the requirements for a Transitional B or C certificate on April 30, 2014 is required to pass the ALST, EAS, and the CST in the area of the certificate, where such CST is required for the certificate title. Successful completion of the CST in the area of the certificate shall not be required for the Transitional B certificate authorizing the teaching of English to speakers of other languages, students with disabilities, students who are deaf or hard-of-hearing, students who are blind or visually impaired, or students with speech and language disabilities, or for an extension of a Transitional B certificate in bilingual education. Instead, the candidate shall submit evidence of having achieved a satisfactory level of performance on a CST prescribed by the Commissioner or a teaching certificate in the classroom teaching service.

Timeline for Transitional B or C Candidates Applying for Certification

Candidates for certification via the Transitional B or C ("alternative") pathways would be subject to the following requirements. A candidate who applies for an initial certificate on or before April 30, 2014, and who has completed all other requirements for an initial certificate or who has completed all requirements for an initial certificate except completion of their registered Transitional B program, on or before April 30, 2014, is required to take the ATS-W and any other examination required for the provisional or initial certificate, as applicable, and/or a bilingual education extension of such certificate, as applicable, on or before April 30, 2014 or a satisfactory level of performance on the edTPA and any other examination required for the provisional or initial certificate, as applicable, and/or a bilingual education extension of such certificate, as applicable.

A candidate who applies for an initial certificate on or after May 1, 2014 or who applies for an initial certificate on or before April 30, 2014 but does not meet all the requirements for an initial certificate on or before April 30, 2014, shall submit evidence of having achieved a satisfactory level of performance on the edTPA and any other examination required for the provisional or initial certificate, as applicable, and/or a bilingual education extension of such certificate, as applicable.

Timeline for Transitional G Candidates

A candidate applying for a Transitional G certificate (only available to individuals who hold a graduate degree and are college professors) on or before April 30, 2014 and who meets all the requirements for a Transitional G certificate on or before April 30, 2014 is required to pass the LAST on or before April 30, 2014 or achieve a satisfactory level of performance on the ALST.

A candidate who applies for a Transitional G certificate on or after May 1, 2014 or who applies for a Transitional G certificate on or before April 30, 2014 but does not meet all the requirements for a Transitional G certificate on or before April 30, 2014 will be required to pass the ALST.

Timeline for School Building Leader Candidates

A candidate applying for a school building leader certificate shall submit evidence of having achieved a satisfactory level of performance on the New York State assessment for school building leadership. In addition, for candidates applying for certification on or after May 1, 2014 or candidates who apply for certification on or before April 30, 2014 but do not meet all the requirements for an initial certificate on or before April 30, 2014, the candidate shall also achieve a satisfactory level of performance on the EAS.

Revised Job Impact Statement

Since publication of the Notice of Proposed Rule Making in the State Register on October 3, 2012, a non-substantial revision was made to the proposed amendment as set forth in the Revised Regulatory Impact Statement submitted herewith.

The proposed rule, as revised, establishes the timeframes for the new teacher and school building leader certification examinations. Because it is evident from the nature of the proposed revised rule that it will have no impact on the number of jobs or employment opportunities in New York State, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and none has not been prepared.

Assessment of Public Comment

Since publication of a Notice of Revised Rule Making in the State Register on October 3, 2012, the State Education Department (SED) received the following comments on the revised proposed amendment.

COMMENT: After reading both the Field 201: EAS Test Design and Framework and the Fields 107/108: School Building Leader Assessment Design and Framework, I find that both will address knowledge and skills needed by effective school leaders.

After working 24 years in a small upstate city school district where the

performance of students revealed the need for an overhaul in the traditional process of teaching and administrating, I have experienced why an improved certification process should be pursued. Now, as a faculty member of a certification program in educational leadership, I also feel it is imperative to transform teaching, learning, and school leadership. Because the particular courses I teach focus on reaching all students, especially those with diverse learning needs, I possess a heightened sense of urgency that future school leaders are prepared to inspire this effort.

I find it interesting that not only is “change” to positively impact student learning challenging at the K-12 level, but based on a CADEA & MCEAP conference I attended, it seems even more challenging in higher ed!

DEPARTMENT RESPONSE: The comment is generally supportive of the regulation. Therefore, no response is necessary.

COMMENTS: A commenter expressed concern with the negative impact of the current timeline on candidate preparation to submit the edTPA, a performance-based assessment portfolio that is completed in the student teaching semester.

The commenter indicated that many stakeholders from the P - 20 learning community are involved in the implementation of the edTPA. A period of knowledge gathering, dissemination, and discussion about the edTPA must take place prior to gaining constituent support and follow-through. The current, proposed implementation timeline does not support a well-planned delivery of edTPA preparation for the stakeholders involved, especially with respect to the timing of designation of campus edTPA coordinators and the candidate cohort who will submit the first round of edTPA portfolios.

Based on the following considerations, it is requested that the Board of Regents' Higher Education Committee move the new exams implementation date from May 1, 2014 to June 1, 2014.

Another commenter indicated that faculty members continue to voice very serious concerns regarding the implementation date for the new exams-particularly the Teacher Performance Assessment (edTPA). Those working directly with the affected cohort of students (juniors if using a baccalaureate program as an example) do not have adequate information at this time to guide their students. Many of the support programs related to the edTPA are at the beginning stages of disseminating information. Newly appointed TPA coordinators are attempting to design guidance and information programs for faculty, candidates, and school districts. This is happening as entering juniors are beginning their year with faculty members who have not had adequate time and information to modify programs. You will find varied and strong perspectives on the use of edTPA within educational communities, yet there is likely agreement that teacher candidates should not be set up for failure at the very point that they are most excited about their career development. If the implementation date is slightly altered, that is from May 1, 2014 to June 1, 2014, this would shift the affected cohort for the edTPA by an entire semester for many programs.

DEPARTMENT RESPONSE: At the November and December 2009 Board of Regents meetings, the Board approved a number of initiatives for the purpose of transforming teaching and learning and school leadership in New York State. One of those initiatives was to strengthen the assessments for the certification of teachers and school leaders, by creation of a teacher performance assessment and increased rigor of the content specialty exams. In May 2010, the Board reaffirmed the direction for the new exams, which includes the Academic Literacy Skills Test (ALST), the Educating All Students test (EAS), the Teacher Performance Assessment (edTPA), and the School Building Leader performance assessment (SBL), as well as revisions to the Content Specialty Tests (CSTs). The new exams were described in New York's Race to the Top (RTTT) application and are part of New York's RTTT scope of work and were scheduled to be implemented in May 2013. At the Board's September 2011 meeting, Department staff presented background information on the exams and proposed revisions to the content of the examinations based on research and developments in educational policy. At the February 2012 meeting, the Board of Regents approved a shift in the implementation date of the new certification examinations (edTPA, ALST, EAS and the SBL) based on input from the field. These new examinations would be required for all candidates applying for teacher or school building leader certification and/or completing all certification requirements on or after May 1, 2014. The Department has already amended its scope of work for its Race to the Top Application to push back the implementation timeline for these new exams. It has also provided more than four years notice of these new examination requirements before they will have been implemented and has provided frameworks and assistance to the field on these new exams. Therefore, the Department does not believe these timeframes should be extended further.

COMMENT: We want to bring attention to the unique difficulties a teacher performance assessment presents to those applying for a CTE certificate. This will prove problematic for most applicants given the

unique niche they fill and the pathway taken by many applicants. Most will not have settings or connections to P-12 teachers with whom to complete a performance assessment.

RESPONSE: The Department is working with its examination administrator and the higher education community to address the unique nature of a CTE certificate and the opportunities for these teachers to perform a performance assessment.

COMMENT: We understand that you are already aware of the need to make the correction in the proposed regulations related to the grade level and the STEM pathway to certification for those with post-secondary teaching experience. While this was originally proposed for grades 5-9 or grades 7-12, it was changed to grades 7-12 (only) as a result of public comment-as per the July, 2011 action by the Board of Regents.

RESPONSE: The commenter is correct and this non-material change to the proposed amendment will be reflected when the proposed amendment is adopted.

COMMENT: While the current regulations refer to an “employee,” this proposed regulation change refers to an “individual”- a current or prospective applicant for certification. This extends an existing regulation to non-employees given the requirement for the edTPA. As we have communicated previously, the logistics for the edTPA will be formidable, particularly given the current implementation date. While the wording change may be minor, the implications for classroom teachers (and candidates) are not. This will be the first time that classroom teachers (or teams) who agree to mentor teacher candidates will be required to accommodate videotaping. This regulation was originally developed for the permanent certificate-that is, employed teachers asking a colleague to videotape them in their class.

While the final video that a candidate submits for the edTPA may be modest in size, we do not yet know how this process will unfold in educational settings. Candidates may be making requests to tape multiple times in order to have choices. Current edTPA guidance suggests that P-12 student responses be audible, which will likely require attention to microphones. It will be important that these expectations as well as others related to the edTPA are clearly communicated to P-12 educators. It is not just teacher preparation program faculty members and their candidates who will need to learn the details of the edTPA. Conversation and information-sharing also needs to take place with P-12 educators and administrators. It is unlikely that preparation programs will be able to do this in a thoughtful and systematic way under the current implementation timeline.

RESPONSE: The regulation was amended to provide prospective candidates seeking certification in New York, who may or may not be employees of the district, to be able to videotape their students so they can complete their performance assessment for certification.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Regents Certificate of Work Readiness

I.D. No. EDU-52-12-00012-P

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

Proposed Action: Amendment of sections 100.5, 100.6 and 200.5 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 208 (not subdivided), 305(1) and (2), 4402(1-7) and 4403(3)

Subject: Regents certificate of work readiness.

Purpose: Establish criteria for award of Regents certificate of work readiness to students with disabilities.

Text of proposed rule: 1. Subparagraph (i) of paragraph (7) of subdivision (b) of section 100.5 of the Regulations of the Commissioner of Education is amended, effective March 27, 2013, as follows:

(i) Except as provided in subparagraphs (vi), (vii), (viii) and (xi) of this paragraph, and paragraph (d)(7) of this section, for students first entering grade nine in the 2001-2002 school year and thereafter, there shall be no diplomas [or], certificates, or credentials other than the following:

- (a) Regents diploma;
- (b) Regents diploma with an advanced designation;
- (c) State high school equivalency diploma as provided in section 100.7 of this Part;
- (d) High School Individualized Education Program Diploma as provided in section 100.9 of this Part; [or]
- (e) Regents diploma, or Regents diploma with an advanced designation, with an affixed technical endorsement awarded upon comple-

tion of an approved career and technical education program pursuant to paragraph (d)(6) of this section;

(f) *Skills and achievement commencement credential as provided in section 100.6(a) of this Part; or*

(g) *Regents certificate of work readiness as provided in section 100.6(b) of this Part.*

2. Section 100.6 of the Regulations of the Commissioner of Education is amended, effective March 27, 2013, as follows:

§ 100.6 *High school exiting credentials.*

(a) *Skills and achievement commencement credential.* Beginning with the 2013-14 school year and thereafter, the board of education or trustees of a school district shall, and the principal of a nonpublic school may, issue a skills and achievement commencement credential to a student who has taken the State assessment for students with severe disabilities, as defined in section 100.1(t)(2)(iv) of this Part, in accordance with the following provisions:

[(a)] (1) Prior to awarding the skills and achievement commencement credential, the governing body of the school district or nonpublic school shall ensure that:

[(1)] (i) . . .

[(2)] (ii) . . .

[(3)] (iii) . . .

[(b)] (2) . . .

[(c)] (3) . . .

[(d)] (4) The credential shall be issued together with a summary of the student's academic achievement and functional performance, as required pursuant to section 200.4(c)(4) of this Title, that includes documentation of:

[(1)] (i) . . .

[(2)] (ii) . . .

[(3)] (iii) . . .

School districts may use the State model form developed by the commissioner for the summary of academic and functional performance or a locally-developed form that meets the requirements of this subdivision.

(b) *Regents certificate of work readiness.* Beginning July 1, 2013 and thereafter, the board of education or trustees of a school district shall, and the principal of a nonpublic school may, issue a Regents certificate of work readiness to a student with a disability who meets the requirements of paragraph (1) of this subdivision to document preparation for entry-level employment after high school, except for those students deemed eligible for a skills and achievement commencement credential pursuant to subdivision (a) of this section. Consistent with sections 100.2(q)(1) and 100.5 of this Part, the school district or nonpublic school shall ensure that the student has been provided with appropriate opportunities to earn a Regents or local high school diploma, including providing a student with meaningful access to participate and progress in the general curriculum to assist the student to meet the State's learning standards.

(1) *Except as provided pursuant to paragraphs (4) and (5) of this subdivision, prior to awarding the Regents certificate of work readiness, the board of education or trustees of the school district, or the governing body of the nonpublic school, shall ensure that each of the following requirements have been met:*

(i) *The student has developed, annually reviewed and, as appropriate, revised a career plan to ensure the student is actively engaged in career exploration. Such plan shall include, but is not limited to, a statement of the student's self-identified career interests; career-related strengths and needs; career goals; and coursework and work-based learning experiences that the student plans to engage in to achieve those goals. School districts shall provide students with either a model form developed by the commissioner to document a student's career plan, or a locally-developed form that meets the requirements of this subdivision. The student's career plan may not be limited to career-related activities provided by the school and may include activities to be provided by an entity other than the school; provided that nothing in this subdivision shall be deemed to require the school to provide the student with the specific activities identified in the career plan. A copy of the student's career plan in effect during the school year in which the student exits high school shall be maintained in the student's permanent record.*

(ii) *The student has demonstrated knowledge and skills relating to the career development occupational studies learning standards set forth in section 100.1(t)(1)(vii)(a), (b) and (c) of this Part as evidenced through successful completion at the secondary school level of not less than the equivalent of two units of study in career development courses and/or work-based learning experiences, which shall be documented in the student's transcript. The equivalent units of study shall be earned through career and technical education courses and/or work-based learning experiences, provided that the student shall successfully complete a minimum of 54 hours of documented work-based learning experiences related to career awareness, exploration and/or preparation, which may, but are not required to be completed in conjunction with the student's career and*

technical education course(s). Work-based learning experiences may include, but are not limited to, job shadowing; community service; volunteering; service learning; senior project(s) and/or school based enterprise(s), provided consistent with guidelines developed by the Department, to prepare the student for entry-level employment after high school; and

(iii) *Within one year prior to a student's exit from high school, a work skills employability profile for the student has been completed by designated school staff knowledgeable about the student's skills and experiences that identifies the student's attainment of each of the career development and occupational studies learning standards set forth in section 100.1(t)(1)(vii)(a), (b) and (c) of this Part including, but not limited to career development; integrated learning; and universal foundation skills. School districts may use a model form developed by the commissioner to document a student's work skills employability profile, or a locally-developed form that meets the requirements of this subdivision. A copy of the student's work skills employability profile shall be maintained in the student's permanent record.*

(2) *The certificate shall be issued at the same time the student receives his/her Regents or local high school diploma or, for a student whose disability prevents the student from earning a Regents or local diploma, any time after such student has attended school for at least 12 years, excluding kindergarten, or has received a substantially equivalent education elsewhere, or at the end of the school year in which a student attains the age of 21.*

(3) *The certificate awarded shall be similar in form to the diploma issued by the school district or nonpublic school, except that it shall not use the term "diploma" and shall indicate that it is a Regents certificate of work readiness. Award of a Regents certificate of work readiness shall be documented in the student's transcript.*

(4) *For students with disabilities who exit from high school prior to July 1, 2015, the district or nonpublic school may award the Regents certificate of work readiness to a student who has not met all of the requirements in subparagraph (ii) of paragraph (1) of this subdivision, provided that the school principal has determined that the student has otherwise demonstrated knowledge and skills relating to the career development occupational studies learning standards.*

(5) *For students with disabilities who transfer from another school district within the State or another state, the principal shall evaluate the work-based learning experiences and coursework on the student's transcript or other records to determine if the student meets the requirements in subparagraph (ii) of paragraph (1) of this subdivision.*

[(e)] (c) *If the student receiving a credential pursuant to subdivision (a) or (b) of this section is less than 21 years of age, such credential shall be accompanied by a written statement of assurance that the student named as its recipient shall continue to be eligible to attend the public schools of the school district in which the student resides without the payment of tuition until the student has earned a [regular] Regents or local high school diploma or until the end of the school year in which such student turns age 21, whichever shall occur first.*

3. Subparagraph (iii) of paragraph (5) of subdivision (a) of section 200.5 of the Regulations of the Commissioner of Education is amended, effective March 27, 2013, as follows:

(iii) *Prior to the student's graduation with an individualized education program (IEP) diploma or, beginning with the 2013-14 school year, prior to a student's exit with a skills and achievement commencement credential or a Regents certificate of work readiness as set forth in section 100.6 of this Title, such prior written notice must indicate that the student continues to be eligible for a free appropriate public education until the end of the school year in which the student turns age 21 or until the receipt of a [regular] Regents or local high school diploma.*

Text of proposed 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

Data, views or arguments may be submitted to: James P. DeLorenzo, Assistant Commissioner P-12, State Education Department, Office of Special Education, State Education Building, Room 309, 89 Washington Ave., Albany, NY 12234, (518) 402-3353, email: spedpubliccomment@mail.nysed.gov

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

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

Regulatory Impact Statement

STATUTORY AUTHORITY:

Education Law section 101 continues the existence of the Education Department, with the Board of Regents at its head and the Commissioner of Education as the chief administrative officer, and charges the Depart-

ment with the general management and supervision of public schools and educational work of the State.

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.

Education Law section 208 authorizes the Regents to establish examinations as to attainments in learning and to award and confer suitable certificates, diplomas and degrees on persons who satisfactorily meet the requirements prescribed.

Subdivision (1) of section 305 of the Education Law empowers the Commissioner of Education to be the chief executive officer of the state system of education and of the Board of Regents and authorizes the Commissioner to enforce laws relating to the educational system and to execute educational policies determined by the Regents.

Subdivision (2) of section 305 of the Education Law authorizes the Commissioner of Education to have general supervision over all schools subject to the Education Law.

Education Law section 4402 establishes district's duties regarding education of students with disabilities.

Education Law section 4403 outlines Department's and district's responsibilities regarding special education programs/services to students with disabilities. Section 4403(3) authorizes Department to adopt regulations as Commissioner deems in their best interests.

LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the authority conferred by the above statutes. The proposed amendment authorizes school districts and nonpublic schools, beginning July 1, 2013 and thereafter, to award a Regents Certificate of Work Readiness to a student with a disability, except those deemed eligible for a Skills and Achievement Commencement Credential, to document the student's preparation for entry-level employment after high school.

NEEDS AND BENEFITS:

In January 2012, the Regulations of the Commissioner were amended to repeal the individualized education program (IEP) diploma, effective July 1, 2013, and replace it with a Skills and Achievement Commencement Credential for students with severe disabilities who are eligible to take the New York State Alternate Assessment. The proposed amendment would, beginning July 1, 2013 and thereafter, authorize school districts and nonpublic schools to award a Regents Certificate of Work Readiness to other students with a disability to document high school preparation for entry-level employment. The Certificate could be awarded as a supplement to a Regents or local high school diploma or, for a student with a disability who is unable to earn a Regents or local diploma, as the student's exiting credential. Because the IEP diploma sunsets as of June 30, 2013, the proposed amendment includes exceptions to certain requirements to allow appropriate discretion for school principals to determine whether students exiting high school in the 2013-14 and 2014-15 school years have sufficient knowledge of the CDOS learning standards to qualify for the award of the Regents Certificate of Work Readiness.

COSTS:

- a. Costs to State government: None.
- b. Costs to local governments: There may be costs associated with issuing students a Regents Certificate of Work Readiness if districts opt to develop their own forms, in lieu of using the Department's career plan and employability profile model forms. These costs are anticipated to be minimal and capable of being absorbed by districts using existing staff and resources.
- c. Costs to regulated parties: There may be costs associated with issuing students a Regents Certificate of Work Readiness if districts opt to develop their own forms, in lieu of using the Department's career plan and employability profile model forms. These costs are anticipated to be minimal and capable of being absorbed by districts using existing staff and resources.
- d. Costs to the State Education Department of implementation and continuing compliance: None.

LOCAL GOVERNMENT MANDATES:

The proposed amendment would require school districts to provide students with disabilities with the opportunity to exit high school with a Regents Certificate of Work Readiness and to ensure that the student's transcript and permanent records include notation of career and technical education coursework and work-based learning experiences completed by the student. It would also require the district to provide a student with a copy of a form to complete his/her Career Plan. Further, for students with disabilities who meet the minimum requirements for the Regents Certificate of Work Readiness, the proposed amendment would require school personnel to complete and maintain a work skills employability profile for the student during his/her last year of school. Currently, an employability profile is only required for students participating in an approved career and technical education program pursuant to section 100.5(d)(6).

Section 100.5, as amended, adds the Skills and Achievement Commencement Credential and the Regents Certificate of Work Readiness to the list of other diploma, credentials and certificates available to students.

Section 100.6, as amended, renumbers the provisions for the Skills and Achievement Commencement Credential; and establishes minimum requirements for students with disabilities to earn a Regents Certificate of Work Readiness.

Section 200.5, as amended, requires that prior notice relating to the provision of a free appropriate public education (FAPE) upon graduation must notify parents that a student awarded a Regents Certificate of Work Readiness continues to be eligible for FAPE until the end of the school year in which the student turns age 21 or until the receipt of a Regents or local high school diploma.

PAPERWORK:

The proposed amendment requires transcript documentation of work-based learning experiences completed by a student with a disability and requires that the school complete an employability profile for a student with a disability who has met the minimum learning experiences to earn a Regents Certificate of Work Readiness.

DUPLICATION:

The proposed amendment does not duplicate, overlap or conflict with any other State or federal statute or regulation.

ALTERNATIVES:

Other options considered include requiring additional coursework and work-based learning experiences; establishing minimum credit requirements; and/or requiring students to pass the assessments necessary to earn one of the national work readiness credentials. The Department also considered extending the sunset date for the individualized education program (IEP) diploma but chose to propose an exception to certain requirements to allow appropriate discretion for school principals to determine whether students exiting high school in the 2013-14 and 2014-15 school years have sufficient knowledge of the CDOS learning standards to qualify for the award of the Regents Certificate of Work Readiness.

FEDERAL STANDARDS:

The proposed amendment is not required by federal law or regulations. There are no applicable federal statutes, regulations or other requirements.

COMPLIANCE SCHEDULE:

It is anticipated that regulated parties will be able to achieve compliance with the proposed amendment by its effective date. The proposed amendment establishes that the new credential must be available to students with disabilities beginning July 1, 2013 and thereafter. To ensure sufficient time for local educational agency (LEA) implementation, the proposed amendment includes exceptions to certain requirements to allow appropriate discretion for school principals to determine whether students exiting high school in the 2013-14 and 2014-15 school years have sufficient knowledge of the CDOS learning standards to qualify for the award of the Regents Certificate of Work Readiness.

Regulatory Flexibility Analysis

Small Businesses:

The proposed amendment authorizes school districts, charter schools and nonpublic schools, beginning July 1, 2013 and thereafter, to award a Regents Certificate of Work Readiness to a student with a disability, except those deemed eligible for a Skills and Achievement Commencement Credential, to document preparation for entry-level employment after high school. The proposed amendment does not impose any adverse economic impact, reporting, recordkeeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no affirmative steps are needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local Governments:

1. EFFECT OF RULE:

The proposed amendment applies to all public school districts, charter schools, and registered nonpublic high schools in the State, to the extent that they offer instruction in the high school grades.

2. COMPLIANCE REQUIREMENTS:

The proposed amendment would require school districts to provide students with disabilities with the opportunity to exit high school with a Regents Certificate of Work Readiness and to ensure that the student's transcript and permanent records include notation of career and technical education coursework and work-based learning experiences completed by the student. It would also require the district to provide a student with a copy of a form to complete his/her Career Plan. Further, for students with disabilities who meet the minimum requirements for the Regents Certificate of Work Readiness, the proposed amendment would require school personnel to complete and maintain a work skills employability profile for the student during his/her last year of school. Currently, an employability profile is only required for students participating in an approved career and technical education program pursuant to section 100.5(d)(6).

Section 100.5, as amended, adds the Skills and Achievement Commencement Credential and the Regents Certificate of Work Readiness to the list of other diploma, credentials and certificates available to students.

Section 100.6, as amended, renumbers the provisions for the Skills and Achievement Commencement Credential; and establishes minimum requirements for students with disabilities to earn a Regents Certificate of Work Readiness.

Section 200.5, as amended, requires that prior notice relating to the provision of a free appropriate public education (FAPE) upon graduation must notify parents that a student awarded a Regents Certificate of Work Readiness continues to be eligible for FAPE until the end of the school year in which the student turns age 21 or until the receipt of a Regents or local high school diploma.

3. PROFESSIONAL SERVICES:

The proposed amendment does not impose any additional professional service requirements on local governments.

4. COMPLIANCE COSTS:

There may be costs to school districts, charter schools and nonpublic schools associated with issuing students a Regents Certificate of Work Readiness if districts opt to develop their own forms, in lieu of using the Department's career plan and employability profile model forms. These costs are anticipated to be minimal and capable of being absorbed by districts using existing staff and resources.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any new technological requirements or costs on local governments.

6. MINIMIZING ADVERSE IMPACT:

The Department considered current diploma requirements and existing Department policy relating to work-based learning experiences when establishing the minimum coursework and work-based learning experience instructional requirements. Because the individualized education program (IEP) diploma sunsets as of June 30, 2013, to ensure sufficient time for local educational agency (LEA) implementation, the proposed amendment includes exceptions to certain requirements to allow appropriate discretion for school principals to determine whether students exiting high school in the 2013-14 and 2014-15 school years have sufficient knowledge of the CDOS learning standards to qualify for the award of the Regents Certificate of Work Readiness.

7. LOCAL GOVERNMENT PARTICIPATION:

Copies of the proposed amendment have been provided to District Superintendents with the request that they distribute them to school districts within their supervisory districts for review and comment. Copies were also provided for review and comment to the chief school officers of the five big city school districts and to charter schools.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:

The proposed amendment will apply to all public school districts, charter schools, and registered nonpublic high schools in the State, to the extent that they offer instruction in the high school grades, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with population density of 150 per square miles or less.

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

The proposed amendment does not impose any additional compliance requirements or professional services requirements on entities in rural areas.

The proposed amendment authorizes school districts and nonpublic schools, beginning July 1, 2013 and thereafter, to award a Regents Certificate of Work Readiness to a student with a disability, except those deemed eligible for a Skills and Achievement Commencement Credential, to document the student's preparation for entry-level employment after high school.

Section 100.5, as amended, adds the Skills and Achievement Commencement Credential and the Regents Certificate of Work Readiness to the list of other diploma, certificates and credentials available to students.

Section 100.6, as amended, renumbers the provisions for the Skills and Achievement Commencement Credential; and establishes minimum requirements for students with disabilities to earn a Regents Certificate of Work Readiness.

Section 200.5, as amended, requires that prior notice relating to the provision of a free appropriate public education (FAPE) upon graduation must notify parents that a student awarded a Regents Certificate of Work Readiness continues to be eligible for FAPE until the end of the school year in which the student turns age 21 or until the receipt of a Regents or local high school diploma.

3. COSTS:

There may be costs to school districts, charter schools and nonpublic schools in rural areas that are associated with issuing students a Regents Certificate of Work Readiness if districts opt to develop their own forms, in lieu of using the Department's career plan and employability profile model forms. These costs are anticipated to be minimal and capable of being absorbed by districts using existing staff and resources.

4. MINIMIZING ADVERSE IMPACT:

The Department considered current diploma requirements and existing Department policy relating to work-based learning experiences when establishing the minimum coursework and work-based learning experience instructional requirements. Because the individualized education program (IEP) diploma sunsets as of June 30, 2013, to ensure sufficient time for local educational agency (LEA) implementation, the proposed amendment includes exceptions to certain requirements to allow appropriate discretion for school principals to determine whether students exiting high school in the 2013-14 and 2014-15 school years have sufficient knowledge of the CDOS learning standards to qualify for the award of the Regents Certificate of Work Readiness.

The proposed amendment would authorize school districts to award a State-recognized credential to any student with a disability in the State who meets the minimum requirements, and therefore it is not appropriate to establish different compliance and reporting requirements for regulated parties in rural areas, or to exempt them from the rule's provisions.

5. RURAL AREA PARTICIPATION:

The proposed amendment was submitted for comment to the Department's Rural Education Advisory Committee, which includes representatives of school districts in rural areas.

Job Impact Statement

The proposed amendment authorizes school districts and nonpublic schools, beginning July 1, 2013 and thereafter, to award a Regents Certificate of Work Readiness to a student with a disability, except those deemed eligible for a Skills and Achievement Commencement Credential, to document preparation for entry-level employment after high school.

The proposed amendment will not have a substantial impact on jobs and employment opportunities. Because it is evident from the nature of the amendment that it will not affect job and employment opportunities, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required, and one has not been prepared.

Department of Financial Services

EMERGENCY RULE MAKING

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

I.D. No. DFS-34-12-00005-E

Filing No. 1212

Filing Date: 2012-12-05

Effective Date: 2012-12-05

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

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

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

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

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

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

In recent years, the media has reported cases of unsuitable sales to

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

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

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

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

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

Text of emergency rule: A new Part 225 is added to read as follows:

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) of the Insurance Law and shall be a violation of section 2403 of the Insurance Law.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt 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. DFS-34-12-00005-P, Issue of August 22, 2012. The emergency rule will expire March 4, 2013.

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) 709-1690, email: david.neustadt@dfs.ny.gov

Regulatory Impact Statement

1. Statutory authority: The Superintendent's authority for promulgation of this rule derives from sections 202 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 302 and section 301 of the Insurance Law, 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.

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 Insurance Law Article 24.

Section 4525 of the Insurance Law specifically subjects fraternal benefit societies to certain provisions of Insurance Law 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 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 (Insurance Regulation 199). The modifications from the NAIC Model conformed terminology 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 Insurance Law 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 Insur-

ance 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 at 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 solicitation or sale 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.

EMERGENCY RULE MAKING

Suitability in Annuity Transactions

I.D. No. DFS-52-12-00001-E

Filing No. 1213

Filing Date: 2012-12-05

Effective Date: 2012-12-05

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

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

Statutory authority: Financial Services Law, sections 202, 301 and 302;

and Insurance Law, sections 301, 308, 309, 2110, 2123, 2208, 3209, 4226, 4525 and art. 24

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

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

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

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

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

Subject: Suitability in Annuity Transactions.

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

Text of emergency rule: A new Part 224 is added to read as follows:

Section 224.0 Purpose.

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

Section 224.1 Applicability.

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

Section 224.2 Exemptions.

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

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

(b) a contract used to fund:

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

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

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

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

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

Section 224.3 Definitions.

For the purposes of this Part:

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

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

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

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

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

(1) age;

(2) annual income;

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

(4) financial experience;

(5) financial objectives;

(6) intended use of the annuity;

(7) financial time horizon;

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

(9) liquidity needs;

(10) liquid net worth;

(11) risk tolerance; and

(12) tax status.

Section 224.4 Duties of Insurers and Insurance Producers.

(a) In recommending to a consumer the purchase or replacement of an annuity contract, the insurance producer, or the insurer where no insurance producer is involved, shall have reasonable grounds for believing that the recommendation is suitable for the consumer on the basis of the facts disclosed by the consumer as to the consumer’s investments and other insurance policies or contracts and as to the consumer’s financial situation and needs, including the consumer’s suitability information, and that there is a reasonable basis to believe all of the following:

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

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

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

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

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

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

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

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

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

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

(i) no recommendation is made;

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) filing a complaint with the superintendent; or

(3) cooperating with the investigation of a complaint.

Section 224.5 Insurer Responsibility.

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

Section 224.6 Recordkeeping.

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

Section 224.7 Violations.

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire March 4, 2013.

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) 709-1690, email: david.neustadt@dfs.ny.gov

Regulatory Impact Statement

1. Statutory authority: The Superintendent's authority for promulgation of this rule derives from sections 202 and 302 of the Financial Services Law ("FSL") and sections 301, 308, 309, 2110, 2123, 2208, 3209, 4226, 4525, and Article 24 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 302 and section 301 of the Insurance Law, 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 308 authorizes the Superintendent to address to any authorized insurer or its officers any inquiry relating to its transactions or condition or any matter connected therewith.

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

Insurance Law section 2110 provides grounds for the Superintendent to

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

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

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

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

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

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

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

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

In drafting the Report, the Department considered the legislative changes set forth in Chapter 616 of the Laws of 1997, and the Department's subsequent regulatory requirements that were designed to improve the disclosure requirements to consumers that purchased or replaced life insurance policies and annuity products. It was the Department's determination in the Report that additional time was needed to assess the efficacy of those changes.

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

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

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

4. Costs: Section 224.4(f) of New York Comp. Codes R. & Reg., tit. 11, Part 224 (Insurance Regulation 187) requires an insurer to establish a supervision system designed to ensure an insurer's and its insurance pro-

ducers' compliance with the provisions of Insurance Regulation 187. Additionally, § 224.4(g) requires an insurer to be responsible for ensuring that every insurance producer recommending the insurer's annuity contracts is adequately trained to make the recommendation.

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

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

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

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

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

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

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

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

10. Compliance schedule: The standards included in this rule were previously adopted on an emergency basis and have applied to any recommendation to purchase or replace an annuity contract made to a consumer on or after June 30, 2011 by an insurance producer or an insurer and therefore, insurance producers and insurers have been required to comply with the requirements of the rule since such time. Therefore, this rule will be implemented upon its permanent adoption.

Regulatory Flexibility Analysis

1. Effect of the rule: This rule requires insurers to set forth standards and procedures for recommendations to consumers with respect to annuity

contracts so that the insurance needs and financial objectives of consumers at the time of the transaction are appropriately addressed.

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

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

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

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

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

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

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

7. Small business and local government participation: Affected small businesses had the opportunity to comment at suitability public hearings held by the Department in 2009 and on the outreach draft of the rule, which was posted on the Department website for a two-week comment period.

Rural Area Flexibility Analysis

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

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

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

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

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

5. Rural area participation: Affected parties doing business in rural areas of the State had the opportunity to comment at suitability public hearings held by the Department in 2009 and on the outreach draft of the rule, which was posted on the Department website for a two-week comment period.

Job Impact Statement

The Department of Financial Services finds that this rule will have little or no impact on jobs and employment opportunities. This rule requires

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

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

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

Holding Companies

I.D. No. DFS-52-12-00005-P

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

Proposed Action: Amendment of Subpart 80-1 (Regulation 52) of Title 11 NYCRR.

Statutory authority: Financial Services Law, sections 202 and 302; and Insurance Law, sections 301, 306 and art. 15

Subject: Holding Companies.

Purpose: To conform with the National Association of Insurance Commissioners' amended Model Act, and for modernization measures.

Substance of proposed rule (Full text is not posted on a State website): Insurance Regulation 52 (11 NYCRR 80-1) implements Article 15 of the Insurance Law, which governs the regulation of insurance holding company systems. The National Association of Insurance Commissioners ("NAIC") recently made amendments to its model Insurance Holding Company System Regulatory Act ("Model Act"), many of which are likely to become NAIC accreditation standards. Some of New York's holding company requirements do not match the Model Act, so updating Regulation 52 is necessary to ensure that New York maintains its accreditation status. The proposed amendments to Regulation 52 aim to modernize the Department's processes, to the benefit of both insurers and Department staff.

The Department made technical amendments to section 80-1.1.

The Department amended section 80-1.2 to require insurers to file a registration statement electronically, except in those instances where the Superintendent grants an exemption, and to require a registration statement to include language that provides that the board of directors oversees corporate governance and manages internal controls.

The Department made technical amendments to section 80-1.3.

The Department amended sections 80-1.4 and 80-1.6 to state that upon written application of a significant person or a controlled person who is an individual, the superintendent may permit the significant person to submit a certified public accountant compilation rather than an opinion of an independent certified public accountant, if the superintendent finds, upon review of the application, that submitting an opinion of an independent certified public accountant would constitute a hardship upon the significant person or controlled person. The written application must explain how submitting an opinion of an independent certified public accountant would constitute a hardship upon the significant person or controlled person.

The Department also amended section 80-1.4 to require every controlled insurer to submit to the Superintendent a list that identifies each insurer in the holding company system that is not an authorized insurer in New York State (an "unauthorized insurer") and that electronically filed its most recent annual statement with the NAIC, and for an unauthorized insurer that has not electronically filed its most recent annual statement with the NAIC, a copy of the most recent annual statement filed with the unauthorized insurer's state of domicile.

The Department amended section 80-1.5 to raise the threshold for when a property/casualty insurer must submit a reinsurance agreement to the Superintendent for review and raised the threshold for when an insurer must notify the Superintendent of any lease of real or personal property that does not provide for the rendering of services on a regular and systematic basis. The amendment to section 80-1.5 also would require an insurer to submit to the Superintendent notice of any management agreements, service contracts, tax allocation agreements, guarantees, or cost-sharing arrangements.

The Department made technical amendments to section 80-1.7.

The Department repealed section 80-1.8 and added a new section that states that where a holding company seeks to divest its controlling interest in a domestic insurer in any manner and the domestic insurer is aware of the proposed divestiture, the domestic insurer must file with the Superintendent notice of the proposed divestiture upon the earlier of 30 days prior to the proposed cessation of control or within ten days of becoming aware

of the proposed divestiture; provided, however, that the domestic insurer need not file notice if a person seeking to acquire direct or indirect control of the domestic insurer submits an application for approval of acquisition of control.

The Department added a new section 80-1.9 that sets forth the way in which an insurer or a person may apply to the Superintendent for an exemption from the electronic filing requirement.

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: Joana Lucashuk, New York State Department of Financial Services, 25 Beaver Street, New York, NY 10004, (212) 480-2125, email: joana.lucashuk@dfs.ny.gov

Public comment will be received until: 60 days after publication of this notice.

Regulatory Impact Statement

1. Statutory authority: Financial Services Law §§ 202 and 302 and Insurance Law §§ 301 and 306 and Article 15. Financial Services Law § 202 establishes the office of the Superintendent of Financial Services ("Superintendent"). Financial Services Law § 302 and Insurance Law § 301, in material part, authorize the Superintendent to effectuate any power accorded to the Superintendent by the Financial Services Law, Insurance Law, or any other law, and to prescribe regulations interpreting the Insurance Law. Insurance Law § 306 permits the Superintendent to promulgate regulations to require an insurer or other person or entity to submit a filing or submission to the Superintendent electronically. Insurance Law Article 15 sets forth standards for the regulation of holding company systems.

2. Legislative objectives: Insurance Law Article 15 sets forth standards for the regulation of holding company systems. Further, Financial Services Law § 302 and Insurance Law § 301 authorize the Superintendent to prescribe regulations interpreting the Insurance Law, and to effectuate any power granted to the Superintendent under the Insurance Law to prescribe forms or otherwise make regulations. Insurance Law § 306 authorizes the Superintendent to promulgate regulations requiring that certain filings or submissions to the Superintendent be made electronically.

3. Needs and benefits: Insurance Law Article 15 sets forth standards for the regulation of holding company systems. 11 NYCRR Part 80-1 (Insurance Regulation 52) implements Article 15 by filling in the interstices of that statute. The Legislature first enacted Article 15 in 1969 and the Department promulgated Regulation 52 that same year. The Department last promulgated a substantive amendment to Regulation 52 in 1993. As a result, certain sections of Regulation 52 are out-of-date and do not reflect changes in technology. In addition, the National Association of Insurance Commissioners ("NAIC") adopted amendments to its model Insurance Holding Company System Regulatory Act ("Model Act") in December 2010. Many of these amendments likely will become NAIC accreditation standards in the next couple of years. NAIC accredited state departments must undergo a comprehensive review every five years by an independent review team to ensure they continue to meet baseline standards. The accreditation standards require that state departments have adequate statutory and administrative authority to regulate an insurer's corporate and financial affairs, and that they have the necessary resources to carry out that authority. Therefore, this rule updates Regulation 52 to reflect changes in technology and to adopt certain amendments made to the Model Act.

In addition, domestic controlled property/casualty insurers typically file between 275 and 300 reinsurance treaties or agreements per year with the Department's property bureau pursuant to Insurance Law § 1505(d). However, many of these reinsurance treaties or agreements are minor and it is not necessary for an insurer to file all of the treaties or agreements, since the Department will continue to receive notice of the treaties or agreements and may request a copy of the actual treaty or agreement in specific circumstances if necessary. Thus, this rule raises the threshold for when a domestic controlled property/casualty insurer must file reinsurance treaties or agreements consistent with the Model Act.

4. Costs: This rule does not impose compliance costs on state or local governments. The Department of Financial Services ("Department") does not anticipate additional costs to the Department, and by requiring electronic filings and reducing the paperwork that an insurer must submit in certain circumstances, the Department may reduce its costs. The rule may result in additional costs to domestic controlled insurers, because it imposes additional paperwork and reporting requirements on such insurers. However, the rule also may result in reduced costs to controlled insurers, because they no longer will be required to file paper copies in duplicate or triplicate and certain paperwork and reporting requirements will be reduced.

5. Local government mandates: This rule does not impose any requirement upon a county, city, town, village, school district, fire district, or other special district.

6. Paperwork: The rule would impose additional reporting requirements and paperwork by requiring a domestic controlled insurer to file notice with the Superintendent of a proposed divestiture of a holding company's controlling interest in the insurer, and requiring a domestic controlled insurer to notify the Superintendent of any management agreements, service contracts, tax allocation agreements, guarantees, or cost-sharing arrangements between the insurer and any person in its holding company system. However, the rule also would reduce the amount of paperwork for a controlled insurer, because the rule requires the insurer to file a registration statement electronically (unless it requests and receives an electronic filing exception), and eliminates the requirement that an insurer file paper copies in duplicate or triplicate. Furthermore, the rule raises the thresholds for when a domestic controlled property/casualty insurer must provide the Superintendent with a copy of a reinsurance contract, agreement or memorandum, and when a domestic controlled insurer must notify the Superintendent of any lease of real or personal property, thereby reducing reporting requirements and paperwork.

7. Duplication: This rule will not duplicate, overlap, or conflict with any existing state or federal rules or other legal requirements.

8. Alternatives: The Department received a report dated August 2011 from the New York City Bar Association's Insurance Law Committee (the "Committee") entitled, "Insurance Holding Company Regulation in New York in Light of the 2010 Amendments to the NAIC Model Act" (the "Report"). The Department also conducted outreach to insurance industry trade associations on the proposed rule.

The Report provides suggestions as to how the Department should implement the enterprise risk management ("ERM") reporting requirement and proposes strong confidentiality protections for these kinds of reports. Since the ERM reporting requirement applies to not only insurers subject to Article 15, but insurers subject to Articles 16 and 17 too, the Department decided that it would promulgate a separate regulation rather than amend Regulation 52. The Report also discusses other amendments, which the Department believes the Legislature must incorporate into Article 15.

A trade association requested that the proposed rule provide an exemption from the requirement that a domestic insurer submit notice of a proposed divestiture of control when a person has made a request for approval of acquisition of control of the insurer. The Department added such an exemption.

A trade association also requested that the proposed rule remove the phrase "is responsible for and" from a statement about corporate governance and internal controls in the registration statement. The Department removed the phrase.

In addition, the Department considered overhauling Regulation 52, particularly § 80-1.2, which applies to registration of controlled insurers, to match the Model Act. However, the Department decided not to make such a comprehensive amendment at this time, because an overhaul of the Regulation is not necessary for the Department to maintain its NAIC accreditation and the Report did not suggest such an overhaul.

The Department also considered including the own risk and solvency assessment ("ORSA") reporting requirement in this amendment, but decided that the requirement should be placed in a separate regulation for the same reasons as the ERM reporting requirement.

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

10. Compliance schedule: Insurers must comply with the rule 60 days after Notice of Adoption in the State Register.

Regulatory Flexibility Analysis

Small businesses: The Department of Financial Services ("Department") finds that this rule will not impose any adverse economic impact on small businesses and will not impose any reporting, recordkeeping, or other compliance requirements on small businesses. The basis for this finding is that this rule is directed at insurers authorized to do business in New York State, none of which fall within the definition of a "small business" as found in State Administrative Procedure Act § 102(8). The Department has monitored annual statements and reports on examination of authorized insurers subject to this rule, and believes that none of the insurers falls within the definition of "small business" because no insurer is both independently owned and has fewer than 100 employees.

Local governments: The rule does not impose any impact, including any adverse impact, or reporting, recordkeeping, or other compliance requirements on any local governments. The basis for this finding is that this rule is directed at authorized insurers, which are not local governments.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: Insurers affected by this rule operate in every county in this state, including rural areas as defined under State Administrative Procedure Act ("SAPA") § 102(10).

2. Reporting, recordkeeping and other compliance requirements; and professional services: The rule would impose additional reporting,

recordkeeping, and other compliance requirements by requiring a domestic controlled insurer in a rural area to file notice with the Superintendent of Financial Services ("Superintendent") of a proposed divestiture of a holding company's controlling interest in the insurer, and requiring a domestic controlled insurer in a rural area to notify the Superintendent of any management agreements, service contracts, tax allocation agreements, guarantees, or cost-sharing arrangements between the insurer and any person in its holding company system.

However, the rule also would reduce current reporting, recordkeeping, and other compliance requirements, because the rule requires a controlled insurer in a rural area to file a registration statement electronically (unless it requests and receives an electronic filing exception), and eliminates the requirement that an insurer in a rural area file paper copies in duplicate or triplicate. Furthermore, the rule raises the thresholds for when a domestic controlled property/casualty insurer in a rural area must provide the Superintendent with a copy of a reinsurance contract, agreement, or memorandum, and when a domestic controlled insurer in a rural area must notify the Superintendent of any lease of real or personal property.

It is unlikely professional services will be needed in rural areas to comply with this rule.

3. Costs: The rule may result in additional costs to domestic controlled insurers in rural areas, because it imposes reporting, recordkeeping, and other compliance requirements on such insurers. However, the rule also may result in reduced costs to controlled insurers in rural areas, because they no longer will be required to file paper copies in duplicate or triplicate and certain reporting, recordkeeping, and other compliance requirements will be reduced. Also, any additional costs to insurers in rural areas should be the same for insurers in non-rural areas, and the costs should not differ between public and private entities in rural areas.

4. Minimizing adverse impact: The Department of Financial Services ("Department") considered the approaches suggested in SAPA § 202-bb(2) for minimizing adverse economic impacts. The rule is designed to minimize any adverse economic impacts on rural areas by allowing a controlled insurer in a rural area to request an exemption from the requirement that a controlled insurer electronically file a registration statement based upon undue hardship, impracticability, or good cause.

5. Rural area participation: Public and private interests in rural areas will have an opportunity to participate in the rule making process once the rule is published in the State Register and posted on the Department's website.

Job Impact Statement

This rule should not adversely impact jobs or employment opportunities in New York State. It is likely to have no impact whatsoever, since the rule updates Regulation 52 to account for advances in technology; adopts a few amendments that were made to the National Association of Insurance Commissioners' model Insurance Holding Company System Regulatory Act (the "Model Act"); and raises the threshold for certain filings consistent with the Model Act.

Department of Health

EMERGENCY RULE MAKING

NYS Medical Indemnity Fund

I.D. No. HLT-52-12-00003-E

Filing No. 1214

Filing Date: 2012-12-06

Effective Date: 2012-12-06

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

Action taken: Amendment of Part 69 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 2999-j

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

Specific reasons underlying the finding of necessity: These regulations are being promulgated on an emergency basis because of the need for the Fund to be operational as of October 1, 2011. Authority for emergency promulgation was specifically provided in section 111 of Article VII of the New York State 2011-2012 Budget.

Subject: NYS Medical Indemnity Fund.

Purpose: To provide the structure within which the NYS Medical Indemnity Fund will operate.

Substance of emergency rule: As required by new section 2999-j(15) of the Public Health Law (“PHL”), the New York State Commissioner of Health, in consultation with the Superintendent of Financial Services, has promulgated these regulations to provide the structure within which the New York State Medical Indemnity Fund (“Fund”) will operate. Included are (a) critical definitions such as “birth-related neurological injury” and “qualifying health care costs” for purposes of coverage, (b) what the application process for enrollment in the Fund will be, (c) what qualifying health care costs will require prior approval, (d) what the claims submission process will be, (e) what the review process will be for claims denials, (f) what the process will be for reviews of prior approval, and (g) how and when the required actuarial calculations will be done.

The application process itself has been developed to be as streamlined as possible. Submission of (a) a completed application form, (b) a signed release form, (c) a certified copy of a judgment or court-ordered settlement that finds or deems the plaintiff to have sustained a birth-related neurological injury, (d) documentation regarding the specific nature and degree of the applicant’s neurological injury or injuries at present, (e) copies of medical records that substantiate the allegation that the applicant sustained a “birth-related neurological injury,” and (f) documentation of any other health insurance the applicant may have are required for actual enrollment in the Fund.

The parent or other authorized person must submit the name, address, and phone number of all providers providing care to the applicant at the time of enrollment for purposes of both claims processing and case management. To the extent that documents prepared for litigation and/or other health related purposes contain the required background information, such documentation may be submitted to meet these requirements as well, provided that this documentation still accurately describes the applicant’s condition and treatment being provided.

Those expenses that will or can be covered as qualifying health care costs are defined very broadly. Prior approval is required only for very costly items, items that involve major construction, and/or out of the ordinary expenses. Such prior approval requirements are similar to the prior approval requirements of various Medicaid waiver programs and to commercial insurance prior approval requirements for certain items and/or services.

Reviews of denials of claims and denials of requests for prior approval will provide enrollees with full due process and prompt decisions. Enrollees are entitled to a conference with the Fund Administrator or his or her designee and a review, which will involve either a hearing before or a document review by a Department of Health hearing officer. In all reviews, the hearing officer will make a recommendation regarding the issue and the Commissioner or his designee will make the final determination. An expedited review procedure has also been developed for emergency situations.

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 March 5, 2013.

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:

Section 2999-j (15) of the Public Health Law (PHL) specifically states that the Commissioner of Health, in consultation with the Superintendent of Financial Services (the Superintendent of Insurance until October 3, 2011), “ shall promulgate. . . all rules and regulations necessary for the proper administration of the fund in accordance with the provisions of this section, including, but not limited to those concerning the payment of claims and concerning the actuarial calculations necessary to determine, annually, the total amount to be paid into the fund as otherwise needed to implement this title.”

Legislative Objectives:

The Legislature delegated the details of the Fund’s operation to the two State agencies that have the appropriate expertise to develop, implement and enforce all aspects of the Fund’s operations. Those two agencies are the Department of Health and the Department of Financial Services. These proposed regulations reflect the collaboration of both agencies in providing the administrative details for the manner in which the Fund will operate.

Needs and Benefits:

The regulations have the goal of establishing a process to provide that persons who have obtained a settlement or a judgment based on having sustained a birth-related neurological injury as the result of medical malpractice will have lifetime medical coverage.

Costs:

Regulated Parties:

There are no costs imposed on regulated parties by these regulations. Qualified plaintiffs will not incur any costs in connection with applying for enrollment in the Fund or coverage by the Fund.

Costs to the Administering Agencies, the State, and Local Governments:

Costs associated with the Fund will be covered by applicable appropriations. The Department of Health will also seek Federal Financial Participation for the health care costs of qualified plaintiffs that otherwise would be covered by Medicaid. No costs are expected to local governments.

Local Government Mandates:

None.

Paperwork:

The proposed regulations impose no reporting requirements on any regulated parties.

Duplication:

There are no other State or Federal requirements that duplicate, overlap, or conflict with the statute and the proposed regulations. Although some of the services to be provided by the Fund are the same as those available under certain Medicaid waivers, the waivers have limited slots. Coordination of benefits will be one of the responsibilities of the Fund Administrator. Health care services, equipment, medications or other items that any commercial insurer providing coverage to a qualified plaintiff is legally obligated to provide will not be covered by the Fund (except for copayments and/or deductibles) nor will the Fund cover any health care service, equipment, or other item that either (1) is already being provided through another State or Federal program or similar program in another country, if applicable, such as the Early Intervention Program or as part of an Individualized Education Plan or (2) is not being provided to a qualified plaintiff through another State or Federal program or similar program in another country, if applicable, for which the qualified plaintiff is eligible but for which the parent or guardian cannot demonstrate that he or she has made a reasonable effort to obtain such service, equipment or item for the qualified plaintiff through the applicable program.

Alternatives:

Given the statute’s directive, there are no alternatives to promulgating the proposed regulations.

Federal Standards:

There are no minimum Federal standards regarding this subject.

Compliance Schedule:

The Fund was required to be operational by October 1, 2011.

Regulatory Flexibility Analysis

Effect of Rule:

For 2009, of the 135 general hospitals in New York State that provided maternity services, only ten had less than two hundred deliveries that year.

Compliance Requirements:

The regulations impose no new reporting or recordkeeping obligations.

Professional Services:

None.

Compliance Costs:

There are no costs imposed by these regulations on regulated businesses or local governments.

Economic and Technological Feasibility:

The proposed regulations should not create any economic or technological issues for any hospitals or other health care providers. Manual billing will be permitted for those providers that do not have electronic billing capacity.

Minimizing Adverse Impact:

There will be no adverse impact on small businesses and local governments.

Small Business and Local Government Participation:

For purposes of the regulation drafting process, input was sought from hospital associations, provider associations and advocacy organizations throughout the State as well as the Consumer Advisory Committee required by the statute.

Rural Area Flexibility Analysis

Types and Estimated Number of Rural Areas:

The New York State Medical Indemnity Fund being implemented by these regulations will cover future medical expenses for all qualified plaintiffs throughout New York State who have obtained a judgment or a settlement based on a birth-related neurological impairment on or after April 1, 2011.

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

No reporting, recordkeeping, other compliance requirement or professional services other than the submission of claims are required by the regulations.

Costs:

There are no costs to rural areas associated with these regulations.

Minimizing Adverse Impact:

There will be no adverse impact on rural areas as a result of the proposed regulations.

Rural Area Participations:

For purposes of the regulation drafting process, input was sought from hospital associations, provider associations and advocacy organizations throughout the State as well as the Consumer Advisory Committee required by the statute.

Job Impact Statement**Nature of Impact:**

The regulations should have no substantial impact on jobs and employment opportunities.

Categories and Numbers Affected:

None.

Regions of Adverse Impact:

None.

Minimizing Adverse Impact:

None.

Self-Employment Opportunities:

None.

EMERGENCY RULE MAKING

Presumptive Eligibility for Family Planning Benefit Program

I.D. No. HLT-52-12-00006-E

Filing No. 1215

Filing Date: 2012-12-07

Effective Date: 2012-12-07

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

Action taken: Amendment of section 360-3.7 of Title 18 NYCRR.

Statutory authority: Social Services Law, section 366(1)

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

Specific reasons underlying the finding of necessity: Chapter 59 of the Laws of 2011 enacted a number of proposals recommended by the Medicaid Redesign Team established by the Governor to reduce costs and increase quality and efficiency in the Medicaid program. The changes to SSL section 366(1) that require the Department, by regulation, to implement criteria for presumptive eligibility for the Family Planning Benefit Program, took effect April 1, 2011. Paragraph (t) of section 111 of Part H of Chapter 59 authorizes the Commissioner to promulgate, on an emergency basis, any regulations needed to implement such law. The Commissioner has determined it necessary to file these regulations on an emergency basis.

Subject: Presumptive Eligibility for Family Planning Benefit Program.

Purpose: To set criteria for the Presumptive Eligibility for Family Planning Benefit Program.

Text of emergency rule: Section 360-3.7 is amended to add a new subdivision (e) to read as follows:

(e) *Presumptive eligibility for coverage of family planning benefit program (FPBP) services.*

(1) *An individual will be presumed eligible to receive the MA care, services and supplies listed in paragraph (8) of this subdivision when a qualified provider determines, on the basis of preliminary information, that the individual's family income does not exceed 200 percent of the Federal poverty line applicable to a family of the same size.*

(2) *For purposes of this subdivision, the individual's family income will be determined according to section 360-4.6 of this Part relating to financial eligibility for MA. The resources of the individual's family will not be considered in determining the individual's presumptive eligibility for coverage of FPBP services.*

(3) *For purposes of this subdivision, an individual's family includes the individual, any legally responsible relatives and any legally dependent relatives with whom he or she resides. In determining eligibility for children under 21, parental income is disregarded when the child requests confidentiality, has good cause not to provide or is otherwise unable to obtain parental income information.*

(4) *As used in this subdivision, the term qualified provider means a provider who:*

(i) *is eligible to receive payment under the MA program;*

(ii) *provides family planning services, treatment and supplies; and*

(iii) *has been found by the department to be capable of making presumptive eligibility determinations based on family income.*

(5) *An individual who has been determined presumptively eligible for coverage of FPBP services must submit a FPBP application to the social services district in which he or she resides, or to the department or its agent, by the last day of the month following the month in which a qualified provider determined him or her to be presumptively eligible.*

(6) *A qualified provider that has determined an individual to be presumptively eligible for coverage of FPBP services must:*

(i) *on the day the qualified provider determines the individual to be presumptively eligible, inform the individual that a FPBP application must be submitted to the social services district in which he or she resides, or to the department or its agent, by the last day of the following month in order to continue presumptive eligibility until the day his or her FPBP eligibility is determined;*

(ii) *assist the individual to complete the FPBP application and submit the application on his or her behalf; and*

(iii) *within five business days after the day the qualified provider determines the individual to be presumptively eligible, notify the social services district in which the individual resides, or the department or its agent, of its presumptive eligibility determination on forms the department develops or approves.*

(7) *The period of presumptive eligibility for coverage of FPBP services begins on the day a qualified provider determines the individual to be presumptively eligible. If the individual submits a FPBP application to the social services district in which he or she resides, or to the department or its agent, by the last day of the following month, the period of presumptive eligibility continues through the day the individual's eligibility for FPBP is determined; if the individual fails to submit such an application, the period of presumptive eligibility continues through the last day of the following month.*

(8) *An individual found presumptively eligible pursuant to this subdivision is eligible for coverage of the following medically necessary FPBP services and appropriate transportation to obtain such services:*

(i) *hospital based and free standing clinics;*

(ii) *county health department clinics;*

(iii) *federally qualified health centers or rural health centers;*

(iv) *obstetricians and gynecologists;*

(v) *family practice physicians;*

(vi) *licensed midwives, nurse practitioners; and*

(vii) *family planning related services from pharmacies and laboratories.*

(9) *If a presumptively eligible individual is subsequently determined to be ineligible for FPBP, he or she may request a fair hearing pursuant to Part 358 of this Title to dispute the denial of FPBP, but the presumptive eligibility period will not be extended by such request.*

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 March 6, 2013.

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

Regulatory Impact Statement**Statutory Authority:**

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

Legislative Objectives:

Subdivision (1) of section 366 of the Social Services Law (SSL), as amended by Chapter 59 of the Laws of 2011, provides that pursuant to regulations promulgated by the Commissioner of Health, that the Department will establish criteria for presumptive eligibility for the Family Planning Benefit Program. The legislative objective, expressed through SSL section 366 (1) is to expand access to family planning services by easing the application process.

Needs and Benefits:

New York included in Chapter 59 of the Laws of 2011, the option afforded by the Affordable Care Act, of providing individuals with a period of presumptive eligibility for family planning-only services. This regulation will provide the necessary criteria, as required by subdivision 1 of Section 366 of the Social Services Law, to implement the Presumptive Eligibility for the Family Planning Benefit Program.

COSTS:

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

This amendment will not increase costs to the regulated parties.

Costs to State and Local Government:

This amendment will not increase costs to the State or local governments. There is potential savings to the Medicaid program, which may be achieved by averting births paid for by the Medicaid program.

Costs to the Department of Health:

There will be no additional costs to the Department.

Local Government Mandates:

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

Paperwork:

This amendment will not impose any additional paperwork requirements.

Duplication:

There are no duplicative or conflicting rules identified.

Alternatives:

Establishing criteria for presumptive eligibility for the Family Planning Benefit Program is mandated by section 366(1) of the SSL. No alternatives were considered.

Federal Standards:

The federal Medicaid statute at section 2303(b) of the Affordable Care Act (ACA) added a new section (1920C) to the Social Security Act that gives States that adopt the new family planning group the option of also providing a period of presumptive eligibility based on preliminary information that an individual meets the eligibility criteria for family planning services in new section 1902(ii).

Compliance Schedule:

State services districts should be able to comply with the proposed regulations when they become effective.

Regulatory Flexibility Analysis

No regulatory flexibility analysis is required pursuant to section 202-(b)(3)(a) of the State Administrative Procedure Act. The proposed amendment does not impose an adverse economic impact on small businesses or local governments, and it does not impose reporting, record keeping or other compliance requirements on small businesses or local governments.

Rural Area Flexibility Analysis

No rural area flexibility analysis is required pursuant to section 202-bb(4)(a) of the State Administrative Procedure Act. The proposed amendment does not impose an adverse impact on facilities in rural areas, and it does not impose reporting, record keeping or other compliance requirements on facilities in rural areas.

Job Impact Statement

No Job Impact Statement is required pursuant to section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature of the proposed amendment, that it will not have an adverse impact on jobs and employment opportunities.

Higher Education Services Corporation

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

New York Higher Education Loan Program (NYHELPS)

I.D. No. ESC-52-12-00004-P

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

Proposed Action: Amendment of Part 2213 of Title 8 NYCRR.

Statutory authority: Education Law, sections 691(10) and 655(4)

Subject: New York Higher Education Loan Program (NYHELPS).

Purpose: Amend several provisions of the regulation.

Substance of proposed rule (Full text is posted at the following State website: hesc.ny.gov/NYHELPS_Regulations): 1. Section 2213.1. Definitions. The amendment revises the definition of “eligible cosigner” to clarify that a cosigner may sign multiple NYHELPS loan applications within the same academic year for the same borrower, provided the total amount of loans for any student does not exceed the maximum loan limits. However, a cosigner is only eligible to sign Program loans for a maximum of three separate borrowers for each academic year unless there is a parental relationship for each additional borrower.

2. Section 2213.5. Due diligence in originating, disbursing, and servicing program loans. The amendment clarifies the requirement for reporting to consumer reporting agencies. The amendment also clarifies that a Program loan will enter repayment if the student for whom the loan was taken is no longer enrolled at a Title IV eligible college on at least a half time basis. Lastly, the amendment clarifies that payments in excess of fees and interest will be applied to principal.

3. Section 2213.13. College Certification requirements. The amendment clarifies that colleges must certify that the student for whom a Program loan is taken meets satisfactory academic progress in accordance with the federal satisfactory academic progress requirements.

4. Section 2213.16. Disclosure requirements for participating schools. The amendment clarifies the requirements for both entrance and exit counseling, which will be performed by the Corporation on behalf of participating colleges.

5. Section 2213.19. Reporting/retention requirements for participating holders. The amendment clarifies the documentation that holders of Program loans are required to maintain and increases the retention period for such records.

6. Section 2213.20. Program loan repayment. The amendment inserts titles for subdivisions and paragraphs, other such technical corrections, and:

- (a) provides that repayment options will be determined on an annual basis;
- (b) clarifies in-school payment deferment;
- (c) clarifies that the grace period commences after the last date of attendance at a Title IV eligible college on a least a half time basis;
- (d) clarifies that payments may be suspended if a student borrower in repayment returns to college at a Title IV eligible college on at least a half time basis;
- (e) provides an exception to the minimum payment requirement for payments made in accordance with an approved modified payment plan;
- (f) clarifies the administrative forbearance requirement;
- (g) provides for a limited military service deferment for cosigners in active duty status during the student borrower’s in-school and grace period;
- (h) revises the requirements for continued military service deferment eligibility;
- (i) provides that the terms of a disability discharge will be determined annually; and
- (j) clarifies that to be eligible for cosigner release, the required payments must be made once the student is no longer enrolled at a Title IV eligible college on at least a half time basis, and allows for the ability to reduce the number of required payments effective July 1, 2012.

7. Section 2213.21. Due diligence for program loan delinquency. The amendment deletes the requirements for due diligence activity from the regulation text and provides that such requirements will be set forth in the Program’s Default Avoidance and Claim Manual.

8. Section 2213.28. Incorporation by reference. The amendment updates the regulation to include version 4 of both the Program’s Underwriting Manual and the Program’s Default Avoidance and Claim Manual.

Text of proposed rule and any required statements and analyses may be obtained from: Cheryl B. Fisher, NYS Higher Education Services Corporation, 99 Washington Avenue, Room 1315, Albany, NY 12255, (518) 474-5592, email: regcomments@hesc.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:
Education Law § 691(10) provides that the New York State Higher Education Services Corporation (Corporation) shall have the power and duty to adopt rules and regulations to implement the New York Higher Education Loan Program (Program or NYHELPS).

Education Law § 652(2) includes in the Corporation’s statutory purposes the improvement of the post-secondary educational opportunities of eligible students through the centralized administration and coordination of New York State’s financial aid programs and those of other levels of government.

Education Law § 653(9) further empowers the Corporation’s Board of Trustees to perform such other acts as may be necessary or appropriate to carry out the objects and purposes of the Corporation, including the promulgation of regulations.

Education Law § 655(4) authorizes the President of the Corporation (President) to propose regulations, subject to approval by the Board of Trustees, governing the application for, and the granting and administration of, student aid and loan programs, the repayment of loans or the guarantee of loans made by the Corporation, and administrative functions in support of New York State student aid programs. Under Education Law

§ 655(9), the Corporation's President is also authorized to receive assistance from any Division, Department or Agency of the State in order to properly carry out the President's powers, duties and functions. Finally, Education Law § 655(12) provides the President with the authority to perform such other acts as may be necessary or appropriate to effectively carry out the general objects and purposes of the Corporation.

2. Legislative objectives:

The Program, as enacted by Part J of Chapter 57 of the Laws of 2009, authorizes the Corporation to serve as the Program's administrator and empowers the Corporation to adopt rules and regulations to implement the Program.

3. Needs and benefits:

NYHELPS was enacted on April 7, 2009 to offer New York State students and families the option of an affordable private education loan to fill the gap between college costs and currently available State and federal student aid. The regulations implementing the Program were effective on November 4, 2009, which led to the sale of private activity bonds to underwrite the Program in mid-December, and the processing of the first applications on December 21, 2009.

As a new Program with no prior history, NYHELPS was structured to maximize the number of constituents served while offering the most favorable interest rate, and utilizing a relatively small pool of funds. As the Program developed over its first year, the Corporation identified several sections of the regulation that required clarification or revision, which were adopted on June 2, 2010 (as a consensus rule), August 25, 2010, and January 26, 2011.

As the Program grows, the Corporation continues to work with Program participants (especially colleges, students, and families) to enhance and streamline the Program and its processes. Additionally, the Corporation continues to review actual Program data to ascertain whether its constituency is being served as intended. As a result of these efforts, the Corporation identified several sections of the regulation that require clarification or revision. Some of the changes include:

(i) Clarification of, or changes to, processing and servicing requirements:

- In developing policies and procedures in connection with modified payment plans, it was decided to clarify that the monthly payments made in accordance with an approved modified payment plan may be less than the required minimum monthly payment.

- In developing policies and procedures in connection with servicing loans, it was decided to eliminate the Default Aversion Assistance Request (DAAR) filing requirement as well as streamline other due diligence and loan processing requirements. These changes will enable the Corporation to provide more consistent, effective and efficient customer service to students and their families.

(ii) Conformance with other provisions of the regulation:

- In response to amendments to the regulation text, corresponding provisions to the Underwriting Manual were made for consistency, such as the ability of the borrower to change his or her repayment option as described in (iii) below.

- In response to amendments to the regulation text, corresponding provisions to the Default Avoidance and Claim Manual were made for consistency, such as the elimination of the DAAR filing requirements.

(iii) Program flexibility:

- After consultation with SONYMA, it was decided to provide the Corporation with the authority to offer student borrowers who demonstrate compelling financial circumstances the option to change his or her repayment option to the interest only or fully deferred payment option. This type of program flexibility will benefit consumers experiencing difficulty in repaying their loans.

- After consultation with SONYMA, it was decided to provide a limited military service deferment for cosigners in active military status during the student borrower's in-school and grace period.

(iv) Clarification of language with no substantive change:

- In responding to consumer inquiries, it was decided to clarify the definition of "eligible cosigner".

- In response to inquiries from participating colleges, it was decided to specify that colleges must certify that students meet satisfactory academic progress in accordance with the federal requirements (rather than the State requirements).

(v) Technical clean up:

- As a result of the extension of the origination period in connection with the Bond proceeds, the effective date of certain provisions was changed to the 2012-13 academic year.

- It was decided to insert titles for subdivisions and paragraphs in the section addressing Program loan repayment in order to make it easier to identify subject areas.

4. Costs:

There is no anticipated cost to the Corporation, other state agencies, or local governments for the implementation of, or continuing compliance

with, this rule. In fact, the proposed amendments to this rule will result in consistency, increased efficiency and reduced complexity, which will avoid costs and could reduce costs.

5. Paperwork:

This rule will not result in any additional paperwork on Program participants. In fact, the rule streamlines the documentation requirements and the processing of those documents.

6. Local government mandates:

No program, service, duty, or responsibility will be imposed by this rule upon any county, city, town, village, school district, fire district or other special district.

7. Duplication:

This rule clarifies provisions, without duplication, and streamlines processes. In fact, this rule eliminates duplication by consolidating provisions.

8. Alternatives:

The 'no action' alternative would perpetuate inconsistencies, misinterpretation, and inefficient servicing, and the alternatives considered were deemed to be less effective than the proposed amendments. For example:

- Provisions contained in the bond documents require changing the effective date of the current credit criteria regarding delinquencies.

- In connection with the current servicing and due diligence provisions contained in the text as well as the Default Avoidance and Claim Manual, other alternatives were considered, but ultimately the Corporation concluded that the proposed amendments would best serve the Program's constituency by providing accurate, consistent, and efficient servicing of their loans.

9. Federal standards:

This proposal does not exceed any minimum standards of the federal government.

10. Compliance schedule:

The Corporation, students, colleges and any other parties impacted by this proposal will be able to comply with this rule immediately upon its adoption.

Regulatory Flexibility Analysis

This statement is being submitted pursuant to subdivision (3) of section 202-b of the State Administrative Procedure Act and in support of the New York State Higher Education Services Corporation's (Corporation) Notice of Proposed Rulemaking seeking to amend part 2213 of Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

It is apparent from the nature and purpose of this rule that it will not impose an adverse economic impact on small businesses or local governments. The Corporation finds that this rule will not impose reporting, record keeping or compliance requirements on small businesses or local governments. The regulation implements the New York Higher Education Loan Program (NYHELPS), which will help fill the gap between college costs and available financial aid in order to assist eligible students and their families in the financing of their college costs. The proposal provides for: (i) clarification of, or changes to, processing and servicing requirements; (ii) conformance with other provisions of the regulation; (iii) program flexibility; (iv) clarification of language with no substantive change; and (v) technical clean up.

The Corporation has determined that this rule will not impose an adverse economic impact or impose reporting or other compliance requirements on either small businesses or local governments; therefore, a full Regulatory Flexibility Analysis for Small Businesses and Local Governments is not required.

Rural Area Flexibility Analysis

This statement is being submitted pursuant to subdivision (4) of section 202-bb of the State Administrative Procedure Act and in support of the New York State Higher Education Services Corporation's (Corporation) Notice of Proposed Rulemaking seeking to amend part 2213 of Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

It is apparent from the nature and purpose of this rule that it will not impose an adverse impact on rural areas. The Corporation finds that this rule will not impose any additional reporting, record keeping or other compliance requirements on public or private entities in rural areas. The regulation implements the New York Higher Education Loan Program (NYHELPS), which will help fill the gap between college costs and available financial aid in order to assist eligible students and their families in the financing of their college costs. The proposal provides for: (i) clarification of, or changes to, processing and servicing requirements; (ii) conformance with other provisions of the regulation; (iii) program flexibility; (iv) clarification of language with no substantive change; and (v) technical clean up.

The Corporation has determined that this rule will not impose an adverse economic impact on public or private entities in rural areas and therefore a full Rural Area Flexibility Analysis is not required.

Job Impact Statement

This statement is being submitted pursuant to subdivision (4) of section 202-bb of the State Administrative Procedure Act and in support of the New York State Higher Education Services Corporation's (Corporation) Notice of Proposed Rulemaking seeking to amend part 2213 of Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

It is apparent from the nature and purpose of this rule that it will not impose an adverse impact on rural areas. The Corporation finds that this rule will not impose any additional reporting, record keeping or other compliance requirements on public or private entities in rural areas. The regulation implements the New York Higher Education Loan Program (NYHELPS), which will help fill the gap between college costs and available financial aid in order to assist eligible students and their families in the financing of their college costs. The proposal provides for: (i) clarification of, or changes to, processing and servicing requirements; (ii) conformance with other provisions of the regulation; (iii) program flexibility; (iv) clarification of language with no substantive change; and (v) technical clean up.

The Corporation has determined that this rule will have no substantial adverse impact on any private or public sector jobs or employment opportunities and therefore a full Job Impact Statement is not necessary.

Department of Law

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Contents of Annual Financial Reports Filed with the Attorney General by Certain Nonprofits

I.D. No. LAW-52-12-00013-P

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

Proposed Action: Addition of sections 91.6, 91.5(c)(2)(iii) and 91.7(b)(2)(iv); amendment of section 91.3; and renumbering of sections 91.6-91.12 to sections 91.7-91.13 of Title 13 NYCRR.

Statutory authority: Executive Law, section 177(1); Estates, Powers and Trusts Law, section 8-1.4(h)

Subject: Contents of annual financial reports filed with the Attorney General by certain nonprofits.

Purpose: To require certain nonprofits to disclose information regarding election advocacy to the Attorney General and the public.

Public hearing(s) will be held at: 11:00 a.m., January 15, 2013 at 250 Broadway, 19th Fl., Rm. 1923, New York, NY; 11:00 a.m., January 29, 2013 at Legislative Office Bldg. Roosevelt Hearing Rm. C, 2nd Fl., Albany, NY; 12:00 p.m., February 20, 2013 at Central Library, One Lafayette Sq., Buffalo, NY; and 11:00 a.m., February 27, 2013 at Nassau County Legislative Bldg., Legislative Chambers, 1550 Franklin Ave., Mineola, NY.

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

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

Text of proposed rule: 13 NYCRR Sections 91.6-91.12 are renumbered to sections 91.7-91.13.

A new section 91.6 is added to title 13 to read as follows:

91.6 Annual Disclosure of Electioneering Activities by Non-501(c)(3) Registrants

(a) *Definitions. For purposes of this section:*

(1) "Annual Financial Report" means any report filed pursuant to section 91.5 or 91.7 of this part.

(2) "Covered organization" means any organization that is: (i) registered or required to be registered with the Attorney General pursuant to Article 7-A of the Executive Law and/or Article 8 of the Estates, Powers and Trusts Law; and (ii) not prohibited by Internal Revenue Code section 501(c) from participating in, or intervening in, any political campaign on behalf of, or in opposition to, any candidate for public office.

(3) "Election" means any general, special, or primary election for federal, state or local office, or at which any proposition, referendum or

other question is submitted to the voters in any state or any locality in the United States.

(4) "New York Election" means only those general, special, or primary elections conducted by a New York state or local government entity for New York state or local office, or any election at which any New York state or local constitutional amendment, proposition, referendum or other question is submitted to the voters.

(5) "Election related expenditure" means (i) any expenditure made, liability incurred, or contribution provided for express election advocacy or election targeted issue advocacy; or (ii) any other transfer of funds, assets, services or any other thing of value to any individual, group, association, corporation whether organized for profit or not-for-profit, labor union, political committee, political action committee, or any other entity for the purpose of supporting or engaging in express election advocacy or election targeted issue advocacy by the recipient or a third party.

(6) "Express election advocacy" means any communication made at any time that:

(i) contains express words such as "vote," "oppose," "support," "elect," "defeat," or "reject," which call for the nomination, election or defeat of one or more clearly identified candidates, the election or defeat of one or more political parties, or the passage or defeat of one or more constitutional amendments, propositions, referenda or other questions submitted to voters at any election; or

(ii) otherwise refers to or depicts one or more clearly identified candidates, political parties, constitutional amendments, propositions, referenda or other questions submitted to the voters in a manner that is susceptible of no reasonable interpretation other than as a call for the nomination, election or defeat of such candidates in an election, the election or defeat of such political parties, or the passage or defeat of such constitutional amendments, propositions, referenda or other questions submitted to the voters in any election.

(7) "Election targeted issue advocacy" means any communication other than express election advocacy made within one hundred eighty days of an election that:

(i) refers to one or more clearly identified candidates in that election;

(ii) depicts the name, image, likeness or voice of one or more clearly identified candidates in that election; or

(iii) refers to any political party, constitutional amendment, proposition, referendum or other question submitted to the voters in that election.

(8) "Communication" means:

(i) paid advertisements broadcast over radio, television, cable, or satellite;

(ii) paid placement of content on the Internet or other electronic communication networks;

(iii) paid advertisements published in a periodical or on a billboard;

(iv) paid telephone communications to one thousand or more households;

(v) mailings sent or distributed to five thousand or more recipients;

or

(vi) printed materials exceeding five thousand copies.

(9) "Covered donation" means any contribution, gift, loan, advance, or deposit of money or any thing of value made to a covered organization that is available to be used for a New York election related expenditure.

(b) *Disclosure of Election Related Expenditures.*

(1) The annual financial report filed by any covered organization shall include the amount and the percentage of total expenses during the reporting period that are election related expenditures.

(2) The annual financial report filed by any covered organization that has made New York election related expenditures in an aggregate amount or fair market value exceeding ten thousand dollars during the reporting period shall include an itemized schedule disclosing information related to each New York election related expenditure, unless the information is exempt from disclosure pursuant to paragraph d of this section. Such information shall include for each New York election related expenditure: (i) the amount or fair market value of any funds, services or assets provided, and any liabilities incurred; (ii) the date that such funds, services or assets were provided, and that any liabilities were incurred; (iii) the name and address of the recipients of the expenditure; and (iv) a clear description of the expenditure and its purpose, including support for or opposition to a candidate, political party, referendum or other question put before the voters in an election.

(c) *Disclosures of Donations Related to New York Elections.*

(1) The annual financial report filed by a covered organization that has made New York election related expenditures in an aggregate amount or fair market value exceeding ten thousand dollars during the reporting period shall include an itemized schedule disclosing information related to each covered donation it has received during the reporting period, unless the information is exempt from disclosure pursuant to paragraph d of

this section. Such information shall include: (i) the name and address of each donor who made covered donations in an aggregate amount of one hundred dollars or more during the reporting period; (ii) the employer of each such individual donor, if reasonably available; and (iii) the date and amount of each such covered donation.

(2) If a covered organization keeps one or more segregated bank accounts containing funds used solely for New York election related expenditures, and makes all of its New York election related expenditures from such accounts, then the annual financial report must only include information specified in the preceding subparagraph concerning donations deposited into such accounts.

(d) *Exceptions for Disclosures to Multiple Agencies.* The annual financial report filed by a covered organization is not required to include the information specified by subparagraph two of paragraph b of this section, or paragraph c of this section, if: (i) any law or rule requires that such information be disclosed to any other government agency that makes such information available to the public, and (ii) the covered organization is in compliance with the requirements of such law or rule at the time it files the annual financial report.

(e) *Schedule to be Provided by the Attorney General.* Upon adoption of this regulation, the Attorney General shall make available a schedule ("Electioneering Disclosure Schedule") to the Annual Filing for Charitable Organizations and if necessary amend existing forms to allow covered organizations to make the disclosures required by this section.

(f) *Guidance to be Provided by the Attorney General.* Upon adoption of this regulation, the Attorney General shall make available to the public guidance concerning compliance with this rule.

(g) *Public Disclosure.* The Attorney General shall make information contained in the completed Electioneering Disclosure Schedule available to the public on the Attorney General's website, except for:

(1) information exempt from disclosure pursuant to any state or federal law;

(2) information related to any covered donation received prior to the effective date of this rule; or

(3) information the Attorney General deems exempt from disclosure pursuant to paragraph (h) of this section.

(h) *Exemption from Public Disclosure.*

(1) Notwithstanding paragraph g of this section, the Attorney General may, upon application by a donor or covered organization to be made in a form and manner prescribed by the Attorney General, grant an exemption and refrain from disclosing any information to the public related to any covered donation if the applicant shows by clear and convincing evidence that such disclosure will cause undue harm, threats, harassment or reprisals to any person or organization.

(2) An application for such exemption shall be submitted no later than forty-five days prior to the due date for the applicable annual filing. The Attorney General will inform the applicant and may inform other persons or organizations to which the exemption would apply, in writing, whether the application for exemption has been granted or denied. Any denial issued by the Attorney General shall include a statement of findings and conclusions, and the reasons or basis for the denial.

(3) The submission of an application does not relieve the covered organization of its obligation to timely file annual financial reports, including an Electioneering Disclosure Schedule disclosing all donors for which the covered organization has not sought exemption.

(4) To the extent permitted by federal and state law, the Attorney General will exempt from public disclosure all materials submitted in support of an application for an exemption; provided that the Attorney General may disclose such materials to a court in response to any judicial subpoena or court order. The Attorney General may publicly disclose that a covered organization has submitted one or more applications for an exemption, or that one or more of a covered organization's requests for an exemption has been granted or denied.

(i) *Severability.* If any provision in this section or the application of such provision to any persons or circumstances shall be held invalid, the validity of the remainder of the provisions and/or the applicability of such provisions to other persons or circumstances shall not be affected thereby.

Section 91.5(c)(2)(iii) is added to title 13 to read as follows:

Schedule EDS (Electioneering Disclosure Schedule) or a successor form is required for covered organizations that must file such form pursuant to section 91.6 of this part.

Section 91.7(b)(2)(iv) is added to title 13 to read as follows:

Schedule EDS (Electioneering Disclosure Schedule) or a successor form is required for covered organizations that must file such form pursuant to section 91.6 of this part.

The introductory paragraph to section 91.3 of title 13 is amended to read as follows:

Certain organizations are exempt from registration with the Attorney General. Unregistered organizations that are exempt from registration are not required to submit an exemption request to the Attorney General,

except that an organization that receives a failure to register notice from the Attorney General but believes it is exempt from registration must claim an exemption from registration. Organizations that wish to request exemption from registration under Article 7-A or the EPTL or both, shall claim such exemption by completing the appropriate registration, amended registration or reregistration statement form, defined in sections 91.4, 91.7[8] and 91.8[9], respectively, of this Chapter, or a successor form, including the exemption request section of such form, and attaching Schedule E (Request for Exemption for Charitable Organizations) or a successor form along with all required attachments listed in both the registration and exemption request forms.

Text of proposed rule and any required statements and analyses may be obtained from: Gregory M. Krakower, Counselor to the Attorney General, Department of Law, 120 Broadway, New York, NY 10271, (212) 416-8030, email: gregory.krakower@ag.ny.gov

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

Public comment will be received until: March 6, 2013

Regulatory Impact Statement

1. **Statutory Authority.** Article 7-A of the Executive Law (hereinafter "Article 7-A") and Article 8 of the Estates, Powers & Trusts Law (hereinafter "EPTL") require certain organizations and trusts to file annual financial reports and other disclosures with the Attorney General, and require the Attorney General to establish and maintain a register of such disclosures. Section 177(1) of the Executive Law and section 8-1.4(h) of the EPTL empower the Attorney General to make rules and regulations necessary for the administration of these provisions.

2. **Legislative Objectives.** The rule requires certain organizations that are registered with the Attorney General and that may participate or intervene in political campaigns (hereinafter "covered organizations") to disclose information concerning expenditures and donations related to such electioneering in annual financial reports that are submitted to the Attorney General. The rule does not apply to organizations exempt from taxation under section 501(c)(3) of the U.S. Internal Revenue Code. The rule aims to, among other things: enhance detection and deterrence of illegal conduct by covered organizations and related individuals; inform and protect prospective donors to such organizations; protect the integrity and reputation of nonprofit organizations that do not intervene in political campaigns; maintain the anonymity of donors to covered organizations if their donations are restricted to purposes unrelated to influencing elections; protect the public interest in transparent financing of state and local elections; shield donors to covered organizations that intervene in political campaigns from public disclosure if it will cause undue harm, threats, harassment or reprisal; and ensure that there is clear guidance to covered organizations and related individuals concerning compliance.

3. **Needs and Benefits.** New York donors should know how nonprofit organizations that solicit donations from them are likely to use those funds. However, covered organizations, many of which enjoy tax-exempt status on the basis that they act to promote social welfare, may utilize funds solicited from the public to engage in direct and indirect electioneering activities. Donors to nonprofit organizations may be unaware that their donations to a charitable, social welfare or similar organization can be used to directly or indirectly influence elections. Furthermore, such organizations can solicit funds without disclosing critical information about the political nature of their expenditures or sources of funding. There is substantial evidence in the public record that some nonprofit organizations are increasingly raising and spending funds to influence elections. The lack of transparency in this area creates the potential for covered organizations and related individuals to: mislead donors about the uses of their donations; violate tax and other laws without detection by regulators or law enforcement; and evade state and local campaign finance laws in a manner contrary to the public interest. The rule will, among other things:

(A) Better enable regulators to enforce tax and other laws and rules that restrict electioneering and other political activities by covered organizations, and deter illegal conduct;

(B) Protect donors from fraudulent, false or misleading solicitations by covered organizations;

(C) Protect the integrity and reputation of charities and other nonprofits that refrain from impermissible or excessive electioneering;

(D) Assist regulators in ensuring that charities, including organizations exempt from taxation pursuant to section 501(c)(3) of the U.S. Internal Revenue Code, do not illegally transfer assets to covered organizations to be used for electioneering purposes, and deter such illegal conduct;

(E) Inform potential donors that contributions to covered organizations may be used to advance particular outcomes in elections, and provide relevant information to allow donors to take into account the political goals, interests and activities of the organization and related individuals when contributing or responding to a solicitation;

(F) Protect the public interest in transparency in the electoral process by disclosing contributions that covered organizations transfer directly to

candidates for elective office in New York or otherwise use to influence New York state and local elections;

(G) Maintain the anonymity of donors to covered organizations if their donations are restricted to purposes unrelated to influencing New York state and local elections;

(H) Protect donors to covered organizations from disclosure if they will be unduly harmed by such disclosure; and

(I) Provide clear guidance to covered organizations and related individuals concerning compliance.

4. **Costs.** Covered organizations that do not engage in electioneering will face de minimus costs associated with the rule. Covered organizations that choose to devote over \$10,000 of their expenditures in any fiscal year to influencing New York state and local elections, that are not otherwise required to disclose those activities to other state or local agencies, might bear small costs associated with tracking and accounting for funds raised and spent for purposes related to election advocacy. Some covered organizations that engage in election advocacy may choose to deposit donations available for electioneering activities into a segregated bank account or establish a separate political action committee to address the needs of donors who wish to restrict the ability of the covered organization to use donated funds for electioneering purposes. Such measures are not required by the rule but could entail small costs if taken by covered organizations that engage in electioneering. The Department of Law will also incur de minimus costs associated with processing filings of the new disclosure schedule by covered organizations, and with reviewing and making determinations concerning any applications for exemption from disclosure, as provided in the rule.

5. **Paperwork.** As part of their existing annual filing obligations, covered organizations will have to indicate what portion of expenditures were spent on electioneering activities, and covered organizations that spend at least \$10,000 in a fiscal year to influence state or local elections in New York will be required to file an additional schedule with the Attorney General disclosing information concerning such election related expenditures and donations, unless they have disclosed this information to another government agency that makes the information publically available.

6. **Local Government Mandates.** None.

7. **Duplications.** The rule has been drafted to coordinate with existing state and federal laws concerning disclosure of expenditures and contributions related to electioneering activities. Accordingly, the rule does not require a covered organization to disclose itemized information related to election-related donations and expenditures that is disclosed to other government agencies and made publically available.

8. **Alternatives.** (A) **\$10,000 Expenditure Threshold.** Thresholds both lower and higher than \$10,000 in a year on election related expenditures to trigger additional disclosure under the rule were considered. While establishing a threshold lower than \$10,000 would provide benefits with respect to protecting donors from fraudulent solicitations, law enforcement functions, and transparency in New York state and local elections, the Department of Law determined that the added costs to organizations that engage in this level of election related activity outweighed these benefits. The Department of Law rejected establishing a threshold higher than \$10,000, because this could reduce benefits that the rule is designed to promote with respect to, among other things, law enforcement, fraud-reduction, integrity of nonprofits, and transparency.

(B) **\$100 Contribution Threshold.** The Department of Law considered and rejected alternatives to the \$100 contribution threshold to trigger disclosure of donor information, because this amount is consistent with the contribution disclosure threshold required by Election Law, section 14-102(1). (C) **Application to federal elections.** The Department of Law considered applying the rule's itemized disclosure requirements to expenditures and donations in connection with federal campaigns but chose not to address this issue at this time.

9. **Federal Standards.** Federal tax law requires tax exempt nonprofit organizations to report certain information concerning expenses, donations and donors to the Internal Revenue Service, and federal campaign law requires disclosures of certain federal election-related expenditures and donors to the Federal Election Commission. EPTL article 8, Executive Law article 7-A, and existing regulations require nonprofit organizations regardless of tax exempt status that solicit \$25,000 or use a professional fundraiser in New York to register with the Attorney General and submit annual financial reports. For such organizations that are allowed under federal and state tax law to influence elections, the proposed rule requires their annual reports indicate the percentage of the organization's revenue that is spent on influencing elections. For such organizations that spend \$10,000 or more in a fiscal year to influence New York state and local elections, the proposed rule requires their annual financial reports to include information concerning certain expenditures and donations relating to these elections. However, in order to avoid burdensome and unnecessary duplication and multiple filings, the rule does not require the annual financial reports to include specific information related to New York

state or local elections that is disclosed to any other agency and made available to the public. The rule requires these additional disclosures, because, while federal law requires such organizations to publically disclose certain types of expenditures and donations relating to federal elections, it does not require a statement of the percentage of expenses used to influence elections, or any disclosures relating to New York state or local elections. And to the extent federal law requires tax-exempt organizations to disclose the total amount of certain election-related expenditures, it defines election-related expenditures in a manner that leaves donors and regulators in the dark about nonprofit activity that could run afoul of New York state tax or charities law, or federal tax law, or that could otherwise constitute deceptive solicitations or practices. The rule accordingly requires these additional disclosures in order to, among other things: help regulators identify when a covered organization might be primarily engaged in influencing elections and thus in violation of federal tax law, state tax law, and other New York state laws; inform donors about election related activities of covered organizations; deter and detect fraudulent solicitations of funds by covered organizations; and support the public's interest in transparency in regard to nonprofits and elections.

10. **Compliance Schedule.** Prior to filing annual financial reports with the Attorney General pursuant to Article 7-A and/or the EPTL for the fiscal year beginning on or after the effective date of the rule, covered organizations that made election related expenditures in excess of \$10,000 during that year will have to compile the information necessary to make the required disclosures. Should an organization need additional time to file annual reports, the Attorney General may, pursuant to section 172-b(5) of Article 7-A and section 8-1.4(r) of the EPTL, grant filing extensions. Covered organizations wishing to identify and deposit covered donations into a segregated bank account to prevent disclosure of donors who prohibit their donations from being used for election related expenditures will need to open and begin utilizing such segregated accounts if they do not use them already.

Regulatory Flexibility Analysis

By virtue of its subject matter, the proposed rules do not apply to local governments or small businesses. The rule requires nonprofit organizations that are registered with the Attorney General and that are legally allowed to engage in election-related advocacy to include in their annual financial report a calculation of the percentage of total expenses spent on such election advocacy. The rule also requires nonprofit organizations that spend over \$10,000 in any fiscal year to influence state or local elections in New York to include an additional schedule in their annual report filed with the Attorney General that itemizes specific information regarding expenditures and donations related to such election advocacy, unless the information is reported to another public agency and made available to the public. Accordingly, while the rule imposes minor recordkeeping and compliance costs on such nonprofit corporations, the rule does not impose recordkeeping or compliance costs on small businesses or local governments, and will not have any adverse economic impact on small businesses or local governments.

Rural Area Flexibility Analysis

1. **Types and estimated numbers of rural areas.** The rule applies uniformly throughout the state, including all rural areas. Executive Law, Article 19-F Rural Affairs Act, Section 481(7) defines a rural area as a county with a population of less than 200,000. New York currently has 44 counties that would constitute rural areas. The rule applies to nonprofit organizations that are registered with the Attorney General and that are legally allowed to participate or intervene in political campaigns. Such organizations may exist or engage in activity in all areas of the state.

2. **Compliance requirements.** The rule requires nonprofit organizations in rural areas and elsewhere that are registered with the Attorney General and that are legally allowed to engage in election-related advocacy to include in their annual financial report a calculation of the percentage of total expenses spent on such election advocacy. The rule also requires nonprofit organizations that spend more than \$10,000 in any fiscal year to influence state or local elections in New York to include an additional schedule in their annual report filed with the Attorney General that itemizes specific information regarding expenditures and donations related to such election advocacy, unless the information is reported to another public agency and made available to the public.

3. **Compliance costs.** (A) **Nonprofits located in rural areas and elsewhere that are registered with the Attorney General and that are allowed to engage in activities to influence an election will be subjected to de minimus compliance costs associated with calculating and reporting the percentage of their expenditures, if any, that are spent on influencing elections in a fiscal year.** (B) **Nonprofits located in rural areas and elsewhere that are registered with the Attorney General and that spend more than \$10,000 in any fiscal year to influence New York state and local elections will bear small costs associated with tracking and reporting information**

on donations and expenditures related to such election advocacy, unless the information is reported to another public agency and made available to the public.

4. Minimizing adverse impact. The rule will not adversely impact rural areas in any way. Relatively few nonprofits in New York State will be impacted by the rule's additional filing or disclosure requirements because (a) a substantial portion of nonprofits are not allowed to participate in election activities at all; and (b) few nonprofits will spend more than \$10,000 or more in any fiscal year to influence New York state and local elections. In any event, the costs of complying are de minimus or negligible even for those nonprofits that spend this amount to influence elections, and the rule exempts them from having to file itemized information related to New York State and local elections if they have provided such information to other government agencies that make the information available to the public. Thresholds both lower and higher than \$10,000 on election related expenditures to trigger additional disclosure under the rule were considered. While establishing a threshold lower than \$10,000 would provide some benefits with respect to protecting donors from fraudulent solicitations, law enforcement functions, and transparency in New York state and local elections, the Department of Law determined that the added costs to organizations in rural areas and elsewhere that engage in this level of election related activity outweighed these benefits. The Department of Law rejected establishing an amount greater than a \$10,000 threshold because of the reduction in benefits with respect to law enforcement, fraud-reduction, and transparency in New York state and local elections that the rule is designed to promote.

5. Rural participation. In order to ensure that nonprofits and other interested parties in rural areas have an opportunity to participate in the rule making process, a copy of the rule will be posted on the Attorney General's web site, members of the public will have the opportunity to comment on the rule in writing, and four hearings will be held in different regions of the state concerning the proposed rule.

Department of Motor Vehicles

NOTICE OF WITHDRAWAL

Ulster County Motor Vehicle Use Tax

I.D. No. MTV-51-12-00008-W

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

Action taken: Notice of proposed rule making, I.D. No. MTV-51-12-00008-P, has been withdrawn from consideration. The notice of proposed rule making was published in the *State Register* on December 19, 2012.

Subject: Ulster County motor vehicle use tax.

Reason(s) for withdrawal of the proposed rule: Technical issues.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Ulster County Motor Vehicle Use Tax

I.D. No. MTV-52-12-00007-P

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

Proposed Action: This is a consensus rule making to amend section 29.12 of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a) and 401(6)(d)(ii); and Tax Law, section 1202(c)

Subject: Ulster County motor vehicle use tax.

Purpose: To impose a motor vehicle use tax.

Text of proposed rule: Section 29.12 is amended by adding a new subdivision (a) to read as follows:

(a) *Ulster County. The Ulster County Legislature adopted a resolution on November 13, 2012 to establish an Ulster County Motor Vehicle Use Tax. The Legislative Chairman of the Ulster County Legislature entered into an agreement with the Commissioner of Motor Vehicles for the collection of the tax in accordance with the provisions of this Part, for the collection of such tax on original registrations made on and after March 1, 2013 and upon the renewal of*

registrations expiring on and after April 1, 2013. The Commissioner of Finance is the appropriate fiscal officer, except that the County Attorney is the appropriate legal officer of Ulster County referred to in this Part. The tax due on passenger motor vehicles for which the registration fee is established in paragraph (a) of subdivision (6) of Section 401 of the Vehicle and Traffic Law shall be \$5.00 per annum on such motor vehicles weighing 3,500 lbs. or less and \$10.00 per annum for such motor vehicles weighing in excess of 3,500 lbs. The tax due on trucks, buses and other commercial motor vehicles for which the registration fee is established in subdivision (7) of Section 401 of the Vehicle and Traffic Law used principally in connection with a business carried on within Ulster County, except for vehicles used in connection with the operation of a farm by the owner or tenant thereof shall be \$10.00 per annum.

Text of proposed rule and any required statements and analyses may be obtained from: Heidi Bazicki, Department of Motor Vehicles, 6 Empire State Plaza, Room 522A, Albany, NY 12228, (518) 474-0871, email: heidi.bazicki@dmv.ny.gov

Data, views or arguments may be submitted to: Ida Traschen, Department of Motor Vehicles, 6 Empire State Plaza, Room 522A, Albany, NY 12228, (518) 474-0871, email: ida.traschen@dmv.ny.gov

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

Consensus Rule Making Determination

This proposed regulation would create a new 15 NYCRR Part 29.12(a) to provide for the collection of a Ulster County motor vehicle use tax by the Department of Motor Vehicles. Pursuant to the authority contained in Tax Law section 1202(c) and Vehicle and Traffic Law section 401(6)(d)(ii), the Commissioner must collect a motor vehicle use tax if a county has enacted a local law requiring the collection of such tax.

On November 13, 2012 the Ulster County Legislature enacted a resolution requiring that a motor vehicle use tax be imposed on passenger and commercial vehicles. Pursuant to this resolution, the Commissioner is required to collect the tax on behalf of the county and transmit the revenue to the County, minus the administrative costs required to process the tax. The tax is five dollars per annum on a passenger vehicle weighing 3,500 pounds or less, ten dollars per annum on a passenger vehicle weighing more than 3,500 pounds, and ten dollars per annum on all commercial vehicles. There are certain exempt vehicles, such as vehicles used by non-profit religious, charitable, or educational organizations, and vehicles used only in connection with the operation of a farm by the owner or tenant of the farm.

This is a consensus rule because the Commissioner has no discretion about whether to collect the tax, i.e., it must be collected per the mandate of the Ulster County resolution. The merits of the tax may have been debated before the Ulster County Legislature, but are no longer the subject of debate—it is now the law. DMV is merely carrying out the will expressed by the County Legislature.

Job Impact Statement

A Job Impact Statement is not submitted with this rule because it will not have an adverse impact on job creation or development.

Office for People with Developmental Disabilities

NOTICE OF ADOPTION

Person-Centered Behavioral Intervention

I.D. No. PDD-52-11-00020-A

Filing No. 1226

Filing Date: 2012-12-11

Effective Date: 2013-04-01

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

Action taken: Amendment of Parts 81, 624, 633 and 681 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 13.07, 13.09(b) and 16.00

Subject: Person-Centered Behavioral Intervention.

Purpose: To establish requirements for interventions used in the OPWDD system to modify or control challenging behavior.

Substance of final rule: The final regulations establish new requirements concerning behavioral interventions in the OPWDD system. OPWDD is adding a new 14 NYCRR Section 633.16, which contains comprehensive requirements for supports and interventions related to challenging behavior. These new requirements will help agencies provide high quality services, and will protect the rights and welfare of individuals receiving services.

The new Section 633.16 contains a number of provisions to protect the health, safety and rights of individuals who engage in challenging behaviors. Among the provisions of Section 633.16 are the following:

- Aversive conditioning is prohibited.
- Agencies must conduct a functional behavioral assessment to obtain relevant information for effective intervention planning before a behavior support plan is developed to address challenging behavior. Specific components must be addressed or included in the functional behavioral assessment.
- Behavior support plans must be developed that are specific to each person who exhibits challenging behavior. These plans specify the interventions that may be used. The regulations establish a number of components that must be included in the plan. Among the specific required components of behavior support plans is the inclusion of a hierarchy of behavioral approaches, strategies, and supports to address the behavior(s) requiring intervention, with the preferred methods being positive approaches, strategies and supports.
- Additional safeguards are established for plans that contain “restrictive/intrusive interventions” or limitations on a person’s rights.” “Restrictive/intrusive interventions” are defined in the regulation and include specific behavioral interventions such as “intermediate” and “restrictive” physical intervention techniques (hands-on techniques), use of “time-out,” use of mechanical restraining devices, and use of medication to modify or control challenging behavior.
- Safeguards and protections related to restrictive/intrusive interventions and limitations on a person’s rights include:
 - Additional components must be included in the person’s behavior support plan. Plans must be developed or supervised by a licensed psychologist, licensed clinical social worker, or behavioral intervention specialist (either Level 1 or 2, with the appropriate supervision outlined in the regulation). Those providers who demonstrate sustained hardship in recruiting employees or contractors who meet the specified qualifications, may apply to OPWDD for a waiver.
 - Plans must be reviewed and sanctioned before implementation by a behavior plan review /human rights committee. Required membership and procedures for these committees are established. (The requirement for committee review does not apply to monitoring plans that include medication to treat a co-occurring diagnosed psychiatric condition. The regulations describe standards for determining what constitutes a “co-occurring diagnosed psychiatric disorder”)
 - Informed consent is required for the use of restrictive/intrusive interventions and for the use of psychotropic medications. Procedures are established to determine whether the person receiving services is capable of providing informed consent. If an individual is not capable of providing informed consent, procedures are established for obtaining informed consent from designated surrogate decision makers (e.g. actively involved parents and actively involved family members). In the event that no other surrogate is reasonably available and willing, consent can be sought from the Willowbrook Consumer Advisory Board or an informed consent committee. Required membership and procedures are established for the informed consent committee. Consent can also be obtained from a court.
 - Procedures are established for objecting to interventions in behavior support plans, and addressing a lack of informed consent. Procedures are also established concerning refusal by the individual receiving services to take medication.
 - Requirements are included for training of staff, family care providers and respite substitute providers.
 - Additional safeguards are established for the use of physical intervention techniques (hands-on techniques). Physical intervention techniques are categorized as protective, intermediate or restrictive. Among these safeguards are requirements for training and certification in the use of the techniques.
 - Additional safeguards are established for the limitations on a person’s rights.
 - Additional safeguards are established for the use of “time-out.” “Time-out” includes both exclusionary time-out (placing a person in a specific time-out room), and non-exclusionary time-out (removing the positively reinforcing environment from the individual.) Environmental requirements are established for time-out rooms.
 - Additional safeguards are established for the use of mechanical restraining devices.

- Additional safeguards are established for the use of medication to modify or control challenging behavior, and/or to treat a diagnosed co-occurring psychiatric disorder. Safeguards include monitoring plans to be completed when medication is used to treat co-occurring diagnosed psychiatric conditions.

- The new Section 633.16 references existing requirements in Section 633.17(a)(18) concerning medication regimen reviews. Results of these reviews must be provided to prescribers and the program planning team.

- The regulations specify that restrictive/intrusive interventions cannot be used in an emergency, except for intermediate and restrictive physical intervention techniques and the use of medication. Limitations on a person’s rights can also be used in an emergency.

- Provisions are established for phasing-in the requirements. Requirements for new behavior support plans (and associated informed consent) are applied 60 days after the regulation becomes effective (May 31, 2013), and requirements for existing plans (and associated informed consent) are applied a year after that (May 31, 2014). This will enable agencies to apply the new development standards to existing behavior support plans during regularly scheduled reviews.

The regulation also amends 14NYCRR Section 681.13, which contains requirements applicable to behavior management in ICF/DD facilities. The provisions of this section address many of the same issues that are addressed in Section 633.16. The amendments to Section 681.13 phase out the requirements of that section in conjunction with the phase-in of the requirements of the new Section 633.16. Once Section 633.16 is fully phased in, Section 681.13 will no longer be effective. Outdated and duplicative requirements in Part 81 are deleted.

14NYCRR Part 624 is amended so that new definitions of categories of abuse become effective once Section 633.16 is fully phased in. These new definitions conform to Section 633.16 so that if interventions are used which are not in accordance with the requirements of the new section, their use is considered to be abuse (unless actions were taken that were necessary to address an immediate risk to the health or safety of the person or others). Definitions in the glossary of Part 624 are also changed to conform to the new definitions in Section 633.16.

14NYCRR Part 633 is amended to enhance protections related to limiting the rights of a person receiving services and to conform to protections related to limitation of rights in the new Section 633.16. Definitions in Section 633.99 are also changed to conform to the new definitions used in Section 633.16.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 624.4, 624.6(f), 624.20, 633.16(a), (f), (j)(3) and 681.13.

Text of rule and any required statements and analyses may be obtained from: Barbara Brundage, Director, Regulatory Affairs Unit, OPWDD, 44 Holland Avenue, Albany, NY 12229, (518) 474-1830, email: barbara.brundage@opwdd.ny.gov

Additional matter required by statute: Pursuant to the requirements of the State Environmental Quality Review Act, OPWDD, as lead agency, has determined that the action described herein will have no effect on the environment, and an E.I.S. is not needed.

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

Minor changes were made to the proposed regulation as follows:

Throughout the text - The actual dates were substituted for phrases used in the text such as “the effective date” and “60 days after the effective date.” For example, the final text substitutes “April 1, 2013” for “the effective date” which was in the revised proposed regulations. These changes are clearly non-substantive.

Subdivision 624.6(f) – A conforming change was added to eliminate a reference to “restraint” as a category of incident. “Restraint” as a category of incident was deleted in the revised proposed regulations so this is a non-substantive change.

Subparagraph 633.16 (f)(1)(i) and paragraph (f)(3) – Changes were made to increase the clarity and emphasize the distinction made regarding medication to treat a co-occurring psychiatric disorder, and restrictive intrusive interventions – including medication used solely to modify challenging behaviors. The addition of the adjective “monitoring” in paragraph (f)(3) was, again, a clarification to ensure that all references to medications for co-occurring psychiatric disorder and their required monitoring plans are consistent and clear. These were deemed non-substantive as they did not change the requirements or meaning of the regulation or its terms.

These changes do not necessitate revisions to the previously published Regulatory Impact Statement, Regulatory Flexibility Analysis for Small Business and Local Governments, Rural Area Flexibility Analysis, or Job Impact Statement.

Assessment of Public Comment

OPWDD received several comments concerning the revised proposed regulations from a variety of sources. Specifically, OPWDD received com-

ments from a number of not-for-profit providers of services to individuals with developmental disabilities.

1) Comment: One comment asserted that the diagnosis of psychiatric disorders in the DD population is dependent on the motivation, skill, knowledge and experience of the prescribing psychiatrist or physician's assistant. Thus, the distinction between the proposed uses and/or purpose of psychotropic medication – for the treatment of symptoms associated with co-occurring psychiatric disorders or to address and control the expression of challenging behavior – would be “subjective,” and often arbitrary or random. The revised proposed regulations treat this as an exact science and propose totally different procedures for addressing these situations.

Response: This distinction has been the basis of research on the issue of dual diagnosis among the ID/DD population. While recognition of the distinction – and occasions of overlap – between some extreme behavioral expressions of specific symptoms associated with a co-occurring psychiatric disorder and certain challenging behaviors (described in the Definitions section of the regulation) will require competent, thoughtful evaluation and adequate training/experience in both areas, the differentiation does not have to be made in a “random” or “arbitrary” way. A review of the literature makes it clear that such a distinction – while sometimes complex and reliant on clinical judgment – must be made by qualified practitioners, to ensure that effective and appropriate clinical and behavioral services are provided to individuals who experience more than one limiting condition. The expectation is that assessment and prescribed interventions of any kind will be based on and informed by data collected from careful observation, creation/review of an adequate clinical history, and reports from the individual, caregivers and other service providers.

2) Comment: Most LCSWs lack any relevant training or experience in providing the required behavioral services. It would make sense to create a 3rd category of BIS, possibly called a BIS Supervisor. Another commenter requested that consideration be given to expanding the list of qualified supervisors for clinicians writing non-restrictive plans to include LMSWs and LMHCs with 5 years of experience working with people with disabilities and 3 years of supervisory experience.

Response: Intervention services or plans involving restrictive/intrusive interventions will require oversight by the most rigorously qualified licensed professional. According to the NY State Office of the Professions, “The major difference between the two is that the LMSW may only provide ‘clinical social work’ services (diagnosis, psychotherapy, and assessment-based treatment planning) under supervision; the LCSW may provide those services without supervision.” A licensed clinical social worker does not necessarily lack training or experience in providing, supervising, or teaching about behavioral intervention services; the field practicum and clinical coursework or post-degree supervised experience requirements exceed those of the other mental health practitioners mentioned in the comment.

The qualifications for supervisors of non-restrictive plans may already include LMHCs who meet the education and experience criteria in the regulation. OPWDD does not consider that an additional three years of supervisory experience is necessary if the employing agency provides adequate oversight and mentoring.

3) Comment: The use of the December 31, 2012 date is confusing. This may prohibit future new hires as they may not meet the specified criteria. It is not clear if that is what OPWDD intended.

Response: This was intended to refer to those who are hired by or before December 31, 2012. The intent is to require that individuals hired after this date have, at minimum, a graduate degree at the Master's level.

4) Comment: Requires that the provider notify MHLS of any Informed Consent Committee meetings. This is a very cumbersome requirement. The Informed Consent Committee reviews and approves psychotropic medication for individuals who lack capacity and have no family to sign. The frequency of these meetings makes this notification requirement burdensome.

Response: The agency is only required to notify MHLS regarding the schedule of meetings.

5) Comment: One agency stated that monitoring restrictive devices every 30 minutes during overnight periods will be very challenging because there are several IRA homes that do not require overnight staff.

Response: An individual who engages in behavior that may require such a restrictive device during overnight hours must have adequate available supervision on a 24-hour basis.

6) Comment: Data collection for behavior support plans and monitoring plans, ongoing data collection that includes frequency, duration and intensity of both positive and challenging behaviors, would be very difficult. This would require a high staff to participant ratio and would be a financial burden to increase staff ratio.

Response: OPWDD believes that manageable systems for data collection are available or can be created; this type of data collection is already being done.

7) Comment: One commenter stated that a functional behavioral assessment (FBA) would be challenging and would not provide accurate information due to the progressive cognitive and medical decline secondary to Dementia. For individuals with a diagnosis of Dementia, a monitoring plan without an FBA would be beneficial.

Response: Individuals with one of the dementias may exhibit behaviors that are internally driven; it is important to distinguish these from behaviors that are reactive to certain environmental stimuli or elements, identify interventions that may maintain or eliminate reactive behaviors seen in the dementias, and create plans that address both challenging and non-challenging symptoms of the dementia.

8) Comment: One commenter stated that items of apparel that restrict an individual's access to his or her body in order to prevent self-injury or other unsafe challenging behaviors, should not require the approval of a physician every six months. This is excessive and will make our working relationships with physicians difficult.

Response: When physical restrictions are employed on a regular basis for an extended period, medical oversight and review of continued need, and prevention of any potentially harmful effects must be part of the plan.

9) Comment: Currently the nursing team and pharmacy are reviewing and monitoring in conjunction with the physician. We do not believe the review by the program planning team and prescriber are necessary.

Response: The program planning team is responsible to review both the behavioral data associated with intervention outcomes, and any effects or side effects of medication use that may influence behavior. These outcomes should not be viewed in isolation, but as components of the BSP or monitoring plan that are reviewed. The results of the reviews should be shared among those who plan and provide clinical services – including the prescriber – in order to create integrated and informed intervention plans.

Public Service Commission

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Consideration of the Petition of Multiple Intervenors Regarding Empire Zone and Recharge New York Economic Development Rates

I.D. No. PSC-52-12-00009-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 the petition of Multiple Intervenors to allow certain customers qualifying for two economic development program discounts to retain both discounts on their entire load, and for any further relief related thereto.

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

Subject: Consideration of the petition of Multiple Intervenors regarding Empire Zone and Recharge New York economic development rates.

Purpose: Whether to allow customers to receive multiple discounts on Recharge New York power.

Substance of proposed rule: On December 4, 2012, Multiple Intervenors (MI) submitted a petition for clarification or, alternatively, for a declaratory ruling with regard to the Public Service Commission's September 19, 2011 Order in Case 11-E-0176. MI's petition requests that the Commission (1) determine that customers qualifying for participation in both the Recharge New York (RNY) and the Empire Zone (EZR) economic development programs may choose either to retain their EZR delivery rate discount for their entire load, inclusive of any accepted RNY allocation, or otherwise elect to receive delivery service pursuant to the RNY Order; (2) direct any utility to issue refunds to EZR/RNY customers for any past and ongoing delivery charges that exceed the option selected by the customer – including refunds to any affected customer that was forced to terminate its receipt of RNY power as a result of the utility's unwarranted actions; and (3) direct any utility to issue refunds in an amount equal to the difference between RNY supply costs and the otherwise applicable supply cost to EZR/RNY customers that elected to forego or relinquish a RNY allocation due to the utility's actions and/or advice. The Commission is considering whether to approve, reject or modify, in whole or in part, the relief requested in MI's petition.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact: Deborah Swatling, Public Service Commission, 3 Empire State Plaza,

Albany, New York 12223-1350, (518) 486-2659, email: deborah.swatling@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-E-0176SP10)

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

To Designate TWCIS/NY as a Lifeline-Only ETC in New York

I.D. No. PSC-52-12-00010-P

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

Proposed Action: The Commission is considering whether to grant or deny, in whole or in part, the petition of Time Warner Cable Information Services (New York), LLC [TWCIS/NY] to designate TWCIS/NY as a Lifeline-only eligible telecommunications carrier (ETC) in New York.

Statutory authority: Public Service Law, section 94(2); and 47 USC 214(e)(2)

Subject: To designate TWCIS/NY as a Lifeline-only ETC in New York.

Purpose: To allow TWCIS/NY to offer residential voice telephone service to Lifeline-eligible customers.

Substance of proposed rule: The Commission is considering whether to grant or deny, in whole or in part, the petition of Time Warner Cable Information Services (New York), LLC [TWCIS/NY] to designate TWCIS/NY as a Lifeline-only eligible telecommunications carrier (ETC) in New York. The TWCIS/NY petition seeks modification of its existing ETC designation from a dormant designation granted to predecessor entities to a Lifeline-only ETC serving franchise areas listed in Exhibit B of its petition.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact: Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: deborah.swatling@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-C-0510SP1)

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

New York State Reliability Council's Establishment of an Installed Reserve Margin of 17.0%

I.D. No. PSC-52-12-00011-P

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

Proposed Action: The Commission is considering whether to adopt, modify, or reject, in whole or in part, an Installed Reserve Margin of 17.0% established by the New York State Reliability Council for the Capability Year beginning May 1, 2013, and ending April 30, 2014.

Statutory authority: Public Service Law, sections 4(1), 5(2), 65(1), 66(1), (2), (4) and (5)

Subject: New York State Reliability Council's establishment of an Installed Reserve Margin of 17.0%.

Purpose: To adopt an Installed Reserve Margin for the Capability Year beginning May 1, 2013, and ending April 30, 2014.

Substance of proposed rule: The Public Service Commission is considering whether to adopt, modify, or reject, in whole or in part, an Installed Reserve Margin (IRM) of 17.0% established by the New York State Reliability Council's Executive Committee on December 7, 2012, for the Capability Year beginning May 1, 2013, and ending April 30, 2014. The IRM is based on the Technical Study Report entitled "New York Control Area Installed Capacity Requirements For The Period May 2013 Through April 2014" (Report). The Report is available on the internet at: http://www.nysrc.org/NYSRC_NYCA_ICR_Reports.asp

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: Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: deborah.swatling@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.

(07-E-0088SP7)

Racing and Wagering Board

**EMERGENCY
RULE MAKING**

Implementation of Substantive Changes and Procedures Pertaining to Equine Drugs and Reporting Requirements for Thoroughbreds

I.D. No. RWB-52-12-00014-E

Filing No. 1227

Filing Date: 2012-12-11

Effective Date: 2012-12-11

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

Action taken: Amendment of sections 4043.2 and 4043.4 of Title 9 NYCRR.

Statutory authority: Racing, Pari-Mutuel Wagering and Breeding Law, sections 101(1) and 902(1)

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

Specific reasons underlying the finding of necessity: The Board has determined that immediate adoption of these rule amendments is necessary for the preservation of the public safety and general welfare and that compliance with the requirements of subdivision 1 of Section 202 of the State Administrative Procedure Act would be contrary to the public interest.

On September 27, 2012, the New York State Task Force on Racehorse Health and Safety released their report on the investigation of 21 equine fatalities at the 2011-12 fall and winter meet at Aqueduct Racetrack. The Task Force determined that there may have been opportunities to prevent 11 of those 21 fatalities. The amendments contained in this emergency rulemaking are based upon the findings and recommendations of the Task Force.

The Board originally adopted emergency rules to address the administration of clenbuterol and corticosteroids, which were scheduled to go into effect on December 12, 2012. Since those rules were approved by the Board on October 11, 2012, representatives of the thoroughbred industry have expressed concern about the need to revise some of these rules to more effectively implement the testing and treatment procedures involv-

ing clenbuterol and corticosteroids. These emergency rules were requested by the injury for the purpose of protecting the equine and human athletes involved in thoroughbred racing and must be implemented on an emergency basis.

Given the danger of a horse breaking down, and the safety threat presented to both the horse and the jockeys racing in close proximity, these rule amendments are necessary to protect the safety of human and equine athletes. Thoroughbred horses travel over the racetrack at an average speed of approximately 40 miles per hour, sometimes exceeding that average as they sprint to the finish or sprint to gain positional advantage. An unsound horse or a horse influenced by the administration of certain medications may be forced to race beyond its limits and result in a fatal breakdown, oftentimes in a sudden or uncontrollable breakdown.

This rule is also necessary to protect the general welfare of the horse racing industry and the thousands of jobs that are created through it. Public confidence in both the process of racing and in pari-mutuel wagering system is necessary for the sport to survive, and with it the jobs and revenue generated in support of government.

Subject: Implementation of substantive changes and procedures pertaining to equine drugs and reporting requirements for thoroughbreds.

Purpose: To protect the health and safety of thoroughbred race horses, jockeys and exercise riders.

Text of emergency rule: The following amendment to Subdivision (g) of Section 4043.2 of 9 NYCRR to repeal paragraph (5) and renumber paragraphs (6) through (16), which was previously scheduled to go into effect on December 12, 2012 pursuant to Emergency Rulemaking RWB-48-12-00006-E as published in the State Register of November 28, 2012, is hereby repealed and the following amendment will go into effect on December 26, 2012:

4043.2 Restricted use of drugs, medication and other substances.

(g) The following substances are permitted to be administered by any means until 96 hours before the scheduled post time of the race in which the horse is to compete:

- (1) acepromazine;
- (2) albuterol;
- (3) atropine;
- (4) butorphanol;
- [(5) clenbuterol;]
- [(6)](5) detomidine;
- [(7)](6) glycopyrrolate;
- [(8)](7) guaifenesin;
- [(9)](8) hydroxyzine;
- [(10)](9) isoxsuprine;
- [(11)](10) lidocaine;
- [(12)](11) mepivacaine;
- [(13)](12) pentoxifylline;
- [(14)](13) phenytoin;
- [(15)](14) pyrilamine;
- [(16)](15) xylazine.

They may not be administered within 96 hours of the scheduled post time of the race in which the horse is to compete. In this regard, substances ingested by a horse shall be deemed administered at the time of eating and drinking. It shall be part of the trainer's responsibility to prevent such ingestion within such 96 hours.

The following amendment to Paragraph 9 of Subdivision (e) of Section 4043.2 of 9 NYCRR, which was previously scheduled to go into effect on December 12, 2012 pursuant to Emergency Rulemaking RWB-48-12-00006-E as published in the State Register of November 28, 2012, is hereby repealed and the following amendment is made to go into effect on December 26, 2012:

(9) hormones [and steroids] (e.g., [testosterone, progesterone, estrogens,] chorionic gonadotropin[, glucocorticoids]), except in conjunction with joint aspiration as restricted in subdivision (i) of this section; the use of anabolic steroids is governed by section 4043.15 of this Part;

The amendment to Subdivision (i) of Section 4043.2 of 9 NYCRR as published as an Emergency Rulemaking (RWB-48-12-00006-E) in the November 28, 2012 State Register is hereby repealed and Subdivision (i) of Section 4043.2 of 9 NYCRR is amended to read as follows:

(i) In addition, a horse [which has had a joint aspirated (in conjunction with a steroid injection)] may not race for [at least five days following such procedure, and whenever such procedure is performed, the trainer shall notify the stewards of such fact, in writing, before the horse is entered to race] *the following periods of time:*

- (1) for at least five days following a systemic administration of a corticosteroid;
- (2) for at least seven days following a joint injection of a corticosteroid; and
- (3) for at least fourteen days following an administration of clenbuterol.

In this regard, substances ingested by a horse shall be deemed administered at the time of eating and drinking. It shall be part of the trainer's responsibility to prevent such ingestion within such time periods.

Amendments creating a new Subdivision (b) of Section 4043.4 of 9 NYCRR as published as an Emergency Rulemaking (RWB-48-12-00006-E) in the November 28, 2012 State Register is hereby repealed, and new Subdivision (b) of Section 4043.4 of 9 NYCRR is added to read as follows:

(b) Trainers shall maintain accurate records of all corticosteroid joint injections to horses trained by them. The record(s) of every corticosteroid joint injection shall be submitted, in a form and manner approved by the Board, by the trainer to the Board within 48 hours of the treatment. The trainer may delegate this responsibility to the treating veterinarian, who shall make these reports when so designated. The reports shall be accessible to the examining veterinarian for the purpose of assisting with pre-race veterinary examinations.

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires March 10, 2013.

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

Regulatory Impact Statement

1. Statutory authority and legislative objectives of such authority: The Board is authorized to promulgate these rules pursuant to Racing Pari-Mutuel Wagering and Breeding Law sections 101(1) and 902(1). Under section 101, the Board has general jurisdiction over all horse racing activities and all pari-mutuel betting activities in the state, both on track and off-track, and the persons engaged therein, including the authority to regulate the use of drugs that can manipulate race performance. Section 902(1) prescribes that a state college within New York with an approved equine science program shall conduct equine drug testing to assure public confidence in and to continue the high degree of integrity at pari-mutuel race meetings, and authorizes the Board to promulgate any rules and regulations necessary to implement its equine drug testing program and to impose substantial administrative penalties for anyone who races drugged horses.

2. Legislative objectives: To enable the New York State Racing and Wagering Board to preserve the integrity of pari-mutuel racing, while generating reasonable revenue for the support of government.

3. Needs and benefits: These rule amendments have been identified by the New York Task Force on Racehorse Health and Safety as emergency measures required to protect the safety and health of thoroughbred race horses and jockeys in New York State. The New York State Racing and Wagering Board has reviewed these recommendations and has endorsed them for emergency adoption.

The Task Force was formed in 2012 after 21 equine deaths occurred between November 2011 and March 2012. The 21 deaths was more than double the expected frequency rate. The Task Force's investigation revealed troubling aspects as to the way horses are examined and managed in this State, and found that the health and safety of racehorses and jockeys will be improved by reducing the use of legal anti-inflammatory medications in the time after the horse is entered to race.

On September 27, 2012, the Task Force published its report and included recommendations for the adoption of several emergency rules, which are contained in this Emergency Rulemaking. Previously, the Board adopted emergency amendments to these rules in response to Task Force recommendations. Those amendments were published in the State Register on November 28, 2012. The Board adopted an effective date of December 12, 2012 to allow trainers and others to prepare for the new rules. The new rules impose greater time periods during which certain drugs cannot be administered to a horse before its next race. These drugs are corticosteroids, newly restricted to 5 days (previously 48 hours for systemic use) or 7 days (previously 5 days for joint injection), and clenbuterol, newly restricted to 21 days (previously 96 hours). The new rules also require trainers to report all corticosteroid joint injection (CJI) to the Board for use during pre-race exams.

The Task Force, after meetings on November 13 and 30, 2012 and thereafter with national experts and regulatory authorities, very recently revised some of its recommendations, two of which are central to the Board's new emergency rules scheduled to take effect on December 12, 2012: the restriction on clenbuterol administration and Depo Medrol IA.

The Task Force has informed the Board that these modifications are appropriate because of its concern for effective regulatory laboratory testing thresholds. There would be an unfairness to voluntarily complying trainers and others because, in its view, racing commissions cannot yet effectively test for illegal use of these drugs from 15 to 21 days (clenbuterol) or 8 to 15 days (Depo Medrol) before racing. Its most recent recommendations, it should be noted, still substantially strengthen the regulation of these

substances in comparison to rules of racing that generally prevail in U.S. racing jurisdictions, including New York. The Board based its decision for these amendments in part upon recommendation from Dr. George Maylin of the New York State Drug Testing and Research Program.

The Task Force and Board staff further recommend a short implementation delay of two weeks to allow trainers and owners to be prepared in advance for the new rule. The effect of this delay is mitigated by occurring during a very slow time of the year for New York thoroughbred racing.

The amendments to Board Rule 4043.2(i) are necessary to control the administration of corticosteroids to thoroughbred horses. These amendments are necessary for the health and safety of both the horse and the jockeys/riders. The withdrawal periods in the rule were prescribed directly by the Task Force and are necessary to provide clear guidance as to when administration should be discontinued for the purposes of testing and for the safety of the horse. The intra-articular use of corticosteroids can mask the inflammatory changes ordinarily associated with joint disease, and can confound the pre-race clinical examination. For these reasons, regulation of intra-articular administration of corticosteroids is appropriate. The term "intra-articular" has been revised to "joint injection" in the rule text to more accurately reflect a more common vernacular of the trade.

The Task Force also identified the need to tighten controls over the use of clenbuterol, which is currently permitted as a 96-hour rule under the Board's rules. It is a potent bronchodilator that is Food and Drug Administration-approved for treatment of lower airway inflammation and upper respiratory infections in the horse. It is used to prevent respiratory infections in horses experiencing exercise-induced pulmonary hemorrhage (respiratory bleeding), while some trainers have indicated that their horses look better and have increased appetites when treated with clenbuterol. The amendments will replace the existing 96-hour time restriction, prompting the change to subdivision (g) of 4043.2 of 9 NYCRR to remove any reference to clenbuterol, with a 14-day restriction to be found in a new paragraph (3) of subdivision (i) of 9E NYCRR.

Nevertheless, the report stated that in addition to its pharmacological effect on the respiratory tract, clenbuterol mimics anabolic steroids in that it increases muscle and decreases fat in cattle, pigs, poultry and sheep. The report stated that there is a belief that illegally compounded clenbuterol has been used in thoroughbred horses as an alternative to the prohibited anabolic steroids. The Task Force found: "It was abundantly clear to the Task Force that while the NYSRWB's time limit regarding clenbuterol was being followed, the medication is in common use as a substitute for anabolic steroids and not for the legitimate therapeutic purpose for which it is intended."

The Board also amended Paragraph (9) of Subdivision (e) of 4043.2 of 9 NYCRR to remove any references to steroids. This was not a recommendation by the Task Force, but in light of the Board's existing rule limiting the administration of anabolic steroids (Rule 4043.15) and the restrictions placed on corticosteroids in this rulemaking, the Board believes that no reference to steroids should be contained in 4043.2(e)(9) in order to avoid confusion.

The Task Force reported: "The failure of trainers to report intra-articular injections as required prevented the NYRA veterinarians from identifying a pattern of redundant...treatments that had the potential to misrepresent the true clinical condition of a horse." Therefore, in order to ensure proper notification, the Board will amend Section 4043.4 of 9 NYCRR, which is commonly known as the "Trainer's Responsibility Rule," to require that trainers maintain accurate records of all corticosteroid joint injections to horse trained by them. The corticosteroid reporting will require that a trainer submit a corticosteroid joint injection record to the Board within 48 hours of treatment so that examining veterinarians will have access as part of the pre-race examinations. This amendment will improve the quality of pre-examinations, provide the Board with timely notice of any potential ailments and ensure that a document trail is available in the event the horse's fitness comes into question.

In response to input from the New York Thoroughbred Racing Association, the Board added a provision in the CJI reporting rule, the new 9 NYCRR 4043.4(b), authorizing trainers to delegate the reporting responsibility to the treating veterinarians. The Board has decided to initiate this requirement on December 26, 2012, rather than December 12, 2012 to allow regulated parties to prepare for this requirement and to facilitate compliance with online reporting, which is scheduled to occur on December 26, 2012. This will allow trainers and veterinarians to familiarize themselves with an online reporting system that the Board has designed, and for this system to be altered to facilitate ease of reporting by a veterinarian, even when the veterinarian is reporting CJI for many trainers/horses.

4. Costs:

(a) Costs to regulated parties for the implementation of and continuing compliance with the rule: The costs for the New York Drug Testing and Research Program will be substantial. The cost for conducting administration trials necessary for Cortisone Testing will be \$36,000. The cost of re-

lated laboratory testing of samples for corticosteroids is \$18,000 per year. The cost of trial administrations of clenbuterol is \$6,000. The related laboratory testing of clenbuterol samples is \$5,000 per year.

(b) Costs to the agency, the state and local governments for the implementation and continuation of the rule: None. The amendments will require the New York State Racing and Wagering Board to develop a filing system for corticosteroid reporting.

There will be no costs to local government because the New York State Racing and Wagering Board is the only governmental entity authorized to regulate pari-mutuel horse racing.

(c) The information, including the source(s) of such information and the methodology upon which the cost analysis is based: The Board relied on its experience in collecting information and based upon its experience in the equine drug testing program. The costs associated with clenbuterol and corticosteroid testing was provided directly from the New York Drug Testing and Research Program.

(d) Where an agency finds that it cannot provide a statement of costs, a statement setting forth the agency's best estimate, which shall indicate the information and methodology upon which the estimate is based and the reason(s) why a complete cost statement cannot be provided. Not applicable.

5. Local government mandates: None. The New York State Racing and Wagering Board is the only governmental entity authorized to regulate pari-mutuel horse racing activities.

6. Paperwork: There will be a need for reporting corticosteroid injections. Trainers will be required submit paperwork to the Board in a manner prescribed by the Board.

7. Duplication: None.

8. Alternatives. These rule amendments are based upon the finding and recommendations of the Task Force and no other alternatives were considered.

9. Federal standards: None.

10. Compliance schedule: The amendments of 9E NYCRR 4043.2(g) and 9E NYCRR 4043.2(e)(9) will go into effect on December 26, 2012; The amendments of 9E NYCRR 4043.2(i) and 4043.4(b) will go into effect upon filing. The Board intends to submit this rule as a Proposed Rulemaking in the future and the extension of this rule may be necessary pursuant to the provisions of the State Administrative Procedure Act.

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

As is evident by the nature of this rulemaking, this will not have an adverse affect on jobs or rural areas. This proposal concerns the restricted administration of certain drugs to thoroughbred race horses, the testing procedures to ensure compliance with those restrictions, and reporting of the administration of certain drugs. These medications – corticosteroids and clenbuterol – are currently permitted and will continue to be permitted but under different administration schedules. These schedules will have no impact on jobs or rural areas. This amendment is intended to reduce equine deaths in thoroughbred racing, and as such will have a positive effect on horseracing and the revenue generated through pari-mutuel wagering and breeding in New York State. This will not adversely impact rural areas or jobs or local governments and does not require a Rural Area Flexibility Statement or Job Impact Statement.

Office of Temporary and Disability Assistance

NOTICE OF ADOPTION

Standard Utility Allowances for the Supplemental Nutrition Assistance Program

I.D. No. TDA-42-12-00001-A

Filing No. 1217

Filing Date: 2012-12-07

Effective Date: 2012-12-26

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

Action taken: Amendment of section 387.12 of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d) and 95; 7 USC section 2014(e)(6)(C); and 7 CFR section 273.9(d)(6)(iii)

Subject: Standard Utility Allowances for the Supplemental Nutrition Assistance Program.

Purpose: These regulatory amendments set forth the federally mandated and approved standard utility allowances as of October 1, 2012.

Text or summary was published in the October 17, 2012 issue of the Register, I.D. No. TDA-42-12-00001-EP.

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

Text of rule and any required statements and analyses may be obtained from: Jeanine S. Behuniak, NYS Office of Temporary and Disability Assistance, 40 North Pearl Street 16C, Albany, NY 12243-0001, (518) 474-9779, email: Jeanine.Behuniak@otda.ny.gov

Assessment of Public Comment

The agency received no public comment.