

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.

Office of Children and Family Services

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Foster Children - Educational Stability and Identity Theft Prevention

I.D. No. CFS-07-12-00002-EP

Filing No. 55

Filing Date: 2012-01-25

Effective Date: 2012-01-25

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

Proposed Action: Amendment of sections 428.3(b)(2)(v) and 430.11(c)(1)(i); and addition of sections 428.3(b)(2)(vi) and 430.12(k) to Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d) and 34(3)(f)

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

Specific reasons underlying the finding of necessity: On December 12, 2011, OCFS was first informed by the federal Department of Health and Human Services that all states must submit an amendment of their Title IV-E state plans no later than January 31, 2012 to reflect how states have implemented the educational stability and consumer report amendments to Title IV-E, as enacted by the federal Child and Family Services Improvement and Innovation Act of 2011 (p.l. 112-34).

In order for New York State to have a compliant Title IV-E State

Plan, it must be able to demonstrate to the federal government that it has enacted the provisions reflected in the emergency and proposed regulations by January 31, 2012. As per section 471(a) of the Social Security Act, a compliant Title IV-E state plan is a condition for the State of New York to continue to receive funding for foster care, adoption assistance and the administration of those programs.

The failure to comply with the federal mandate, and not have a compliant Title IV-E state plan, exposes the State of New York to the potential loss of significant federal funding. Any loss or delay in the availability of such funding will have a serious impact on the delivery of necessary child welfare programs in the State of New York. The timing of the federal directive did not afford the State of New York with sufficient time to promulgate the proposed regulations through any other means other than on an emergency basis.

Subject: Foster Children - Educational Stability and Identity Theft Prevention.

Purpose: To implement the federal requirements relating to educational stability and identity theft prevention involving foster children.

Text of emergency/proposed rule: Subparagraph (v) of paragraph (2) of subdivision (b) of section 428.3 is amended and a new subparagraph (vi) is added to read as follows:

(v) the child's transition plan prepared in accordance with the standards set forth in section 430.12(j) of this Title; and

(vi) the foster child's consumer report provided in accordance with section 430.12(k) of this Title.

Subparagraph (i) of paragraph (1) of subdivision (c) of section 430.11 is amended to read as follows:

(1)(i) Standard. Whenever possible, a child shall be placed in a foster care setting which permits the child to retain contact with the persons, groups and institutions with which the child was involved while living with his or her parents, and to which the child will be discharged. It shall be deemed inappropriate to place a child in a setting which conforms with this standard only if the child's service needs can only be met in another available setting at the same or lesser level of care. The *initial* placement of the child into foster care and *all subsequent placements* must take into account the appropriateness of the child's existing educational setting and the proximity of such setting to the child's placement location. When it is in the best interest of the foster child to continue to be enrolled in the same school in which the child [was] *is currently* enrolled [when placed into foster care], the agency with case management, case planning or casework responsibility for the foster child must coordinate with applicable local school authorities to ensure that the child remains in such school. When it is not in the best interests of the foster child to continue to be enrolled in the same school in which the child [was] *is currently* enrolled [when placed into foster care], the agency with case management, case planning or casework responsibility for the foster child must coordinate with applicable local school authorities where the foster child is placed in order that the foster child be provided with immediate and appropriate enrollment in a new school; and the agency with case management, case planning or casework responsibility for the foster child must coordinate with the applicable local school authorities where the foster child previously attended in order that all of the applicable school records of the child can be provided to the new school.

A new subdivision (k) of section 430.12 is added to read as follows:

(k) *Consumer Reports (i) Standard. Upon attaining the age of 16 years and each year thereafter until discharged from foster care,*

each foster child must receive a copy of a consumer report on such child, at no cost to the child. The agency with case management, case planning or casework responsibility for the child, as determined by the social services district with legal custody of the foster child, must provide or arrange for the provision of assistance to the foster child, including, where feasible, from any court-appointed advocate, in interpreting and resolving any inaccuracies in the report. For the purpose of this subdivision, a consumer report means information by a consumer reporting agency bearing on the consumer's credit worthiness, credit standing, credit capacity, character, general reputation, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for:

a) credit or insurance to be used primarily for personal, family, or household purposes;

b) employment purposes; or

any other purpose authorized by federal law.

(ii) *Documentation.* Documentation must include that the consumer report was provided to the foster child annually and any assistance provided by the agency to the foster child in interpreting the consumer report or resolving any inaccuracies in such report.

This notice is intended: to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire April 23, 2012.

Text of rule and any required statements and analyses may be obtained from: Public Information Office, NYS Office of Children and Family Services, 52 Washington Street, Rensselaer, N.Y. 12144, (518) 473-7793

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

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

Regulatory Impact Statement

1. Statutory authority:

Section 20(3)(d) of the Social Services Law (SSL) authorizes the Office of Children and Family Services (OCFS) to establish rules and regulations to carry out its powers and duties pursuant to the provisions of the SSL.

Section 34(3)(f) of the SSL requires the Commissioner of OCFS to establish regulations for the administration of public assistance and care within the State.

Section 398(6)(a) of the SSL requires the local commissioners of social services to determine what assistance and care, supervision or treatment foster children require.

2. Legislative objectives:

The proposed regulations are necessary in order for New York State to comply with the federal Child and Family Services Improvement and Innovation Act of 2011 (P.L. 112-34) [the federal Act] that was signed by the President on September 29, 2011 and went into effect on October 1, 2011.

3. Needs and benefits:

The proposed regulations will reduce disruption experienced by foster children when a foster child is changing foster care placements.

The proposed regulations would implement section 106 of the federal Act that amended section 475(1)(G) of the Social Security Act [42 U.S.C. 675(1)(G)] relating to the educational stability of children placed into foster care. The proposed regulations address the need to minimize disruption by requiring that each placement of a foster child take into account the proximity of the foster care placement to the school the foster child currently attends and the appropriateness of the foster child remaining in that school. Where it is not in the best interests of the foster child to remain in such school, the proposed regulations require the agency with case management, case planning or casework responsibility to work with the appropriate school officials to see that the foster child is immediately enrolled in a new school. Prior to the enactment of the federal Act, the above referenced requirement only applied in regard to the initial placement following the child's entry into foster care.

The proposed regulations will assist in the protection of the prevention of the theft of the identity of foster children and support the transition of older children from foster care.

The proposed regulations implement the requirement enacted in section 106 of the federal Act that added a section 475(5)(H) of the Social Security Act dealing with the issue of foster child identification theft. As required by the federal Act, the proposed regulations mandate that each child in foster care who reaches the age of 16 years, and annually thereafter as long as the youth remain in foster care, must receive a copy of the foster child's consumer report. Consistent with the federal Act, the proposed regulations' definition of a consumer report reflects the definition of a consumer report in section 603(d) of the federal Fair Credit Reporting Act (15 U. S.C. § 1681a). The consumer report must be provided to the foster child at no cost to the foster child. The social services district or the voluntary authorized agency acting at the direction of such district must provide or arrange for assistance to the foster child in interpreting the information contained in the consumer report and in resolving any inaccuracies in the report.

4. Costs:

It is estimated that there will be no fiscal impact to the State as a result of the implementation of the proposed regulations.

Any costs related to the transportation of foster children between school districts would be the responsibility of either the social services district or the school district.

Additionally, individuals are entitled to receive one free credit report annually from each of the three major credit reporting agencies.

5. Local government mandates:

The proposed regulations will impose additional mandates on social services districts, as required by federal statute. A social services district may transfer the obligations imposed by the proposed regulations to a voluntary authorized agency under contract with such district.

Current OCFS regulation 18 NYCRR 430.11(c)(1)(i) requires addressing the issue of educational stability only in regard to the initial placement of the child into foster care. There is currently no regulatory requirement that the foster child must be provided with a copy of the foster child's consumer report.

6. Paperwork:

The requirements relating to educational stability of foster children will be recorded in New York's statewide automated child welfare information system, CONNECTIONS.

The requirements relating to the providing of a copy of the foster child's consumer report involving communications between the worker and the foster child will be recorded in CONNECTIONS. The social services district or the voluntary authorized agency, at the direction of the local district, will have to provide a copy of the consumer report to the foster child. The copy of the consumer report will be made part of the foster child's uniform case record.

7. Duplication:

The proposed regulations do not duplicate other state requirements. The proposed regulations addressing educational stability build on related requirements.

8. Alternatives:

Given the mandates imposed by the federal Act and the potential adverse financial consequences for non-compliance, there is no viable alternative to implementing the proposed regulations.

9. Federal standards:

The regulatory amendments reflect requirements imposed by the federal Act. The regulatory change relating to educational stability is federally mandated under Title IV-E of the Social Security Act. New York must demonstrate that it has implemented this standard in order to have a compliant Title IV-E State Plan which is a condition for New York to continue to receive federal funding for foster care, adoption assistance and the administration of those programs. The regulatory change relating to providing the foster child with the child's consumer report is federally mandated under Title IV-B, subpart 1 of the Social Security Act. New York must demonstrate that it has implemented such standard in order to have a compliant Title IV-B State Plan which is a condition for New York to continue to receive federal child welfare services funding.

10. Compliance schedule:

Compliance with the proposed regulations must begin immediately upon final adoption.

Regulatory Flexibility Analysis

1. Effect on Small Business and Local Governments:

Social services districts, the St. Regis Mohawk Tribe or voluntary authorized agencies contracted by social services districts to provide foster care will be affected by the proposed regulations in the State of New York. There are 58 social services districts and approximately 160 voluntary authorized agencies.

2. Compliance Requirements:

The proposed regulations implement standards required by the federal Child and Family Services Improvement and Innovation Act of 2011 (P.L. 112-34) [the federal Act]. The federal Act was signed by the President on September 29, 2011 and took effect on October 1, 2011. Implementation of the proposed regulations is necessary for the State of New York to maintain compliant Title V-B and Title IV-E State Plans which are required for New York to continue to receive federal funding under Title IV-B and Title IV-E of the Social Security Act for foster care, adoption assistance, child welfare services and the administration of those programs.

The proposed regulations address the educational stability of children placed in foster care by requiring whenever a foster child changes foster care placement that there be an assessment of the proximity of the proposed foster care placement to the school the foster child is attending and the appropriateness of the foster child remaining in his or her current school setting. If it is not in the best interests of the foster child to remain in the child's current school setting, the proposed regulations would require that agency staff work with appropriate school officials to see that the foster child is immediately enrolled in a new school.

The proposed regulations also require that for each foster child who reaches the age of 16 years, such foster child must receive a copy of the foster child's consumer report. The foster child must continue to receive a copy of the foster child's consumer report on an annual basis as long as the child remains in foster care. The consumer report must be provided at no cost to the foster child. Assistance must be provided or arranged for the foster child to interpret the consumer report and to resolve any inaccuracies.

The proposed regulations will not impose any new reporting requirements. Compliance with the educational stability and consumer report requirements will be documented in New York's statewide automated child welfare system, CONNECTIONS.

3. Professional Requirements:

It is expected that most social services districts and voluntary authorized agencies will not have to hire additional staff to implement the proposed regulations.

4. Compliance Costs:

It is estimated that there will be no fiscal impact to the State as a result of the implementation of the proposed regulations.

Any costs related to the transportation of foster children between school districts would be the responsibility of either the social services district or the school district.

Additionally, individuals are entitled to receive one free credit report from each of the three major credit reporting agencies.

5. Economic and Technological Feasibility:

The proposed regulations would not have an adverse economic impact on social services districts or voluntary authorized agencies. The proposed regulations would not require the hiring of additional staff. Modifications to technology would not be required by the proposed regulations.

6. Minimizing Adverse Impact:

The proposed regulations reflect mandates imposed on the states by the federal Act. Implementation is necessary for New York to continue to be eligible to receive federal funding for foster care, adoption assistance, child welfare services and the administration of those programs under Title IV-B and Title IV-E of the Social Security Act. The proposed regulations do not go beyond the scope of the federal mandates.

7. Small Business and Local Government Participation:

Because of the proximity of the signing of the federal Act into law (September 29, 2011) to its effective date (October 1, 2011), OCFS has had no opportunity to elicit input from small businesses and local governments. We will do so in the public comment period.

Rural Area Flexibility Analysis

1. Types and Numbers of Rural Areas:

Social services districts, the St. Regis Mohawk Tribe and voluntary authorized agencies that have contracts with social services districts to provide foster care will be affected by the proposed regulations. There are 44 social services districts and the St. Regis Mohawk Tribe that are in rural areas. Currently, there are also approximately 100 voluntary authorized agencies in rural areas of New York State.

2. Reporting, Recordkeeping and Compliance Requirements:

The proposed regulations implement standards required by the federal Child and Family Services Improvement and Innovation Act of 2011 (P.L. 112-34) [the federal Act]. The federal Act was signed by the President on September 29, 2011 and took effect on October 1, 2011. Implementation of the proposed regulations is necessary for New York State to maintain compliant Title IV-B and Title IV-E State Plans which are required for New York to continue to receive federal funding under Title IV-B and Title IV-E of the Social Security Act for foster care, adoption assistance, child welfare services and the administration of those programs.

The proposed regulations address the educational stability of children placed in foster care by requiring whenever a foster child changes foster care placement that there be an assessment of the proximity of the proposed foster care placement to the school the foster child is attending and the appropriateness of the foster child remaining in his or her current school setting. If it is not in the best interests of the foster child to remain in the child's current school setting, the proposed regulations would require that agency staff work with appropriate school officials to see that the foster child is immediately enrolled in a new school.

The proposed regulations also require that for each foster child who reaches the age of 16 years, such foster child must receive a copy of the foster child's consumer report. The foster child must continue to receive a copy of the foster child's consumer report on an annual basis as long as the child remains in foster care. The consumer report must be provided at no cost to the foster child. Assistance must be provided or arranged for the foster child to interpret the consumer report and to resolve any inaccuracies.

The proposed regulations will not impose any new reporting requirements. Compliance with the education stability and consumer report requirements will be documented in New York's stateside automated child welfare system, CONNECTIONS.

3. Professional Services:

It is expected that most social services districts and voluntary authorized agencies will not have to hire additional staff to implement the proposed regulations.

4. Compliance Costs:

It is estimated that there will be no fiscal impact to the State as a result of the implementation of the proposed regulations.

Any costs related to the transportation of foster children between school districts would be the responsibility of either the local social services district or the school district.

Additionally, individuals are entitled to receive one free credit report annually from each of the three major credit reporting agencies.

5. Minimizing Adverse Impact:

The standards set forth in the proposed regulations reflect mandates imposed on the states by the federal Act. Implementation is necessary for New York to continue to be eligible to receive federal funding for foster care, adoption assistance, child welfare services and the administration of those programs under Title IV-B and Title IV-E of the Social Security Act. The proposed regulations do not go beyond the scope of the federal mandates.

6. Rural Area Participation:

Because of the proximity of the signing of the federal Act into law

(September 29, 2011) to its effective date (October 1, 2011), OCFS has had no opportunity to elicit input from agencies operating in rural areas. We will do so in the public comment period.

Job Impact Statement

The proposed regulations will not have a negative impact on jobs or employment opportunities in either public or private child welfare agencies. A full job statement has not been prepared for the proposed regulations as it is assumed that the proposed regulations will not result in the loss of any jobs.

NOTICE OF ADOPTION

Youth Development and Delinquency Prevention Program Fees

I.D. No. CFS-45-11-00005-A

Filing No. 66

Filing Date: 2012-01-30

Effective Date: 2012-02-15

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

Action taken: Amendment of section 165-1.2(b) of Title 9 NYCRR.

Statutory authority: Executive Law, section 419

Subject: Youth Development and Delinquency Prevention program fees.

Purpose: To allow Youth Development and Delinquency Prevention programs to charge a fee to participate in recreational services programs.

Text or summary was published in the November 9, 2011 issue of the Register, I.D. No. CFS-45-11-00005-P.

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

Text of rule and any required statements and analyses may be obtained from: Public Information Office, NYS Office of Children and Family Services, 52 Washington Street, Rensselaer, N.Y. 12144, (518) 473-7793

Assessment of Public Comment

The Office of Children and Family Services (OCFS) received one comment from a youth bureau on the proposed amendment to Title 9 of the NYCRR 165-1.2 that would allow municipalities (counties, cities, towns and villages) to charge a fee to participants for recreational services programs.

The commenter opposes the proposed amendment. The commenter expressed concern that over the past several years state funding to youth bureau afterschool services has been significantly reduced. The commenter feels that a decrease in state funding coupled with the charging of fees will cause undue harm to the already limited services and overburdened working families who primarily utilize their afterschool programs.

The commenter also believes that the amendment may be overly burdensome and unduly costly by requiring localities to create new responsibilities and standards for collecting funds and to determine the ability of parents to pay for these services. The commenter believes that they do not have systems in place to implement the necessary changes that the proposed amendment would require. The commenter stated that, not unlike other state agencies, many of their afterschool services are maintained through contracts with various nonprofit agencies and the amendment would require providers to amend contracts in order to implement the change.

The Office reviewed the regulations and decided not to revise the regulations based on these comments. The proposed amendment allows municipalities to charge a fee but does not mandate that a fee be charged. The amendment further provides that youth who cannot pay the fee must be provided access to the programs through sliding fee schedules, scholarships or waivers. The regulation will allow youth programs to be eligible to receive State funding even if they charge fees for recreation projects which is intended to help municipalities serve more youth without an increase in funding.

The regulation will also not require a youth bureau to charge fees for the programs they contract with locally. Instead, those individual municipalities who decide to implement a fee for their youth recreational programs or activities may incur nominal costs in establishing the fee amount, collecting and accounting for such fees and for documenting participation in the scholarships, tiered fee schedules or waiver policies, which will likely be absorbed into the costs of administration of their existing programs.

NOTICE OF ADOPTION

Youth Bureau Executive Directors

I.D. No. CFS-45-11-00008-A

Filing No. 67

Filing Date: 2012-01-30

Effective Date: 2012-02-15

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

Action taken: Amendment of section 165-1.1(d)(1) of Title 9 NYCRR.

Statutory authority: Executive Law, section 419

Subject: Youth Bureau Executive Directors.

Purpose: To eliminate the existing requirement that the executive director be responsible to the municipality's chief executive officer.

Text or summary was published in the November 9, 2011 issue of the Register, I.D. No. CFS-45-11-00008-P.

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

Text of rule and any required statements and analyses may be obtained from: Public Information Office, NYS Office of Children and Family Services, 52 Washington Street, Rensselaer, N.Y. 12144, (518) 473-7793

Assessment of Public Comment

The Office of Children and Family Services (OCFS) received two comments from County Youth Bureaus and one from an Association of Youth Bureaus. All commenter's opposed the amendment of section 165-1.1 (d) (1) of Title 9 of the NYCRR, which proposes to eliminate the existing requirement that the Executive Director of the Youth Bureau be appointed by, and responsible, to the municipality's Chief Executive Officer. Instead, the change will mandate the Executive Director of the Youth Bureau have appropriate access to the Chief Executive Officer of the municipality.

All of the commenters raised the issue that eliminating the requirement that the Executive Director be responsible to the Chief Executive Officer will change the level of attention, accountability and oversight that the Chief Executive Officer has over the community-based preventive intervention programs that serve the County's general youth population. The commenters expressed concern that the amendment will alter a system that currently functions well and ensures that Chief Executive Officers of municipalities remain permanently focused on services and funding for youth. The commenters also raised concerns that the amendment may result in a loss of youth prevention and development services.

Two commenters also suggested that the amendment will impede the localities ability to be heard on matters affecting statewide public policy and exclude input from local elected leaders who are familiar with the needs of their communities. The commenters expressed concern that the amendment will decrease local participation and reduce the allocation of local funds, thereby lessening the effectiveness of state funding.

OCFS reviewed the comments and does not believe that the amendment will result in any loss of youth services or funding. The Chief Executive Officers of municipalities will continue to play a vital role in ensuring that state aid is effectively provided to the general and special youth populations. The amendment will not limit the Executive Directors' ability to access the Chief Executive Officers but will instead allow municipalities to maximize all resources to support essential child welfare reform.

The Office believes the proposed amendment offers municipalities' greater flexibility in reorganizing or merging their youth bureau function with another appropriate local governmental subdivision. These reorganizations may enable municipalities to achieve administrative savings while maintaining services to children, youth and families. Based on this reasoning, the regulations were not revised in response to these comments.

Department of Civil Service

NOTICE OF ADOPTION

Provision of the Health Benefit Plan for Active and Retired New York State Employees

I.D. No. CVS-50-11-00005-A

Filing No. 63

Filing Date: 2012-01-30

Effective Date: 2012-02-15

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

Action taken: Amendment of sections 73.3(b) and 73.12 of Title 4 NYCRR.

Statutory authority: Civil Service Law, sections 160(1), 161-a and 167(8)
Subject: Provision of the health benefit plan for active and retired New York State employees.

Purpose: To conform 4 NYCRR 73.12 with chapter 491 of the Laws of 2011.

Text or summary was published in the December 14, 2011 issue of the Register, I.D. No. CVS-50-11-00005-P.

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

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

Assessment of Public Comment

One public comment was received in response to the first Notice of Emergency Rule Making. The comment asserts that the proposed rule is contrary to Civil Service Law section 167 regarding health insurance premium contributions by retirees and the subject of the emergency rule was not specifically addressed in the Sponsor’s Memorandum to Chapter 491 of the Laws of the 2011. The Department of Civil Service concludes that the subject rule is required for full compliance with Chapter 491 of the Laws of 2011 and is necessary for the administration of the New York State Health Insurance Program.

Department of Economic Development

EMERGENCY RULE MAKING

Empire Zones Reform

I.D. No. EDV-07-12-00006-E

Filing No. 65

Filing Date: 2012-01-30

Effective Date: 2012-01-30

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

Action taken: Amendment of Parts 10 and 11; renumbering and amendment of Parts 12 through 14 to Parts 13, 15 and 16; and addition of new Parts 12 and 14 to Title 5 NYCRR.

Statutory authority: General Municipal Law, art. 18-B, section 959; L. 2000, ch. 63; L. 2005, ch. 63; and L. 2009, ch. 57

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

Specific reasons underlying the finding of necessity: Regulatory action is needed immediately to implement the statutory changes contained in Chapter 57 of the Laws of 2009. The emergency rule also clarifies the administrative procedures of the program, improves efficiency and helps make it more cost-effective and accountable to the State’s taxpayers, particularly in light of New York’s current fiscal climate. It bears noting that General Municipal Law section 959(a), as amended by Chapter 57 of the Laws of 2009, expressly authorizes the Commissioner of Economic Development to adopt emergency regulations to govern the program.

Subject: Empire Zones reform.

Purpose: Allow Department to continue implementing Zones reforms and adopt changes that would enhance program’s strategic focus.

Substance of emergency rule: The emergency rule is the result of changes to Article 18-B of the General Municipal Law pursuant to Chapter 63 of the Laws of 2000, Chapter 63 of the Laws of 2005, and Chapter 57 of the Laws of 2009. These laws, which authorize the empire zones program, were changed to make the program more effective and less costly through higher standards for entry into the program and for continued eligibility to remain in the program. Existing regulations fail to address these requirements and the existing regulations contain several outdated references. The emergency rule will correct these items.

The rule contained in 5 NYCRR Parts 10 through 14 (now Parts 10-16 as amended), which governs the empire zones program, is amended as follows:

1. The emergency rule, tracking the requirements of Chapter 63 of the

Laws of 2005, requires placement of zone acreage into “distinct and separate contiguous areas.”

2. The emergency rule updates several outdated references, including: the name change of the program from Economic Development Zones to Empire Zones, the replacement of Standard Industrial Codes with the North American Industrial Codes, the renaming of census-tract zones as investment zones, the renaming of county-created zones as development zones, and the replacement of the Job Training Partnership Act (and private industry councils) with the Workforce Investment Act (and local workforce investment boards).

3. The emergency rule adds the statutory definition of “cost-benefit analysis” and provides for its use and applicability.

4. The emergency rule also adds several other definitions (such as applicant municipality, chief executive, concurring municipality, empire zone capital tax credits or zone capital tax credits, clean energy research and development enterprise, change of ownership, benefit-cost ratio, capital investments, single business enterprise and regionally significant project) and conforms several existing regulatory definitions to statutory definitions, including zone equivalent areas, women-owned business enterprise, minority-owned business enterprise, qualified investment project, zone development plans, and significant capital investment projects. The emergency rule also clarifies regionally significant project eligibility. Additionally, the emergency rule makes reference to the following tax credits and exemptions: the Qualified Empire Zone Enterprise (“QEZE”) Real Property Tax Credit, QEZE Tax Reduction Credit, and the QEZE Sales and Use Tax Exemption. The emergency rule also reflects the eligibility of agricultural cooperatives for Empire Zone tax credits and the QEZE Real Property Tax Credit.

5. The emergency rule requires additional statements to be included in an application for empire zone designation, including (i) a statement from the applicant and local economic development entities pertaining to the integration and cooperation of resources and services for the purpose of providing support for the zone administrator, and (ii) a statement from the applicant that there is no viable alternative area available that has existing public sewer or water infrastructure other than the proposed zone.

6. The emergency rule amends the existing rule in a manner that allows for the designation of nearby lands in investment zones to exceed 320 acres, upon the determination by the Department of Economic Development that certain conditions have been satisfied.

7. The emergency rule provides a description of the elements to be included in a zone development plan and requires that the plan be resubmitted by the local zone administrative board as economic conditions change within the zone. Changes to the zone development plan must be approved by the Commissioner of Economic Development (“the Commissioner”). Also, the rule adds additional situations under which a business enterprise may be granted a shift resolution.

8. The emergency rule grants discretion to the Commissioner to determine the contents of an empire zone application form.

9. The emergency rule tracks the amended statute’s deletion of the category of contributions to a qualified Empire Zone Capital Corporation from those businesses eligible for the Zone Capital Credit.

10. The emergency rule reflects statutory changes to the process to revise a zone’s boundaries. The primary effect of this is to limit the number of boundary revisions to one per year.

11. The emergency rule describes the amended certification and decertification processes. The authority to certify and decertify now rests solely with the Commissioner with reduced roles for the Department of Labor and the local zone. Local zone boards must recommend projects to the State for approval. The labor commissioner must determine whether an applicant firm has been engaged in substantial violations, or pattern of violations of laws regulating unemployment insurance, workers’ compensation, public work, child labor, employment of minorities and women, safety and health, or other laws for the protection of workers as determined by final judgment of a judicial or administrative proceeding. If such applicant firm has been found in a criminal proceeding to have committed any such violations, the Commissioner may not certify that firm.

12. The emergency rule describes new eligibility standards for certification. The new factors which may be considered by the Commissioner when deciding whether to certify a firm is (i) whether a non-manufacturing applicant firm projects a benefit-cost ratio of at least 20:1 for the first three years of certification, (ii) whether a manufacturing applicant firm projects a benefit-cost ratio of at least 10:1 for the first three years of certification, and (iii) whether the business enterprise conforms with the zone development plan.

13. The emergency rule adds the following new justifications for decertification of firms: (a) the business enterprise, that has submitted at least three years of business annual reports, has failed to provide economic returns to the State in the form of total remuneration to its employees (i.e. wages and benefits) and investments in its facility greater in value to the tax benefits the business enterprise used and had refunded to it; (b)

the business enterprise, if first certified prior to August 1, 2002, caused individuals to transfer from existing employment with another business enterprise with similar ownership and located in New York state to similar employment with the certified business enterprise or if the enterprise acquired, purchased, leased, or had transferred to it real property previously owned by an entity with similar ownership, regardless of form of incorporation or organization; (c) change of ownership or moving out of the Zone, (d) failure to pay wages and benefits or make capital investments as represented on the firm's application, (e) the business enterprise makes a material misrepresentation of fact in any of its business annual reports, and (f) the business enterprise fails to invest in its facility substantially in accordance with the representations contained in its application. In addition, the regulations track the statute in permitting the decertification of a business enterprise if it failed to create new employment or prevent a loss of employment in the zone or zone equivalent area, and deletes the condition that such failure was not due to economic circumstances or conditions which such business could not anticipate or which were beyond its control. The emergency rule provides that the Commissioner shall revoke the certification of a firm if the firm fails the standard set forth in (a) above, or if the Commissioner makes the finding in (b) above, unless the Commissioner determines in his or her discretion, after consultation with the Director of the Budget, that other economic, social and environmental factors warrant continued certification of the firm. The emergency rule further provides for a process to appeal revocations of certifications based on (a) or (b) above to the Empire Zones Designation Board. The emergency rule also provides that the Commissioner may revoke the certification of a firm upon a finding of any one of the other criteria for revocation of certification set forth in the rule.

14. The emergency rule adds a new Part 12 implementing record-keeping requirements. Any firm choosing to participate in the empire zones program must maintain and have available, for a period of six years, all information related to the application and business annual reports.

15. The emergency rule clarifies the statutory requirement from Chapter 63 of the Laws of 2005 that development zones (formerly county zones) create up to three areas within their reconfigured zones as investment (formerly census tract) zones. The rule would require that 75% of the acreage used to define these investment zones be included within an eligible or contiguous census tract. Furthermore, the rule would not require a development zone to place investment zone acreage within a municipality in that county if that particular municipality already contained an investment zone, and the only eligible census tracts were contained within that municipality.

16. The emergency rule tracks the statutory requirements that zones reconfigure their existing acreage in up to three (for investment zones) or six (for development zones) distinct and separate contiguous areas, and that zones can allocate up to their total allotted acreage at the time of designation. These reconfigured zones must be presented to the Empire Zones Designation Board for unanimous approval. The emergency rule makes clear that zones may not necessarily designate all of their acreage into three or six areas or use all of their allotted acreage; the rule removes the requirement that any subsequent additions after their official redesignation by the Designation Board will still require unanimous approval by that Board.

17. The emergency rule clarifies the statutory requirement that certain defined "regionally significant" projects can be located outside of the distinct and separate contiguous areas. There are four categories of projects: (i) a manufacturer projecting the creation of fifty or more net new jobs in the State of New York; (ii) an agri-business or high tech or biotech business making a capital investment of ten million dollars and creating twenty or more net new jobs in the State of New York, (iii) a financial or insurance services or distribution center creating three hundred or more net new jobs in the State of New York, and (iv) a clean energy research and development enterprise. Other projects may be considered by the empire zone designation board. Only one category of projects, manufacturers projecting the creation of 50 or more net new jobs, are allowed to progress before the identification of the distinct and separate contiguous areas and/or the approval of certain regulations by the Empire Zones Designation Board. Regionally significant projects that fall within the four categories listed above must be projects that are exporting 60% of their goods or services outside the region and export a substantial amount of goods or services beyond the State.

18. The emergency rule clarifies the status of community development projects as a result of the statutory reconfiguration of the zones.

19. The emergency rule clarifies the provisions under Chapter 63 of the Laws of 2005 that allow for zone-certified businesses which will be located outside of the distinct and separate contiguous areas to receive zone benefits until decertified. The area which will be "grandfathered" shall be limited to the expansion of the certified business within the parcel or portion thereof that was originally located in the zone before redesignation. Each zone must identify any such business by December 30, 2005.

20. The emergency rule elaborates on the "demonstration of need" requirement mentioned in Chapter 63 of the Laws of 2005 for the addition (for both investment and development zones) of an additional distinct and separate contiguous area. A zone can demonstrate the need for a fourth or, as the case may be, a seventh distinct and separate contiguous area if (1) there is insufficient existing or planned infrastructure within the three (or six) distinct and separate contiguous areas to (a) accommodate business development and there are other areas of the applicant municipality that can be characterized as economically distressed and/or (b) accommodate development of strategic businesses as defined in the local development plan, or (2) placing all acreage in the other three or six distinct and separate contiguous areas would be inconsistent with open space and wetland protection, or (3) there are insufficient lands available for further business development within the other distinct and separate contiguous areas.

The full text of the emergency rule is available at www.empire.state.ny.us

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires April 28, 2012.

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

Regulatory Impact Statement

STATUTORY AUTHORITY:

Section 959(a) of the General Municipal Law authorizes the Commissioner of Economic Development to adopt on an emergency basis rules and regulations governing the criteria of eligibility for empire zone designation, the application process, the certification of a business enterprises as to eligibility of benefits under the program and the decertification of a business enterprise so as to revoke the certification of business enterprises for benefits under the program.

LEGISLATIVE OBJECTIVES:

The rulemaking accords with the public policy objectives the Legislature sought to advance because the majority of such revisions are in direct response to statutory amendments and the remaining revisions either conform the regulations to existing statute or clarify administrative procedures of the program. These amendments further the Legislative goals and objectives of the Empire Zones program, particularly as they relate to regionally significant projects, the cost-benefit analysis, and the process for certification and decertification of business enterprises. The proposed amendments to the rule will facilitate the administration of this program in a more efficient, effective, and accountable manner.

NEEDS AND BENEFITS:

The emergency rule is required in order to implement the statutory changes contained in Chapter 57 of the Laws of 2009. The emergency rule also clarifies the administrative procedures of the program, improves efficiency and helps make it more cost-effective and accountable to the State's taxpayers, particularly in light of New York's current fiscal climate.

COSTS:

A. Costs to private regulated parties: None. There are no regulated parties in the Empire Zones program, only voluntary participants.

B. Costs to the agency, the state, and local governments: There will be additional costs to the Department of Economic Development associated with the emergency rule making. These costs pertain to the addition of personnel that may need to be hired to implement the Empire Zones program reforms. There may be savings for the Department of Labor associated with the streamlining of the State's administration and concentration of authority within the Department of Economic Development. There is no additional cost to local governments.

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

LOCAL GOVERNMENT MANDATES:

None. Local governments are not mandated to participate in the Empire Zones program. If a local government chooses to participate, there is a cost associated with local administration that local government officials agreed to bear at the time of application for designation as an Empire Zone. One of the requirements for designation was a commitment to local administration and an identification of local resources that would be dedicated to local administration.

This emergency rule does not impose any additional costs to the local governments for administration of the Empire Zones program.

PAPERWORK:

The emergency rule imposes new record-keeping requirements on businesses choosing to participate in the Empire Zones program. The emergency rule requires all businesses that participate in the program to establish and maintain complete and accurate books relating to their participation in the Empire Zones program for a period of six years.

DUPLICATION:

The emergency rule conforms to provisions of Article 18-B of the Gen-

eral Municipal Law and does not otherwise duplicate any state or federal statutes or regulations.

ALTERNATIVES:

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

FEDERAL STANDARDS:

There are no federal standards in regard to the Empire Zones program. Therefore, the emergency rule does not exceed any Federal standard.

COMPLIANCE SCHEDULE:

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

Regulatory Flexibility Analysis

1. Effect of rule

The emergency rule imposes new record-keeping requirements on small businesses and large businesses choosing to participate in the Empire Zones program. The emergency rule requires all businesses that participate in the program to establish and maintain complete and accurate books relating to their participation in the Empire Zones program for a period of six years. Local governments are unaffected by this rule.

2. Compliance requirements

Each small business and large business choosing to participate in the Empire Zones program must establish and maintain complete and accurate books, records, documents, accounts, and other evidence relating to such business's application for entry into the Empire Zone program and relating to existing annual reporting requirements. Local governments are unaffected by this rule.

3. Professional services

No professional services are likely to be needed by small and large businesses in order to establish and maintain the required records. Local governments are unaffected by this rule.

4. Compliance costs

No initial capital costs are likely to be incurred by small and large businesses choosing to participate in the Empire Zones program. Annual compliance costs are estimated to be negligible for both small and large businesses. Local governments are unaffected by this rule.

5. Economic and technological feasibility

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

6. Minimizing adverse impact

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

7. Small business and local government participation

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

Rural Area Flexibility Analysis

The Empire Zones program is a statewide program. Although there are municipalities and businesses in rural areas of New York State that are eligible to participate in the program, participation by the municipalities and businesses is entirely at their discretion. The emergency rule imposes no additional reporting, record keeping or other compliance requirements on public or private entities in rural areas. Therefore, the emergency rule will not have a substantial adverse economic impact on rural areas or reporting, record keeping or other compliance requirements on public or private entities in such rural areas. Accordingly, a rural area flexibility analysis is not required and one has not been prepared.

Job Impact Statement

The emergency rule relates to the Empire Zones program. The Empire Zones program itself is a job creation incentive, and will not have a substantial adverse impact on jobs and employment opportunities. In fact, the emergency rule, which is being promulgated as a result of statutory reforms, will enable the program to continue to fulfill its mission of job creation and investment for economically distressed areas. Because it is evident from its nature that this emergency rule will have either no impact or a positive impact on job and employment opportunities, no further 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.

Education Department

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

Award of Local High School Diploma to Veterans of World War II, the Korean Conflict and the Vietnam War

I.D. No. EDU-07-12-00009-P

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

Proposed Action: Amendment of section 100.5(b)(7) of Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 208 (not subdivided), 209 (not subdivided), 305(1), (2), (29), (29-a), (29-b), 309 (not subdivided) and 3204(3)

Subject: Award of Local High School Diploma to Veterans of World War II, the Korean Conflict and the Vietnam War.

Purpose: Prescribe requirements for award of high school diplomas to veterans.

Text of proposed rule: Paragraph (7) of subdivision (b) of section 100.5 of the Regulations of the Commissioner of Education is amended, effective May 16, 2012, as follows:

(7) Types of diplomas. (i) Except as provided in subparagraphs (vi), (vii), [and] (viii) and (xi) of this paragraph, and paragraph (7) of subdivision (d) of this section, for students first entering grade nine in the 2001-2002 school year and thereafter, there shall be no diplomas or certificates 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; [or]
- (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 completion of an approved career and technical education program pursuant to paragraph (d)(6) of this section.

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

(xi) *Notwithstanding the provisions of this section, any veteran of the Armed Forces of the United States who served in World War II, the Korean Conflict or the Vietnam War and who was unable, for any reason, to complete a secondary education, may be awarded a local diploma based on knowledge and experience gained while in service, pursuant to the provisions of this subparagraph.*

(a) *In order to obtain a local diploma, the candidate may submit to any school district:*

- (1) *evidence of service during World War II (December 7, 1941 through December 31, 1946) or the Korean Conflict (June 27, 1950 through January 31, 1955) or the Vietnam War (May 1, 1961 through April 30, 1975) and receipt of an honorable discharge. Such documentation may include a copy of discharge papers or other such documents or a letter from a recognized veterans agency affirming such service; and*
- (2) *a statement affirming in writing that the candidate is a resident of New York State and does not possess a high school diploma.*

(b) *Upon submission of documentation meeting the requirements of clause (a) of this subparagraph, the school district to which such documentation is submitted shall issue the candidate a local diploma. No fee shall be charged for such issuance.*

(c) *The next of kin of a deceased veteran may apply for and receive such diploma, on behalf of the deceased, upon submission of documentation meeting the requirements of clause (a) of this subparagraph, together with a copy of a death certificate for such deceased veteran or other satisfactory proof of death, and satisfactory proof of such kinship.*

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) 474-8857, email: legal@mail.nysed.gov

Data, views or arguments may be submitted to: Kevin G. Smith, Deputy Commissioner, Office of Adult Career and Continuing Education Services, Room 1606, One Commerce Plaza, Albany, NY 12234, (518) 474-2714

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

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

Education Law section 207 empowers the Board of Regents and the Commissioner to adopt rules and regulations to carry out laws of the State regarding education and the functions and duties conferred on the Department by law.

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.

Education Law section 209 authorizes the Regents to establish secondary school examinations in studies furnishing a suitable standard of graduation and of admission to colleges; to confer certificates or diplomas on students who satisfactorily pass such examinations; and requires the admission to these examinations of any person who shall conform to the rules and pay the fees prescribed by the Regents.

Education Law section 305(1) and (2) provide that the Commissioner, as chief executive officer of the State system of education and of the Board of Regents, shall have general supervision over all schools and institutions subject to the provisions of the Education Law, or of any statute relating to education, and shall execute all educational policies determined by the Board of Regents. Section 305(29), (29-a) and (29-b) direct the Commissioner to develop a program whereby any veteran of the armed forces who served in World War II, the Korean Conflict, or the Vietnam War, and who was unable, for any reason, to complete a secondary education, may be awarded a high school diploma based on knowledge and experience gained while in service.

Education Law section 309 charges the Commissioner with the general supervision of boards of education and their management and conduct of all departments of instruction.

Education Law section 3204(3) provides for required courses of study in the public schools and authorizes the State Education Department to alter the subjects of required instruction.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the above statutory authority and is necessary to prescribe requirements for the award of high school diplomas to certain veterans pursuant to Education Law section 305(29), (29-a) and (29-b).

3. NEEDS AND BENEFITS:

The proposed amendment is necessary to prescribe, in the Commissioner's Regulations, requirements for the award of high school diplomas to certain veterans pursuant to Education Law section 305(29), (29-a) and (29-b). The statute directs the Commissioner to develop a program whereby any veteran of the armed forces who served in World War II, the Korean Conflict, or the Vietnam War, and who was unable, for any reason, to complete a secondary education, may be awarded a high school diploma based on knowledge and experience gained while in service. Such program has been in existence for many years, having been originally established for World War II veterans and expanded over the years to include Korean and Vietnam veterans, and operates under the name "Operation Recognition", whereby a veteran meeting the statutory requirements can be awarded a local high school diploma.

In July 2005, the Board of Regents amended Commissioner's Regulations section 100.5(b)(7) to eliminate the local high school diploma for general education students, beginning with students who entered grade 9 in 2008. While section 100.5(b)(7) provides exceptions to allow local high school diplomas for certain groups of students in limited circumstances, no exception is currently provided in the Commissioner's Regulations for veterans receiving a high school diploma pursuant to Education Law section 305(29), (29-a) and (29-b). Consequently, school districts stopped issuing local diplomas to veterans requesting them pursuant to the statute. The proposed amendment will amend section 100.5(b)(7) of the Commissioner's Regulations to provide for issuance of a local high school diploma to such veterans, consistent with the statute's requirements, and to add a new subparagraph (xi) to codify in the Commissioner's Regulations the process for the issuance of such diplomas.

4. COSTS:

(a) Costs to State government: None.

(b) Costs to local government: None. The proposed amendment is necessary to conform the Commissioner's Regulations to Education Law section 305(29), (29-a) and (29-b) and will not impose any costs on school districts beyond those inherent in the statute. The proposed amendment merely codifies in the Commissioner's Regulations the existing process for awarding a local high school diploma to veterans pursuant to Education Law section 305(29), (29-a) and (29-b). It is anticipated that any costs associated with issuing local diplomas to veterans will be minimal and capable of being absorbed using existing school district staff and resources. The number of veterans who may request such diploma, by its nature, is very limited. Although the State Education Department does not maintain records of the number of local diplomas issued to veterans under the statute, based upon informal inquiries by veterans received by the Department, it is estimated that no more than 75 to 100 veterans would seek such diploma in a given year. Since there are 695 school districts in the State, the number of requests for diplomas is expected to be far less than 1 request per school district.

(c) Costs to private regulated parties: None.

(d) Costs to regulating agency for implementation and continued administration of this rule: None.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any additional program, service, duty or responsibility upon any county, city, town, village, school district, fire district or other special district. It merely codifies in the Commissioner's Regulations the existing process for awarding a local high school diploma to veterans pursuant to Education Law section 305(29), (29-a) and (29-b).

Pursuant to the proposed amendment, a school district shall award a local diploma to a candidate who submits documentation that provides evidence of service during World War II (December 7, 1941 through December 31, 1946) or the Korean Conflict (June 27, 1950 through January 31, 1955) or the Vietnam War (May 1, 1961 through April 30, 1975) and receipt of an honorable discharge, and a statement affirming in writing that the candidate is a resident of New York State and does not possess a high school diploma. The next of kin of a deceased veteran may apply for and receive such diploma, on behalf of the deceased, upon submission of the specified documentation, together with a copy of a death certificate for the deceased veteran or other satisfactory proof of death, and satisfactory proof of kinship.

6. PAPERWORK:

The proposed amendment does not impose any additional paperwork requirements on school districts. It merely codifies in the Commissioner's Regulations the existing process for awarding a local high school diploma to veterans pursuant to Education Law section 305(29), (29-a) and (29-b).

7. DUPLICATION:

The proposed amendment is necessary to conform the Commissioner's Regulations to Education Law section 305(29), (29-a) and (29-b) and does not duplicate existing State or federal requirements.

8. ALTERNATIVES:

The proposed amendment is necessary to conform the Commissioner's Regulations to Education Law section 305(29), (29-a) and (29-b) by codifying in the Commissioner's Regulations the existing process for awarding a local high school diploma to veterans pursuant to the statute. There are no significant alternatives to the proposed amendment and none were considered.

9. FEDERAL STANDARDS:

There are no related federal standards in this area.

10. COMPLIANCE SCHEDULE:

Because the proposed amendment merely codifies existing practice in the Commissioner's Regulations, it is anticipated that school districts will be able to achieve compliance with this rule by its effective date.

Regulatory Flexibility Analysis

Small Businesses:

The proposed amendment relates to the award of local high school diplomas to certain veterans of the U.S. Armed Forces, and does not impose any adverse economic impact, reporting, recordkeeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local Governments:

1. EFFECT OF RULE:

The proposed amendment applies to each school district within the State.

2. COMPLIANCE REQUIREMENTS:

The proposed amendment is necessary to conform the Commissioner's Regulations to Education Law section 305(29), (29-a) and (29-b) and does

not impose any additional compliance requirements on school districts. It merely codifies in the Commissioner's Regulations the existing process for awarding a local high school diploma to veterans pursuant to the statute.

Pursuant to the proposed amendment, a school district shall award a local diploma to a candidate who submits documentation that provides evidence of service during World War II (December 7, 1941 through December 31, 1946) or the Korean Conflict (June 27, 1950 through January 31, 1955) or the Vietnam War (May 1, 1961 through April 30, 1975) and receipt of an honorable discharge, and a statement affirming in writing that the candidate is a resident of New York State and does not possess a high school diploma. The next of kin of a deceased veteran may apply for and receive such diploma, on behalf of the deceased, upon submission of the specified documentation, together with a copy of a death certificate for the deceased veteran or other satisfactory proof of death, and satisfactory proof of kinship.

3. PROFESSIONAL SERVICES:

The proposed amendment imposes no additional professional service requirements on school districts.

4. COMPLIANCE COSTS:

The proposed amendment is necessary to conform the Commissioner's Regulations to Education Law section 305(29), (29-a) and (29-b) and will not impose any costs on school districts beyond those inherent in the statute. The proposed amendment merely codifies in the Commissioner's Regulations the existing process for awarding a local high school diploma to veterans pursuant to Education Law section 305(29), (29-a) and (29-b). It is anticipated that any costs associated with issuing local diplomas to veterans will be minimal and capable of being absorbed using existing school district staff and resources. The number of veterans who may request such diploma, by its nature, is very limited. Although the State Education Department does not maintain records of the number of local diplomas issued to veterans under the statute, based upon informal inquiries by veterans received by the Department, it is estimated that no more than 75 to 100 veterans would seek such diploma in a given year. Since there are 695 school districts in the State, the number of requests for diplomas is expected to be far less than 1 request per school district.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any technological requirements or costs on school districts.

6. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to conform the Commissioner's Regulations to Education Law section 305(29), (29-a) and (29-b) and does not impose any additional compliance requirements or costs on school districts beyond those inherent in the statute. It merely codifies in the Commissioner's Regulations the existing process for awarding a local high school diploma to veterans pursuant to the statute.

7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:

Comments on the proposed amendment were solicited from school districts through the offices of the district superintendents of each supervisory district in the State, and from the chief school officers of the five big city school districts.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

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

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

The proposed amendment is necessary to conform the Commissioner's Regulations to Education Law section 305(29), (29-a) and (29-b) and does not impose any additional compliance requirements or professional service requirements on school districts in rural areas beyond those inherent in the statute. It merely codifies in the Commissioner's Regulations the existing process for awarding a local high school diploma to veterans pursuant to the statute.

Pursuant to the proposed amendment, a school district shall award a local diploma to a candidate who submits documentation that provides evidence of service during World War II (December 7, 1941 through December 31, 1946) or the Korean Conflict (June 27, 1950 through January 31, 1955) or the Vietnam War (May 1, 1961 through April 30, 1975) and receipt of an honorable discharge, and a statement affirming in writing that the candidate is a resident of New York State and does not possess a high school diploma. The next of kin of a deceased veteran may apply for and receive such diploma, on behalf of the deceased, upon submission of the specified documentation, together with a copy of a death certificate for the deceased veteran or other satisfactory proof of death, and satisfactory proof of kinship.

3. COMPLIANCE COSTS:

The proposed amendment is necessary to conform the Commissioner's Regulations to Education Law section 305(29), (29-a) and (29-b) and will not impose any costs on school districts beyond those inherent in the statute. The proposed amendment merely codifies in the Commissioner's Regulations the existing process for awarding a local high school diploma to veterans pursuant to Education Law section 305(29), (29-a) and (29-b). It is anticipated that any costs associated with issuing local diplomas to veterans will be minimal and capable of being absorbed using existing school district staff and resources. The number of veterans who may request such diploma, by its nature, is very limited. Although the State Education Department does not maintain records of the number of local diplomas issued to veterans under the statute, based upon informal inquiries by veterans received by the Department, it is estimated that no more than 75 to 100 veterans would seek such diploma in a given year. Since there are 695 school districts in the State, the number of requests for diplomas is expected to be far less than 1 request per school district.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to conform the Commissioner's Regulations to Education Law section 305(29), (29-a) and (29-b) and does not impose any additional compliance requirements or costs on school districts in rural areas beyond those inherent in the statute. It merely codifies in the Commissioner's Regulations the existing process for awarding a local high school diploma to veterans pursuant to the statute.

5. RURAL AREA PARTICIPATION:

Comments on the proposed rule were solicited from the Department's Rural Advisory Committee, whose membership includes school districts located in rural areas.

Job Impact Statement

The proposed amendment relates to the award of local high school diplomas to certain veterans of the U.S. Armed Forces, and will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the proposed amendment that it will have no impact on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

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

Local High School Equivalency Diplomas Based Upon Experimental Programs

I.D. No. EDU-07-12-00010-P

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

Proposed Action: Amendment of section 100.8 of Title 8 NYCRR.

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

Subject: Local high school equivalency diplomas based upon experimental programs.

Purpose: To extend until 6/30/13 the provision for awarding local high school equivalency diplomas based upon experimental programs.

Text of proposed rule: Section 100.8 of the Regulations of the Commissioner of Education is amended, effective May 16, 2012, as follows:

100.8 Local high school equivalency diploma.

Boards of education specified by the commissioner may award a local high school equivalency diploma based upon experimental programs approved by the commissioner until [June 30, 2012] *June 30, 2013*, after which date such boards may no longer award a local high school equivalency 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) 474-8857, email: legal@mail.nysed.gov

Data, views or arguments may be submitted to: Kevin G. Smith, Deputy Commissioner, Office of Adult Career and Continuing Education Services, Room 1606, One Commerce Plaza, Albany, NY 12234, (518) 474-2714

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

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

Education Law section 101 continues the existence of the Educa-

tion Department, with the Board of Regents at its head and the Commissioner of Education as the chief administrative officer, and charges the Department with the general management and supervision of public schools and the educational work of the State.

Education Law section 207 empowers the Board of Regents and the Commissioner to adopt rules and regulations to carry out laws of the State regarding education and the functions and duties conferred on the Department by law.

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.

Education Law section 209 authorizes the Regents to establish secondary school examinations in studies furnishing a suitable standard of graduation and of admission to colleges; to confer certificates or diplomas on students who satisfactorily pass such examinations; and requires the admission to these examinations of any person who shall conform to the rules and pay the fees prescribed by the Regents.

Education Law section 305(1) and (2) provide that the Commissioner, as chief executive officer of the State system of education and of the Board of Regents, shall have general supervision over all schools and institutions subject to the provisions of the Education Law, or of any statute relating to education, and shall execute all educational policies determined by the Board of Regents.

Education Law section 309 charges the Commissioner with the general supervision of boards of education and their management and conduct of all departments of instruction.

Education Law section 3204(3) provides for required courses of study in the public schools and authorizes the State Education Department to alter the subjects of required instruction.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the above statutory authority and is necessary to implement Regents policy to extend for one year the provision in section 100.8 of the Commissioner's Regulations that allows boards of education and BOCES specified by the Commissioner to award a local high school equivalency diploma based upon experimental programs approved by the Commissioner. The existing provision will otherwise sunset on June 30, 2012.

3. NEEDS AND BENEFITS:

The proposed amendment is necessary to implement Regents policy to extend for one year the provision in section 100.8 of the Commissioner's Regulations that allows boards of education and BOCES to award local high school equivalency diplomas based upon experimental programs approved by the Commissioner.

The extension will allow the continuance in New York State of the National External Diploma Program (NEDP), which is a complete assessment program that allows adults over age 21 to demonstrate and document the lasting outcomes and transferable skills for which a high school diploma is awarded. The NEDP is a competency based, applied performance assessment system which capitalizes on an adult's life experiences and uses a practical application of learning for assessment through such methods as simulations, authentic demonstration, research projects, hands-on interviews and oral interviews. An NEDP candidate must demonstrate a job skill and the competencies that align with the skills needed to function effectively in the workplace. All competencies require a 100 percent mastery.

The one year extension will ensure that all current NEDP students in the approximately 18 program sites across the State are provided with an opportunity to complete their programs and earn a local high school equivalency diploma.

4. COSTS:

(a) Costs to State government: None.

(b) Costs to local government: None.

(c) Costs to private regulated parties: None.

(d) Costs to regulating agency for implementation and continued administration of this rule: None.

The proposed amendment will not impose any costs on the State, local governments, private regulated parties or the State Education

Department. It merely extends for one year the existing provision in section 100.8 of the Commissioner's Regulations that allows boards of education and BOCES specified by the Commissioner to award a local high school equivalency diploma based upon experimental programs approved by the Commissioner.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any program, service, duty or responsibility upon any county, city, town, village, school district, fire district or other special district. It merely extends for one year an existing provision related to the issuance of a local high school equivalency diploma.

6. PAPERWORK:

The proposed amendment merely extends for one year an existing provision related to the issuance of a local high school equivalency diploma, and does not impose any additional paperwork requirements.

7. DUPLICATION:

The proposed amendment does not duplicate existing State or federal requirements.

8. ALTERNATIVES:

The proposed amendment is necessary to implement Regents policy to extend for one year the provision in section 100.8 of the Commissioner's Regulations that allows boards of education and BOCES to award local high school equivalency diplomas based upon experimental programs approved by the Commissioner. The existing provision will otherwise sunset on June 30, 2012. There are no significant alternatives to the proposed amendment and none were considered.

9. FEDERAL STANDARDS:

There are no related federal standards in this area.

10. COMPLIANCE SCHEDULE:

Because of the nature of the proposed amendment, which merely extends for one year the existing provision in section 100.8 of the Commissioner's Regulations, it is anticipated that school districts and boards of cooperative educational services will be able to achieve compliance with this rule by its effective date.

Regulatory Flexibility Analysis

Small Businesses:

The proposed amendment merely extends for one year the existing provision in section 100.8 of the Commissioner's Regulations that allows boards of education and boards of cooperative educational services (BOCES) specified by the Commissioner to award a local high school equivalency diploma for adults over age 21, based upon experimental programs approved by the Commissioner, and will not impose any adverse economic impact, reporting, record keeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local Governments:

1. EFFECT OF RULE:

The proposed amendment applies to boards of education and boards of cooperative educational services (BOCES) that are specified by the Commissioner to award a local high school equivalency diploma based upon experimental programs approved by the Commissioner. The proposed amendment will ensure that all current National External Degree Program (NEDP) students in the approximately 18 program sites across the State are provided with an opportunity to complete their programs and earn a local high school equivalency diploma.

2. COMPLIANCE REQUIREMENTS:

The proposed amendment does not impose any new compliance requirements but merely extends for one year the existing provision in section 100.8 of the Commissioner's Regulations that allows boards of education and BOCES specified by the Commissioner to award a local high school equivalency diploma based upon experimental programs approved by the Commissioner.

3. PROFESSIONAL SERVICES:

The proposed amendment does not impose any additional professional services requirements.

4. COMPLIANCE COSTS:

The proposed amendment will not impose any costs on local governments. It merely extends for one year the existing provision in section 100.8 of the Commissioner's Regulations that allows boards of education and BOCES specified by the Commissioner to award a local high school equivalency diploma based upon experimental programs approved by the Commissioner.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

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

6. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to implement policy enacted by the Board of Regents. The proposed amendment does not impose any new compliance requirements or costs on local governments, but merely extends the existing provision in section 100.8 of the Commissioner's Regulations that allows boards of education and BOCES to award local high school equivalency diplomas based upon experimental programs approved by the Commissioner.

7. LOCAL GOVERNMENT PARTICIPATION:

Comments on the proposed amendment were solicited from school districts through the offices of the district superintendents of each supervisory district in the State.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment applies to all school districts and boards of cooperative educational services (BOCES) that are specified by the Commissioner to award a local high school equivalency diploma based upon experimental programs approved by the Commissioner, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less. The proposed amendment will ensure that all current National External Degree Program (NEDP) students in the approximately 18 program sites across the State are provided with an opportunity to complete their programs and earn a local high school equivalency diploma. Of these 18 sites, 10 are in rural areas.

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

The proposed amendment does not impose any new compliance requirements on rural areas but merely extends for one year the existing provision in section 100.8 of the Commissioner's Regulations that allows boards of education and BOCES specified by the Commissioner to award a local high school equivalency diploma based upon experimental programs approved by the Commissioner. The proposed amendment does not impose any additional professional services requirements.

3. COMPLIANCE COSTS:

The proposed amendment will not impose any costs on rural areas. It merely extends for one year the existing provision in section 100.8 of the Commissioner's Regulations that allows boards of education and BOCES specified by the Commissioner to award a local high school equivalency diploma based upon experimental programs approved by the Commissioner.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to implement policy enacted by the Board of Regents. The proposed amendment does not impose any new compliance requirements on rural areas, but merely extends the existing provision in section 100.8 of the Commissioner's Regulations that allows boards of education and BOCES to award local high school equivalency diplomas based upon experimental programs approved by the Commissioner.

5. RURAL AREA PARTICIPATION:

Comments on the proposed amendment were solicited from the Department's Rural Advisory Committee, whose membership includes school districts located in rural areas.

Job Impact Statement

The proposed amendment merely extends for one year the existing provision in section 100.8 of the Commissioner's Regulations that allows

boards of education specified by the Commissioner to award a local high school equivalency diploma based upon experimental programs approved by the Commissioner, and will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the proposed amendment that it will have no impact on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Policy and Guidelines Prohibiting Discrimination and Harassment of Students

I.D. No. EDU-07-12-00011-P

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

Proposed Action: Addition of section 100.2(jj) to Title 8 NYCRR.

Statutory authority: Education Law, sections 11(1)-(7), 12(1) and (2), 13(1)-(3), 14(1)-(3), 101 (not subdivided), 207 (not subdivided), 305(1), (2) and 2854(1)(b); and L. 2010, ch. 482

Subject: Policy and guidelines prohibiting discrimination and harassment of students.

Purpose: To establish criteria for issuance of policy and guidelines relating to the Dignity for All Students Act (ch. 482, L. 2010).

Text of proposed rule: Subdivision (jj) of section 100.2 of the Regulations of the Commissioner of Education is added, effective July 1, 2012, as follows:

(jj) *Dignity For All Students School Employee Training Program.*

(1) *Definitions. As used in this subdivision:*

(i) *School employee means an employee as defined in subdivision 3 of section 1125 of the Education Law, or an employee of a charter school.*

(ii) *School property means in or within any building, structure, athletic playing field, playground, parking lot or land contained within the real property boundary line of a public elementary or secondary school, including a charter school; or in or on a school bus, as defined in section 142 of the Vehicle and Traffic Law; or at a school function.*

(iii) *School function means a school-sponsored extracurricular event or activity.*

(iv) *Discrimination and harassment means an intentional act against any student, by employees or students on school property or at a school function, that creates a hostile environment by conduct, with or without physical contact and/or by verbal threats, intimidation or abuse, of such a severe nature that:*

(a) *has or would have the effect of unreasonably and substantially interfering with a student's educational performance, opportunities or benefits, or mental, emotional and/or physical well-being; or*

(b) *reasonably causes or would reasonably be expected to cause a student to fear for his or her physical safety.*

Such conduct shall include, but is not limited to, threats, intimidation, or abuse based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender or sex; provided that nothing in this subdivision shall be construed to prohibit a denial of admission into, or exclusion from, a course of instruction based on a person's gender that would be permissible under Education Law sections 3201-a or 2854(2)(a) and Title IX of the Education Amendments of 1972 (20 U.S.C. section 1681, et seq.), or to prohibit, as discrimination based on disability, actions that would be permissible under section 504 of the Rehabilitation Act of 1973.

(v) *Disability means a disability as defined in subdivision 21 of section 292 of the Executive Law.*

(vi) *Sexual orientation means actual or perceived heterosexuality, homosexuality or bisexuality.*

(vii) *Gender means actual or perceived sex and shall include a person's gender identity or expression.*

(2) *On or before July 1, 2012, each school district and each charter school shall establish guidelines for its school or schools to implement, commencing with the 2012-2013 school year and continuing in each school year thereafter, Dignity for All Students school employee training programs to promote a positive school environment that is free from discrimination and harassment; and to discourage and respond to incidents of discrimination and/or harassment on school property or at a school function. Such guidelines shall be approved by the board of education, trustees or sole trustee of the school district (or by the chancellor of the city school district, in the case of the City School District of the City of New York) or by the board of trustees of the charter school.*

(3) *The guidelines shall include, but not be limited to, providing employees, including school and district administrators, with:*

(i) *training to raise awareness and sensitivity to potential acts of discrimination or harassment directed at students that are committed by students or school employees on school property or at school functions; including, but not limited to, discrimination or harassment based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practices, disability, sexual orientation, gender identity or sex;*

(ii) *training to enable employees to prevent and respond to incidents of harassment and discrimination;*

(iii) *training which may be implemented and conducted in conjunction with existing professional development training pursuant to subparagraph 100.2(dd)(2)(ii) of this Title and/or with any other training for school employees.*

(4) *At least one employee in every school shall be designated as a Dignity Act Coordinator and instructed in the provisions of this subdivision and thoroughly trained in methods to respond to human relations in the areas of race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender and sex.*

(i) *The designation of each Dignity Act Coordinator shall be approved by the board of education, trustees or sole trustee of the school district (or in the case of the City School District of the City of New York, by the principal of the school in which the designated employee is employed) or, in the case of a charter school, by the board of trustees.*

(ii) *The name(s) and contact information for the Dignity Act Coordinator(s) shall be shared with all school personnel, students, and persons in parental relation.*

(iii) *In the event a Dignity Act Coordinator vacates his or her position, another school employee shall be immediately designated for an interim appointment as Coordinator, pending approval of a successor Coordinator by the applicable governing body as set forth in subparagraph (i) of this paragraph within 30 days of the date the position was vacated. In the event a Coordinator is unable to perform the duties of his or her position for an extended period of time, another school employee shall be immediately designated for an interim appointment as Coordinator, pending return of the previous Coordinator to his or her duties as Coordinator.*

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) 474-8857, email: legal@mail.nysed.gov

Data, views or arguments may be submitted to: Ken Slentz, Deputy Commissioner P-12 Education, State Education Department, State Education Building, 2M West, 89 Washington Ave., Albany, NY 12234, (518) 474-5520, email: NYSEDP12@mail.nysed.gov

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

Education Law section 11, as added by section 2 of Chapter 482 of the Laws of 2010 (Dignity for All Students Act - "Dignity Act"), establishes definitions for purposes of the new Article 2 of the Education Law added by such statute.

Education Law section 12(1), as added by section 2 of the Dignity Act, prohibits discrimination and harassment of students by students and school employees on school property or at school functions, on the basis of the student's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender, or sex. Section 12(2) provides that an age-appropriate version of the policy outlined in section 12(1), written in plain-language, shall be included in the code of conduct adopted pursuant to Education Law section 2801 and a summary of such policy shall be included in any summaries required by such section 2801.

Education Law section 13 requires school districts to create policies to create a school environment that is free from discrimination and harassment, and create guidelines to be used in school training programs to discourage the development of discrimination or harassment, raise the awareness and sensitivity of employees to potential discrimination or harassment, and enable employees to prevent and respond to discrimination or harassment and guidelines relating to the development of nondiscriminatory instructional and counseling methods, and guidelines relating to nondiscriminatory instructional and counseling methods. The statute also requires that at least one staff member at every school be thoroughly trained to handle human relations in the areas of race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender and sex.

Education Law section 14 requires the Commissioner to provide direction, including model policies and, to the extent possible, direct services to

school districts in preventing discrimination and harassment and fostering an environment in every school where all children can learn free of manifestations of bias. Section 14(3) authorizes the Commissioner to promulgate regulations to assist school districts in implementing Article 2 of the Education Law.

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

Education Law section 207 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 305(1) empowers the Commissioner of Education to be the chief executive officer of the State system of education and the Board of Regents and authorizes the Commissioner to enforce laws relating to the educational system and to execute educational policies determined by the Board of Regents. Education Law section 305(2) authorizes the Commissioner to have general supervision over all schools subject to the Education Law.

Education Law section 2854(1)(b) provides that charter schools shall meet the same health and safety, civil rights, and student assessment requirements applicable to other public schools, except as otherwise specifically provided in Article 56 of the Education Law.

Chapter 482 of the Laws of 2010 added a new Article 2 to the Education Law, relating to Dignity for All Students. Section 13 of Article 2 of the Education Law requires school districts to create:

(i) policies to create a school environment free from discrimination and harassment;

(ii) guidelines to be used in school training programs to discourage the development of discrimination or harassment and that are designed to raise awareness and sensitivity of school employees to potential discrimination or harassment and enable employees to prevent and respond to discrimination or harassment; and

(iii) guidelines relating to the development of nondiscriminatory instructional and counseling methods, and requiring that at least one staff member of every school be thoroughly trained to handle human relations in the areas of race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender and sex.

2. LEGISLATIVE OBJECTIVES:

Consistent with the above statutory authority, the proposed rule will implement section 13 of Article 2 of the Education Law, as added by section 2 of Chapter 482 of the Laws of 2010.

3. NEEDS AND BENEFITS:

The proposed rule is necessary to implement provisions of the Dignity Act The statute added a new Article 2 to the Education Law and new section 13 of Article 2 requires school districts to create:

(i) policies to create a school environment free from discrimination and harassment;

(ii) guidelines to be used in school training programs to discourage the development of discrimination or harassment and that are designed to raise awareness and sensitivity of school employees to potential discrimination or harassment and enable employees to prevent and respond to discrimination or harassment; and

(iii) guidelines relating to the development of nondiscriminatory instructional and counseling methods, and requiring that at least one staff member of every school be thoroughly trained to handle human relations in the areas of race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender and sex.

The proposed rule establishes standards and criteria for the issuance of such policies and guidelines.

4. COSTS:

(a) Costs to State government: None.

(b) Costs to local government: None. The proposed rule is necessary to conform the Commissioner's Regulations with the Dignity Act and will not impose any additional costs on school districts and BOCES beyond those imposed by the statute. The proposed rule has been carefully drafted to meet statutory requirements and Regents policy while minimizing the impact on school districts and BOCES. Where possible, the proposed rule has incorporated existing requirements and eliminated redundant requirements to minimize work at the local level and have emphasized local flexibility in meeting statutory requirements.

(c) Costs to private regulated parties: None. The proposed rule applies to public school districts and BOCES and therefore does not fiscally impact private parties in any way.

(d) Costs to regulating agency for implementation and continued administration of this rule: None.

5. LOCAL GOVERNMENT MANDATES:

The proposed rule is necessary to conform the Commissioner's Regulations with the Dignity Act and will not impose any additional program, service, duty or responsibility beyond those by the statute.

Consistent with Education Law section 2801 and section 13 of Article 2, as respectively amended and added by Chapter 482 of the Laws of 2010, the proposed rule requires each school district, BOCES and charter school to create guidelines to provide:

- On or before July 1, 2012, for schools to implement school employee training programs, commencing with the 2012 -13 school year and thereafter, to promote a positive school environment that is free from discrimination and harassment and to discourage and respond to incidents of discrimination and/or harassment on school property or at a school function. Employee training guidelines shall be developed in collaboration with key stakeholders within the district and shall be approved by the board of education, or other governing body, or by the chancellor of the city school district in the case of the City School District of the City of New York;

- Training for employees, including school and district administrators:

(i) to raise awareness and understanding of the school district's Code of Conduct pursuant to section 100.2(l) of this Title;

(ii) to raise awareness and sensitivity to potential acts of discrimination or harassment directed at students that are committed by students or school employees on school property or at school functions; including, but not limited to, discrimination or harassment based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practices, disability, sexual orientation, gender identity or sex; and

(iii) to enable employees to prevent and respond to incidents of harassment and discrimination.

Training and/or refresher training are to be conducted as needed, and may be implemented and conducted in conjunction with existing professional development training pursuant to 100.2(dd)(2)(ii) of this Title and/or with any other training for school employees.

- Development of nondiscriminatory instructional and counseling methods for instructional employees and for other employees with direct student mental and/or physical health interaction, including but not limited to therapists, medical personnel, and counselors;
- At least one employee in every school shall be designated as a Dignity Act Coordinator and instructed in the provisions of the proposed rule and thoroughly trained in methods to respond to human relations in the areas of race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender and sex.

(i) The designation of each Dignity Act Coordinator shall be approved by the board of education, trustees or sole trustee of the school district (or in the case of the City School District of the City of New York, by the principal of the school in which the designated employee is employed) and, in the case of a charter school, by the board of trustees.

(ii) The name(s) and contact information for the Dignity Act Coordinator(s) shall be shared with all school personnel, students, and persons in parental relation.

(iii) In the event a Dignity Act Coordinator vacates his or her position, another school employee shall be immediately designated for an interim appointment as Coordinator, pending approval of a successor Coordinator by the applicable governing body within 30 days of the date the position was vacated. In the event a Coordinator is unable to perform the duties of his or her position for an extended period of time, another school employee shall be immediately designated for an interim appointment as Coordinator, pending return of the previous Coordinator to his or her duties as Coordinator.

6. PAPERWORK:

Consistent with Education Law section 2801 and section 13 of Article 2, as respectively amended and added by Chapter 482 of the Laws of 2010, the proposed rule requires each school district, BOCES and charter school to create guidelines to provide, on or before July 1, 2012, for schools to implement school employee training programs, commencing with the 2012 -13 school year and thereafter, to promote a positive school environment that is free from discrimination and harassment and to discourage and respond to incidents of discrimination and/or harassment on school property or at a school function. Employee training guidelines shall be developed in collaboration with key stakeholders within the district and shall be approved by the board of education, or other governing body, or by the chancellor of the city school district in the case of the City School District of the City of New York.

7. DUPLICATION:

The proposed rule does not duplicate existing State or Federal regulations, and is necessary to implement Chapter 482 of the Laws of 2010.

8. ALTERNATIVES:

The proposed rule is necessary to implement provisions of the Dignity Act to establish standards and criteria for the issuance of policies and guidelines regarding student harassment and discrimination, to ensure compliance with the new Article 2 of the Education Law, as added by the Dignity Act. There are no viable alternatives and none were considered.

9. FEDERAL STANDARDS:

There are no related Federal standards.

10. COMPLIANCE SCHEDULE:

The proposed rule is necessary to conform the Commissioner's Regulations with the Dignity Act and will not impose any additional compliance requirements or costs on regulated parties beyond those imposed by the statute. It is anticipated that regulated parties will be able to achieve compliance with proposed rule by its effective date.

Regulatory Flexibility Analysis

Small Businesses:

The proposed rule applies to school districts, boards of cooperative educational services (BOCES) and charter schools and relates to school employee training under the Dignity for All Students Act ("Dignity Act", L. 2010, Ch. 482). The proposed rule 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 rule that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local Governments:

1. EFFECT OF RULE:

The proposed rule applies to each school district, BOCES and charter school in the State. At present, there are 695 school districts (including New York City), 37 BOCES and approximately 190 charter schools.

2. COMPLIANCE REQUIREMENTS:

The proposed rule is necessary to conform the Commissioner's Regulations with the Dignity Act and will not impose any additional program, service, duty or responsibility beyond those by the statute.

Consistent with Education Law section 2801 and section 13 of Article 2, as respectively amended and added by Chapter 482 of the Laws of 2010, the proposed rule requires each school district, BOCES and charter school to create guidelines to provide:

- On or before July 1, 2012, for schools to implement school employee training programs, commencing with the 2012 -13 school year and thereafter, to promote a positive school environment that is free from discrimination and harassment and to discourage and respond to incidents of discrimination and/or harassment on school property or at a school function. Employee training guidelines shall be developed in collaboration with key stakeholders within the district and shall be approved by the board of education of the school district (or by the chancellor of the city school district in the case of the City School District of the City of New York) and by the board of trustees of the charter school;
- Training for employees, including school and district administrators:

(i) to raise awareness and understanding of the school district's Code of Conduct pursuant to section 100.2(l) of this Title or, in the case of a charter school, the school's disciplinary rules and procedures pursuant to Education Law section 2851(2)(h) or, if applicable, the charter school's code of conduct;

(ii) to raise awareness and sensitivity to potential acts of discrimination or harassment directed at students that are committed by students or school employees on school property or at school functions; including, but not limited to, discrimination or harassment based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practices, disability, sexual orientation, gender identity or sex; and

(iii) to enable employees to prevent and respond to incidents of harassment and discrimination.

Training and/or refresher training are to be conducted as needed, and may be implemented and conducted in conjunction with existing professional development training pursuant to 100.2(dd)(2)(ii) of this Title and/or with any other training for school employees.

- Development of nondiscriminatory instructional and counseling methods for instructional employees and for other employees with direct student mental and/or physical health interaction, including but not limited to therapists, medical personnel, and counselors;
- At least one employee in every school shall be designated as a Dignity Act Coordinator and instructed in the provisions of the proposed rule and thoroughly trained in methods to respond to human relations in the areas of race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender and sex.

(i) The designation of each Dignity Act Coordinator shall be approved by the board of education, trustees or sole trustee of the school district (or in the case of the City School District of the City of New York, by the principal of the school in which the designated employee is employed) and, in the case of a charter school, by the board of trustees.

(ii) The name(s) and contact information for the Dignity Act Coordinator(s) shall be shared with all school personnel, students, and persons in parental relation.

(iii) In the event a Dignity Act Coordinator vacates his or her position, another school employee shall be immediately designated for an interim appointment as Coordinator, pending approval of a successor Coordinator by the applicable governing body within 30 days of the date the position was vacated. In the event a Coordinator is unable to perform the duties of his or her position for an extended period of time, another school employee shall be immediately designated for an interim appointment as Coordinator, pending return of the previous Coordinator to his or her duties as Coordinator.

3. PROFESSIONAL SERVICES:

The proposed rule will not impose any additional professional services requirements.

4. COMPLIANCE COSTS:

The proposed rule is necessary to conform the Commissioner's Regulations with the Dignity Act and will not impose any additional costs beyond those imposed by the statute.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

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

6. MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to conform the Commissioner's Regulations with the Dignity Act and will not impose any additional compliance requirements or costs on school districts and BOCES beyond those imposed by the statute. Because these statutory requirements specifically apply to school districts and BOCES it is not possible to exempt them from the proposed rule's requirements or impose a lesser standard. The proposed rule has been carefully drafted to meet statutory requirements and Regents policy while minimizing the impact on school districts and BOCES. Where possible, the regulations have incorporated existing requirements and eliminated redundant requirements to minimize work at the local level and have emphasized local flexibility in meeting statutory requirements. For example, the proposed rule provides that training and/or refresher training may be implemented and conducted in conjunction with existing professional development training and/or with any other training for school employees.

7. LOCAL GOVERNMENT PARTICIPATION:

The proposed rule was developed in cooperation with the Dignity Act Task Force State Policy Work Group which is comprised of other State agencies, the New York City Department of Education, and several not-for-profit organizations. Comments on the proposed rule were solicited from school districts through the offices of the district superintendents of each supervisory district in the State.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed rule applies to all school districts and boards of cooperative educational services (BOCES) in the State, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less. The proposed rule also applies to charter schools. At present, there is one charter school in a rural area.

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

The proposed rule is necessary to conform the Commissioner's Regulations with the Dignity for All Students Act ("Dignity Act", L. 2010, Ch. 482) and will not impose any additional program, service, duty or responsibility beyond those by the statute.

Consistent with Education Law section 2801 and section 13 of Article 2, as respectively amended and added by Chapter 482 of the Laws of 2010, the proposed rule requires each school district, BOCES and charter school to create guidelines to provide:

- On or before July 1, 2012, for schools to implement school employee training programs, commencing with the 2012 -13 school year and thereafter, to promote a positive school environment that is free from discrimination and harassment and to discourage and respond to incidents of discrimination and/or harassment on school property or at a school function. Employee training guidelines shall be approved by the board of education of the school district (or by the chancellor of the city school district in the case of the City School District of the City of New York) and by the board of trustees of the charter school;
- Training for employees, including school and district administrators:
 - (i) to raise awareness and understanding of the school district's Code of Conduct pursuant to section 100.2(l) of this Title or, in the case of a charter school, the school's disciplinary rules and procedures pursuant to Education Law section 2851(2)(h) or, if applicable, the charter school's code of conduct;
 - (ii) to raise awareness and sensitivity to potential acts of discrimination or harassment directed at students that are committed by students or school employees on school property or at school functions; including, but not limited to, discrimination or harassment based on a person's actual or

perceived race, color, weight, national origin, ethnic group, religion, religious practices, disability, sexual orientation, gender identity or sex; and

(iii) to enable employees to prevent and respond to incidents of harassment and discrimination.

Training and/or refresher training are to be conducted as needed, and may be implemented and conducted in conjunction with existing professional development training pursuant to 100.2(dd)(2)(ii) of this Title and/or with any other training for school employees.

- Development of nondiscriminatory instructional and counseling methods for instructional employees and for other employees with direct student mental and/or physical health interaction, including but not limited to therapists, medical personnel, and counselors;
- At least one employee in every school shall be designated as a Dignity Act Coordinator and instructed in the provisions of the proposed rule and thoroughly trained in methods to respond to human relations in the areas of race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender and sex.

(i) The designation of each Dignity Act Coordinator shall be approved by the board of education, trustees or sole trustee of the school district (or in the case of the City School District of the City of New York, by the principal of the school in which the designated employee is employed) and, in the case of a charter school, by the board of trustees.

(ii) The name(s) and contact information for the Dignity Act Coordinator(s) shall be shared with all school personnel, students, and persons in parental relation.

(iii) In the event a Dignity Act Coordinator vacates his or her position, another school employee shall be immediately designated for an interim appointment as Coordinator, pending approval of a successor Coordinator by the applicable governing body within 30 days of the date the position was vacated. In the event a Coordinator is unable to perform the duties of his or her position for an extended period of time, another school employee shall be immediately designated for an interim appointment as Coordinator, pending return of the previous Coordinator to his or her duties as Coordinator.

3. COSTS:

The proposed rule is necessary to conform the Commissioner's Regulations with the Dignity Act and will not impose any additional costs on school districts, BOCES and charter schools in rural areas beyond those imposed by the statute.

4. MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to conform the Commissioner's Regulations with the Dignity Act and will not impose any additional compliance requirements or costs beyond those imposed by the statute. The proposed rule has been carefully drafted to meet statutory requirements and Regents policy while minimizing the impact on school districts, BOCES and charter schools. Where possible, the regulations have incorporated existing requirements and eliminated redundant requirements to minimize work at the local level and have emphasized local flexibility in meeting statutory requirements. For example, the proposed rule provides that training and/or refresher training may be implemented and conducted in conjunction with existing professional development training and/or with any other training for school employees. The statute which the proposed rule implements applies to all school districts, BOCES and charter schools throughout the State, including those in rural areas. Therefore, it was not possible to establish different requirements for entities in rural areas, or to exempt them from the rule's provisions.

5. RURAL AREA PARTICIPATION:

Comments on the proposed rule were solicited from the Department's Rural Advisory Committee, whose membership includes school districts located in rural areas. The proposed amendments were developed in cooperation with the Dignity Act Task Force State Policy Work Group which is comprised of other State agencies, the New York City Department of Education, and several not-for-profit organizations.

Job Impact Statement

The proposed rule relates to school employee training under the Dignity for All Students Act (L. 2010, Ch. 482). The proposed amendment will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the proposed amendment that it will have a positive impact, or no impact, on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Department of Environmental Conservation

NOTICE OF ADOPTION

Model Environmental Assessment Forms

I.D. No. ENV-47-10-00015-A

Filing No. 56

Filing Date: 2012-01-25

Effective Date: 2012-10-01

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

Action taken: Amendment of section 617.20 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, section 8-0113(2)(1)

Subject: Model environmental assessment forms.

Purpose: To provide model forms that may be used to conduct environmental assessments under the State Environmental Quality Review Act.

Substance of final rule: The environmental assessment forms ("EAF") are model forms promulgated by the Department of Environmental Conservation ("DEC") and appended to the State Environmental Quality Review Act ("SEQR") regulations as required by the SEQR (see ECL § 8-0113). The EAFs are used by agencies and boards involved in the SEQR process to assess the environmental significance of actions they may be undertaking, funding or approving. The "Full EAF" has not been substantially revised since 1978 while its sister form, the "Short EAF," was last substantially revised in 1987. In the years since the EAFs were first created, DEC and other SEQR practitioners have gathered a great deal of experience with environmental analyses under SEQR. DEC has brought this experience to bear by preparing modern Full and Short EAFs. The forms, which replace the existing ones set out at 6 NYCRR 617.20, appendices A, B, and C, now include consideration of emerging environmental issues such as climate change. The revised EAFs have been changed to better address planning, policy and local legislative actions, which can have greater impacts on the environment than individual physical changes.

In addition to these substantive changes, the structure of the forms has been updated, to make them more straightforward to use. DEC has merged the substance of the Visual EAF Addendum (6 NYCRR 617.20, former Appendix B) into the Full EAF and then eliminated the Visual EAF Addendum. This will help reduce the multiplicity of forms. The determination of significance has been merged into Part 3 of the forms. Part 2 of the Short Form has been conformed to the structure of Part 2 of the Full EAF.

Both forms have been reworked and modified in response to public comment. The forms as adopted are available on the DEC's website at the following address: <http://www.dec.ny.gov/permits/6061.html>. The effective date of the new forms is October 1, 2012.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 617.20.

Revised rule making(s) were previously published in the State Register on November 24, 2010.

Text of rule and any required statements and analyses may be obtained from: Robert Ewing, Department of Environmental Conservation, DEP, 625 Broadway, Albany, New York 12233, (518) 402-9167, email: depprmt@gw.dec.state.ny.us

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

Revised regulatory impact and flexibility analyses are required when a rule as adopted includes a substantial change from the rule as proposed and the change requires modification of the statements. A revised regulatory impact statement and flexibility analyses are not required here as the information presented in the previously filed statements are adequate and complete as to the environmental assessment forms as revised through the public comment process. The forms do not contain any substantial revisions and the revisions do not necessitate that such statement be modified. Revisions to the forms were made based on public comments. The changes substantially reduced the length and complexity of completing the forms.

The changes reduced rather than increased any regulatory burden as follows:

DEC reduced the length of Part I of the Full EAF by, among other ways, eliminating DEC centric and redundant questions (except where they are fundamental to environmental analysis).

DEC reduced the complexity of questions that would require even a more sophisticated applicant to hire a consultant to answer the question such as on traffic impacts.

Under the revised forms, lead agencies will not have to discuss small impacts in Part 3 (which was not the intent) by reinserting an improved table into Part 2 of the Full EAF that allows the project sponsor to categorize impacts as "no, or small impact" or "moderate to large impact." If an impact is judged to be not present or small, no further analysis is required. If the lead agency determines that an impact may be moderate to large, then it must explain the impact as being not significant or significant in Part 3. The new table strikes a balance that allows lead agencies to dismiss small impacts and ones that should require a more detailed explanation as to why they are or are not significant. The Short EAF has been conformed to the Full EAF so both forms have the same method of analysis.

Revised Job Impact Statement

No change is made to the following statement that appeared in the State Register on November 24, 2010, in connection with the revised environmental assessment forms. The updating of the State Environmental Quality Review Act (SEQR) environmental assessment forms (EAF) should have no impact on existing or future jobs and employment opportunities. EAFs are expected to be completed in part by project sponsors and ultimately by lead agencies to determine whether a particular action may have a potentially significant, adverse impact on the environment. If the lead agency answers in the affirmative, then it must prepare or cause to be prepared an environmental impact statement the purpose of which is to evaluate the identified impacts and how to avoid or mitigate them. Local governments using EAFs or businesses who may fill in portions of the forms would be required to continue to do this, whether DEC revises the forms or continues to use the existing forms. While there may be a small increase in time to complete the new EAFs, this time should be offset by the decrease in time that is now spent in back-and-forth discussions or correspondence between project sponsors and governmental agencies to answer additional questions and clarify points that a new, more comprehensive EAF would include from the beginning. DEC also expects to make greater use of electronic information technologies with the new forms which may help to hasten the information gathering process, which is the object of the forms. DEC proposes to merge the substance of the Visual EAF Addendum (6 NYCRR 617.20, Appendix B) into the full EAF (6 NYCRR 617.20, Appendix A), and then eliminate the Visual EAF form. This will help reduce the multiplicity of forms.

A Job Impact Statement is not submitted with this rulemaking proposal because the proposal will not have a "substantial adverse impact on jobs or employment opportunities," which is defined in the State Administrative Procedure Act Section 201-a to mean "a decrease of more than one hundred full-time annual jobs and employment opportunities, including opportunities for self-employment, in the state, or the equivalent in part-time or seasonal employment, which would be otherwise available to the residents of the state in the two-year period commencing on the date the rule takes effect." The proposed changes to the EAFs are not expected to have any such effect and most likely will have no impact on jobs or employment opportunities.

Assessment of Public Comment

(Full responsiveness documents will be posted on the Department of Environmental Conservation's website at the following address: <http://www.dec.ny.gov/permits/70293.html>.)

The Department (DEC) received about 70 comments on the forms - many of which were highly detailed. Comments were both favorable and unfavorable. Criticism centered on 1) the length of the Full EAF, 2) that some of the questions were too DEC centric (too parochial to DEC's jurisdictions), 3) that in some cases the DEC was asking for a too detailed level of analysis and information at the point in the project review process when EAFs are normally completed, 4) the elimination of the table in Part 2 of the Full EAF that enabled the lead agency

to categorize impacts according to whether they are small to moderate, potentially large, or can be mitigated by project changes, and 5) the information needed to answer the questions would be difficult for project sponsors and municipalities to find without the use of consulting services. In response to these criticisms, DEC made the following changes to the EAFs:

DEC reduced the length of Part I of the Full EAF by, among other ways, eliminating DEC centric and redundant questions.

DEC responded to the criticism that it was seeking a too detailed level of analysis at the EAF stage by eliminating questions that would require even a more sophisticated applicant to hire a consultant to answer the questions. Lead agencies still have the flexibility to seek more information where traffic may be a significant issue.

DEC reinserted an improved table into Part 2 of the Full EAF that allows the project sponsor to categorize impacts as "no, or small impact" or "moderate to large impact." If an impact is judged to be not present or small, no further analysis is required. If the lead agency determines that an impact may be moderate to large, then it must explain the impact as being not significant or significant in Part 3. The new table strikes a balance that allows lead agencies to dismiss impacts that are small and ones that should require a more detailed explanation as to why they are or are not significant. The Short EAF has been conformed to the Full EAF so both forms have the same method of analysis.

DEC has prepared a summary of public comments and responses to comments, which is available on its website at the following address: <http://www.dec.ny.gov/permits/6061.html>.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Sportfish Activities and Associated Activities

I.D. No. ENV-07-12-00005-P

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

Proposed Action: Amendment of sections 10.2, 10.3, 10.5, 10.6, 10.8 and 35.2 of Title 6 NYCRR. This rule is proposed pursuant to SAPA § 207(3), 5-Year Review of Existing Rules.

Statutory authority: Environmental Conservation Law, sections 3-0301, 11-0303, 11-0305, 11-0317, 11-1301, 11-1303, 11-1316 and 11-1319

Subject: Sportfish activities and associated activities.

Purpose: To revise sportfishing regulations and associated activities including snakeheads caught by angling and commercial bait collection.

Substance of proposed rule (Full text is posted at the following State website: www.dec.ny.gov): The purpose of this rule making is to amend the Department of Environmental Conservation's (department) general regulations governing sportfishing (6 NYCRR Part 10) and associated (6 NYCRR Part 35) regulations governing Commercial Inland Fisheries. Following biennial review of the department's fishing regulations, department staff have determined that the proposed amendments are necessary to maintain or improve the quality of the State's fisheries resources. Changes to sportfishing regulations are intended to promote optimum opportunity for public use consistent with resource conservation.

The following is a summary of the amendments that the department is proposing:

Establish a special walleye regulation of 18 inches minimum size and daily limit of 3/day in Lake Pleasant and Sacandaga Lake, Hamilton County, to aid restoration of the walleye population.

Prohibit fishing in the following stream sections from March 16 until the first Saturday in May (opening day for walleye) to protect spawning walleye: Lake Pleasant outlet to the mouth of the Kunjamuk River, Hamilton County; Little Sandy Creek, Oswego County, from the intersection of the channelized area located adjacent to Koster Drive downstream of the State Rt. 3 bridge to the lower boundary of the public fishing rights section located upstream of the State Rt. 3 bridge; and Catskill Creek, Greene County, from the Route 9W bridge upstream to the dam in Leeds.

Remove special walleye regulations (18 inch minimum size and daily limit of 3/day) and apply the statewide regulation (15 inch minimum size and 5/day) for Lime Lake, Cattaraugus County; and Bear and Findley lakes, Chautauqua County because these populations no longer require the added protection.

Change the walleye daily limit for Lake Erie and the Upper Niagara River to 6 per day to harmonize limits with bordering jurisdictions.

Eliminate the special black bass closed season for Oneida Lake and implement statewide regulations to create additional fishing opportunity and expand statewide consistency.

Apply statewide black bass regulations for Allen Lake, Allegany County, and Cassadaga lakes, Chautauqua County as recent surveys have shown stable bass populations in these waters.

Extend the catch and release only regulation for brook trout into tidal streams in Suffolk County to provide additional protection to saltier brook trout populations.

Eliminate Suffolk County tidal trout regulations and apply freshwater stream trout regulations to these sections because the anticipated sea run brown trout fishery did not develop.

Change minimum length for salmonids in the Upper Niagara River to any size because it is not necessary that this section be in sync with the current 12 inch minimum length requirement for Lake Erie, plus this change provides for the allowable harvest of salmonids (any size) below the first impassable barrier of the River. By this elimination, the regulations are simplified and the harvest of newly stocked trout that are part of an urban put and take fishery (located below the first impassable barrier) is allowed for.

Change the trout regulations for the Titicus Outlet, Westchester County, and Esopus Creek, Shandaken tunnel outlet to Ashokan Reservoir, Ulster County, to a daily limit of 5 fish with no more than 2 trout longer than 12 inches to increase catch rates of trout.

Delete the 12 inch size and daily limit of 3 fish/day for kokanee in Glass Lake, Rensselaer County because DEC no longer stocks this species.

Open Lake Kushaqua and Rollins Pond, Franklin County, to ice fishing for lake trout as these stocked populations are considered stable enough to support this activity.

Restore all year trout fishing in Saranac River from the Lake Flower Dam in the Village of Saranac Lake to the Pine Street bridge, as this regulation was mistakenly omitted in 2010.

Open Blue Mountain Lake, Eagle Lake, Forked Lake, Gilman Lake, South Pond and Utowana Lake, Hamilton County, to ice fishing for landlocked salmon and reduce the daily limit for lake trout in these waters from 3/day to 2/day. Combined with an existing regulation, this change will create a suite of nine lakes in Hamilton County that will have the same ice fishing regulations for lake trout and landlocked salmon.

Delete the catch and release trout regulation for Jordan River from Carry Falls Reservoir upstream to Franklin County line, St. Lawrence County, because this regulation is considered inappropriate for this remote stream section.

Implement a 12 inch minimum size for brown trout in Otisco Lake to provide additional opportunity for angler harvest.

Reduce the creel limit of rainbow trout from 5 to 1 in the western Finger Lakes and from 3 to 1 in the tributaries to provide further protection for this species. Western Finger Lakes include Seneca, Keuka, Canandaigua, Canadice, and Hemlock Lakes.

Remove the restriction of no more than 3 lake trout per day as part of the 5 trout creel limit in the western Finger Lakes to reduce competition with other trout species and impacts on the forage base.

Eliminate the current trout catch and release section for Ischua Creek, Cattaraugus County, to enhance angling opportunities by allowing beginner and young anglers to use the section of stream located in the Village of Franklinville, including to keep caught trout.

Change the minimum size limit for rainbow trout in Skaneateles and Owasco lakes from 9 inches to 15 inches, creating consistency with the other Finger Lakes.

Include the tributaries to the current fishing closure of Beaverdam Brook, from their mouths to the upstream boundary of the Salmon River Hatchery property, or within 100 yards of any department fish collection device. This would make oversight and enforcement of this area more effective.

Institute a catch and release only regulation for chain pickerel in Deep Pond, Suffolk County to allow the pickerel population to recover from over exploitation and increase needed predator control over panfish.

Implement a 40 inch size limit for muskellunge and tiger muskellunge in the Chenango, Tioughnioga, Tioga, and Susquehanna rivers, and a 36 inch minimum size limit at Otisco Lake, to increase the trophy potential of these species in these waters.

Delete special ice fishing regulation for Square Pond in Franklin County because this water will no longer be managed for trout.

Eliminate the existing ban on the use of tip-ups in Crumhorn Lake, Otsego County because this is an unnecessary and unwarranted restriction.

Allow ice fishing on stocked trout lakes in Allegany, Niagara, Wyoming, Chautauqua, Erie, and Cattaraugus counties unless otherwise stated. These lakes are managed for put and take trout fishing and they contain warm water fish species that should be available to anglers during the winter months, through the ice.

Provide for ice fishing in select group of waters in the counties of

Herkimer (Forestport Reservoir, Hinkley Reservoir, Kayuta Lake, Moshier Reservoir and North Lake); Jefferson (Millsite Lake); Lewis (Beaver Lake, Francis Lake, Soft Maple Reservoir, and Whetstone Marsh); Oneida (Delta Reservoir) and St. Lawrence (Sterling Pond).

Provide for ice fishing at a privately managed water in Hamilton County (Salmon Pond).

Include Cayuta Lake as a designated water from which baitfish may be collected.

More clearly specify that attempting to take fish by snagging is prohibited.

Permit the use of multiple hooks with multiple points on Lake Erie tributaries to provide additional angling opportunities.

For the Salmon River, Oswego County, allow a bead chain to be attached to floating lures. The distance between a floating lure and hook point may not exceed 3 ½ inches when a bead chain configuration is used. This was determined to be an effective angling method and was not considered an attractive snagging device.

For the Salmon River, Oswego County, implement a no weight restriction (i.e., only floating line and unweighted leaders and flies allowed) from May 1 - 15 for the Lower Fly Area and from May 1 - August 31 for the Upper Fly Area to provide further protection to vulnerable fish.

Remove the allowance for taking 5 additional brook trout at Spafford Creek as this was intended to be included as part of the statewide deletion of this Regulation in 2010.

Delete special regulation for Deer Pond in Franklin County as a special regulation no longer exists since the deletions of the 5+5 brook trout regulation in 2010.

Delete the special trout regulation for Palmer Lake in Saratoga County to match the statewide regulation (minor adjustment as extends the season 15 days).

Prohibit the release of any snakehead caught by angling in New York City waters (i.e. clarify that they should not be released as part of the catch and release requirements).

In addition (to the above) clarify that snakeheads should not be released if caught while angling, statewide.

Eliminate a redundant section of the regulations pertaining to the use of gaff hooks on Finger Lake tributaries through the ice as such is largely prohibited in another section of the regulations.

Provide clarity and language clean-up in sections of Part 10 as warranted. These instances do not result in any substantive regulation changes (e.g. removing an incorrect time period that is inconsistent with the time period governing the Lake Champlain Tributary section of the regulations; clarifying the name of the lake being referenced in Crotona Park (as being Indian Lake) in the special regulation sections for Bronx County; provide consistency when describing first impassable barriers in tributaries; and correct a description for a section of Fall Creek in Tompkins County.

Text of proposed rule and any required statements and analyses may be obtained from: Shaun Keeler, New York State Department of Environmental Conservation, 625 Broadway, Albany, NY 12233, (518) 402-8928, email: sxkeeler@gw.dec.state.ny.us

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

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

Additional matter required by statute: A Programmatic Impact Statement pertaining to these actions is on file with the Department of Environmental Conservation.

Reasoned Justification for Modification of the Rule

General revisions to the State's regulations governing sportfishing (Part 10) and related activities (i.e. including Part 35 in this instance) are continuously needed to meet the management needs for specific waters as well as part of an effort to accommodate angler and other stakeholder desires. To meet this need the Division of Fish, Wildlife and Marine Resources conducts a biennial revision of regulations governing sportfishing and associated activities. Conducting a review of and proposing amendments to 6 NYCRR Part 10, every two years, is responsive and adequate towards meeting the 5 yr of Existing Rules review requirement.

Regulatory Impact Statement

1. Statutory Authority

Section 3-0301 of the Environmental Conservation Law (ECL) establishes the general functions, powers and duties of the Department of Environmental Conservation (department) and the Commissioner, including general authority to adopt regulations. Sections 11-0303 and 11-0305 of the ECL authorize the department to provide for the management and protection of the State's fisheries resources, taking into consideration ecological factors, public safety, and the safety and protection of private property. Section 11-0317 of the ECL empowers the department to adopt regulations, after consultation with the appropriate agencies of the

neighboring states and the Province of Ontario, establishing open seasons, minimum size limits, manner of taking, and creel and seasonal limits for the taking of fish in the waters of Lake Erie, Lake Ontario, the Niagara River and the St. Lawrence River. Sections 11-1301 and 11-1303 of the ECL empower the department to fix by regulation open seasons, size and catch limits, and the manner of taking of all species of fish, except certain species of marine fish (listed in section 13-0339 of the ECL), in all waters of the State. Section 11-1316 of the ECL empowers the department to designate by regulation waters in which the use of bait fish is prohibited. Section 11-1319 of the ECL governs possession of fish taken in waters of the State.

2. Legislative Objectives

Open seasons, size restrictions, daily creel limits, and restrictions regarding the manner of taking fish are tools used by the department in achieving the intent of the legislation referenced above. The purpose of setting seasons is to prevent over-exploitation of fish populations during vulnerable periods, such as spawning, thereby ensuring a healthy population. Size limits are necessary to maintain quality fisheries and to ensure that adequate numbers survive to spawning age. Creel limits are used to distribute the harvest of fish among many anglers and optimize resource benefits. Regulations governing the manner of taking fish upgrade the quality of the recreational experience, provide for a variety of harvest techniques and angler preferences, and limit exploitation. Catch and release fishing regulations are used in waters capable of sustaining outstanding growth and providing a large population of desirable-sized fish, creating an outstanding opportunity for anglers willing to forego harvesting fish. Prohibiting the release of snakehead fish caught by angling is protective of native fish communities by preventing the proliferation of this undesirable fish species. Allowing for the commercial collection of baitfish from specific waters whereby there are no adverse impacts to the fish community provides for enhancing angling opportunity by making baitfish available for angling.

3. Needs and Benefits

Most significant fishery resources in New York State are monitored through annual or periodic survey and inventory by Bureau of Fisheries staff. These fisheries surveys identify particular situations where changes in fishing regulations may be required to maintain the quality of a particular fishery or where significant opportunity for improvement or enhancement of the fishery exists. Additional regulation changes are prompted by the recommendation of user groups or the need to correct or clarify existing regulations. Concepts for regulation amendments that address identified needs are developed by Bureau of Fisheries staff and reviewed with sportsmen's groups at the local, regional, or state-wide level, depending upon the significance of the proposal.

In order to facilitate compliance by the angling public, significant revisions of the department's fishing regulations are currently conducted on a biennial schedule. The proposed amendments are necessary to maintain or improve the quality of the State's fisheries resources. Changes to sportfishing regulations are intended to promote optimum opportunity for public use consistent with resource conservation.

4. Costs

Enactment of the rules and regulations described herein governing fishing will not result in increased expenditures by the State, local governments, or the general public.

5. Local Government Mandates

These amendments of 6 NYCRR will not impose any programs, services, duties or responsibilities upon any county, city, town, village, school district, or fire district.

6. Paperwork

No additional paperwork will be required as a result of these proposed changes in regulations.

7. Duplication

There are no other State or federal regulations which govern the taking of freshwater sportfish.

8. Alternatives

The primary alternative to the proposed regulations would be to retain current fishing regulations. In the absence of the proposed changes, opportunities to enhance the quality or public use and enjoyment of fisheries may be deferred or lost. Failure to adopt regulations in a timely manner could result in undesirable and irreversible changes in aquatic community structure. Some fish populations may decline if the proposed regulations are not enacted in a timely manner. Strengthening current measures for countering the proliferation of snakeheads and their impact on freshwater fish populations would not be implemented. In addition, additional opportunity for the commercial collection of baitfish would not be provided for.

9. Federal Standards

There are no minimum federal standards that apply to the regulation of sportfishing.

10. Compliance Schedule

These regulations, if adopted, will be in effect for the 2012-2013 license year, which begins on October 1, 2012. It is anticipated that regulated persons will be able to immediately comply with these regulations once they take effect.

Regulatory Flexibility Analysis

The purpose of this rule making is to amend and update the Department of Environmental Conservation's (department) general regulations governing sportfishing. These amendments were developed as a result of the department's biennial review of existing sportfishing regulations. Changes to these regulations are intended to promote optimum opportunity for public use consistent with resource conservation.

The department has determined that the proposed regulations will not impose an adverse impact or any new or additional reporting, recordkeeping or other compliance requirements on small businesses or local governments. All reporting or recordkeeping requirements associated with sportfishing are administered by the department. Since small businesses and local governments have no management or compliance role in the regulation of sport fisheries, there is no impact upon these entities. Small businesses may, and town or village clerks do issue fishing and sportsman licenses. However, the department's rule making proposal does not change this process.

Fishing guides, and tackle/baitfish shops (to some extent), are the only business entities directly affected and impacted by changes to regulations pertaining to sport fishing. However, the actions proposed in this rule making (e.g. adjustments to season dates, bag limits, minimum size limits, gear restrictions etc.) are not measures that result in an overall loss of angling opportunities or diminish opportunities for taking fish. Therefore, while guide businesses would need to adjust techniques and schedules to comply with the proposed regulations, these businesses should not lose clientele as a result or otherwise be adversely impacted by the changes. In fact, positive impacts are anticipated for these businesses because the proposed regulations would enhance the likelihood that angling opportunities will remain high and sustainable for future anglers and fishing-related businesses.

Based on the above, the department has determined that a regulatory flexibility analysis is not required.

Finally, Chapter 524 of the New York Laws of 2011 is not applicable as this proposed rule making does not establish or modify a violation or a penalty associated with a violation.

Rural Area Flexibility Analysis

The purpose of this rule making is to amend and update the Department of Environmental Conservation's (department) general regulations governing sportfishing. These amendments were developed as a result of the department's biennial review of existing sportfishing regulations. Changes to these regulations are intended to promote optimum opportunity for public use consistent with resource conservation.

The department has determined that the proposed rules will not impose an adverse impact or any new or additional reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas. All reporting or recordkeeping requirements associated with sportfishing are administered by the department. The proposed regulations are not anticipated to negatively change the number of participants or the frequency of participation in regulated activities.

Fishing guides, and baitfish/tackle shop (to some extent), are the only entities directly affected and impacted by changes to regulations pertaining to sport fishing. However, the actions proposed in this rule making (e.g. adjustments to season dates, bag limits, minimum size limits, gear restrictions, etc.) are not measures that result in an overall loss of angling opportunities or diminish opportunities for taking fish. Therefore, while guide businesses would need to adjust techniques and schedules to comply with the proposed regulations, these businesses should not lose clientele as a result or otherwise be adversely impacted by the changes. In fact, positive impacts are anticipated for these businesses because the proposed regulations would enhance the likelihood that angling opportunities will remain high and sustainable for future anglers and fishing-related businesses.

Small businesses may, and town or village clerks do issue fishing and sportsman licenses. However, the department's rule making proposal does not change this process.

Since the department's proposed rule making will not impose an adverse impact on public or private entities in rural areas and will have no effect on current reporting, recordkeeping, or other compliance requirements, the department has concluded that a rural area flexibility analysis is not required for this regulatory proposal.

Job Impact Statement

The purpose of this rule making is to amend and update the Department of Environmental Conservation's (department) general regulations governing sportfishing. These amendments were developed as a result of the department's biennial review of existing sportfishing regulations.

Changes to these regulations are intended to promote optimum opportunity for public use consistent with resource conservation.

Fishing guides, and baitfish/tackle shops (to some extent), are the only business entities directly affected and impacted by changes to regulations pertaining to sport fishing. However, the actions proposed in this rule making (e.g. adjustments to season dates, bag limits, minimum size limits, gear restrictions, etc.) are not measures that result in an overall loss of angling opportunities or diminish opportunities for taking fish. Therefore, while guide businesses would need to adjust techniques and schedules to comply with the proposed regulations, these businesses should not lose clientele as a result or otherwise be adversely impacted by the changes, and no fishing guide jobs should be lost. In fact, positive impacts are anticipated for these businesses because the proposed regulations would enhance the likelihood that angling opportunities will remain high and sustainable for future anglers and fishing-related businesses.

Based on the above, the department has concluded that the proposed regulatory changes will not have an adverse impact on jobs or employment opportunities in New York, and that a job impact statement is not required.

Department of Health

EMERGENCY RULE MAKING

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

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

Filing No. 73

Filing Date: 2012-01-31

Effective Date: 2012-01-31

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

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

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

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

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

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

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

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

(2) the identification card on its face:

- (i) restricts an individual recipient to a single provider; or
- (ii) requires prior authorization for all ambulatory medical services and supplies except emergency care [.] ; or
- (3) *the service exceeds benefit limitations as established by the department.*

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

- (4) Orthopedic footwear means shoes, shoe modifications, or shoe additions which are used *as follows: in the treatment of children*, to correct, accommodate or prevent a physical deformity or range of motion malfunction in a diseased or injured part of the ankle or foot; *in the treatment of children*, to support a weak or deformed structure of the ankle or foot; *as a component of a comprehensive diabetic treatment plan to treat amputation, ulceration, pre-ulcerative calluses, peripheral neuropathy*

with evidence of callus formation, a foot deformity or poor circulation; or to form an integral part of an orthotic brace. Orthopedic shoes must have, at a minimum, the following features:

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

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

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

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

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

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

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

(i) Payment for orthopedic footwear must not exceed the lower of:
 (a) [the acquisition cost to the provider plus 50%] the maximum reimbursable amount as shown in the fee schedule for durable medical equipment, medical/surgical supplies, orthotics and prosthetic appliances and orthopedic footwear; the maximum reimbursable amount will be determined for each item of footwear based on an average cost of products representative of that item; or
 (b) the usual and customary price charged to the general public for the same or similar products.

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

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

[ITEM	LIMIT
Cane	1 every 3 yrs.
Cane, Quad or three prong	1 every 3 yrs.
Flare heels (each)	2 pair per yr.

Cork lifts	2 pair per yr.
Steindler heel corrections	2 pair per yr.
Spenco Insert	2 pair per yr. per child
Heel wedge	2 pair per yr.
Foot, insert, removable, molded to patient model, longitudinal arch support, each	2 per yr. per adult
Foot, insert, removable, molded to patient model, longitudinal/metatarsal support, each	2 per yr. per adult
Foot, arch support, removable, premolded, longitudinal, each	2 per yr. per adult
Foot, arch support, removable, premolded, longitudinal/metatarsal, each	2 per yr. per adult
Longitudinal arch support	1 pair per yr. per adult
Foot, arch support,	2 pair per yr. per adult
Removable mold/Levi mold	1 pair per yr. per adult
Elastic stocking/below knee medium wt.	4 pair per yr.
Elastic stocking/below knee heavy wt.	4 pair per yr.
Elastic stocking/above knee medium wt.	4 pair per yr.
Elastic stocking/above knee heavy wt.	4 pair per yr.
Elastic stocking/full length medium wt.	4 pair per yr.
Elastic stocking/full length heavy wt.	4 pair per yr.
Elastic stocking/leotards	4 pair per yr.
Elastic stocking/garter belt	4 pair per yr.
Surgical stocking/below knee	4 pair per yr.
Surgical stocking/thigh length	4 pair per yr.
Surgical stocking/full length	4 pair per yr.
Corset, Sacroiliac	2 per yr.
Corset, Lumbar	2 per yr.
Handheld shower head	1 every 3 yrs.
Bed pan, fracture	1 every 3 yrs.
Urinary suspensory	1 every 5 yrs.
Emesis basin	1 every 5 yrs.
Sitz bath	1 every 5 yrs.
Urinal, female, any material	1 every 5 yrs.
Urinal, male, any material	1 every 5 yrs.
Commode pad	1 every 5 yrs.
Flotation pad	1 per yr.
Humidifier, cold air	1 every 3 yrs.
Vaporizer, room type	1 every 3 yrs.
Standard adult wheelchair	1 every 3 yrs.
Electric heating pad standard	1 every 3 yrs.
Hot fomentation heating pads	1 every 3 yrs.
Orthopedic shoes	2 pair per yr.]

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

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

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

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

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

age 21 when caloric and dietary nutrients from food cannot be absorbed or metabolized.

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

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

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

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

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

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. HLT-39-11-00007-P, Issue of September 28, 2011. The emergency rule will expire March 30, 2012.

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

Regulatory Impact Statement

Statutory Authority:

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

Legislative Objective:

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

Needs and Benefits:

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

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

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

Orthopedic footwear. Orthopedic footwear is ordered by practitioners and dispensed by durable medical equipment providers. Medicaid cur-

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

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

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

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

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

COSTS:

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

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

Costs to State and Local Government:

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

Costs to the Department of Health:

There will be no additional costs to the Department.

Local Government Mandates:

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

Paperwork:

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

Duplication:

There are no duplicative or conflicting rules identified.

Alternatives:

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

Federal Standards:

The proposed regulations do not exceed any minimum federal standards.

Compliance Schedule:

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

Regulatory Flexibility Analysis

Effect of Rule:

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

This amendment affects the 955 durable medical equipment providers enrolled in the Medicaid program who actively bill Medicaid for footwear. The amendment will limit the footwear benefit, which will reduce Medicaid utilization and billable claims to these businesses, some of which

are small. The Department is anticipating a \$7.35 million reduction in footwear expenditures in SFY 2011-12 and \$16 million annually thereafter.

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

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

Compliance Requirements:

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

Professional Services:

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

Compliance Costs:

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

Economic and Technological Feasibility:

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

Minimizing Adverse Impact:

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

Small Business and Local Government Participation:

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

Rural Area Flexibility Analysis

Types and Estimated Number of Rural Areas:

The benefit limit on enteral formula will apply to 3123 pharmacies and 369 durable medical equipment providers in New York State. The benefit limit on prescription footwear will apply to 955 durable medical equipment providers in New York State. The benefit limit on compression stockings will apply to 1196 pharmacies and 441 durable medical equipment providers in New York State. These businesses are located in rural, as well as suburban and metropolitan areas of the State.

Reporting, Recordkeeping and Other Compliance Requirements and Professional Services:

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

Costs:

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

Minimizing Adverse Impact:

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

Rural Area Participation:

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

Job Impact Statement

Nature of Impact:

This rule will result in decreased Medicaid billable claims for providers of enteral formula, prescription footwear, and compression stockings. This decreased revenue will not likely have an adverse impact on jobs and

employment opportunities within these businesses as they offer a wide variety of services which are reimbursed by Medicaid.

Categories and Numbers Affected:

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

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

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

Regions of Adverse Impact:

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

Minimizing Adverse Impact:

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

Self-Employment Opportunities:

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

Assessment of Public Comment

The agency received no public comment.

EMERGENCY RULE MAKING

Authority to Collect Pharmacy Acquisition Cost

I.D. No. HLT-07-12-00001-E

Filing No. 54

Filing Date: 2012-01-25

Effective Date: 2012-01-25

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

Action taken: Amendment of section 505.3 of Title 18 NYCRR.

Statutory authority: Public Health Law, sections 201(1)(v) and 206; and Social Services Law, sections 363-a(2) and 367-a(9)(b)

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 change to SSL section 367-a, which incorporates the use of Average Acquisition Cost (AAC) in the drug reimbursement methodology takes effect April 1, 2011. Without actual acquisition cost data, the Department is unable to move forward with development of AAC. 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 this regulation on an emergency basis to achieve the savings intended to be realized by the Chapter 59 provisions.

Subject: Authority to Collect Pharmacy Acquisition Cost.

Purpose: Establishes a requirement that each enrolled pharmacy report actual acquisition cost of a prescription drug to the Department.

Text of emergency rule: Paragraphs (3) through (6) of subdivision (a) of section 505.3 are renumbered as paragraphs (4) through (7) and new paragraph (3) is added to read as follows:

(3) *Drug acquisition cost means the invoice price to the pharmacy of a prescription drug dispensed to a Medicaid recipient, minus the amount of all discounts and other cost reductions attributable to such dispensed drug.*

Paragraph (4) is added to subdivision (f) of section 505.3 to read as follows:

(4) *Each pharmacy enrolled in the Medicaid program shall provide the department, in such manner, for such periods, and at such times as the department may require, with the drug acquisition cost, as defined in paragraph 505.3(a)(3), of prescription drugs.*

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 April 23, 2012.

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

Regulatory Impact Statement

Statutory Authority:

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

Legislative Objective:

On April 1, 2011, the Legislature and Medicaid Redesign Team adopted a proposal to amend Medicaid drug payment methodology, as defined in SSL section 367-a(9)(b), to include average acquisition cost (AAC), when available. To meet Legislative objectives, a rule is needed to require each enrolled pharmacy to report actual acquisition cost of a prescription drug to the Department in a manner specified by the Department. This rule will enable the Department to collect actual acquisition cost, analyze the data and establish a statistically valid and transparent AAC.

Needs and Benefits:

The requirement to report acquisition cost is necessary in order to effectuate the inclusion of AAC in the New York State Medicaid drug reimbursement methodology. Under the fee-for-service pharmacy program, Medicaid reimburses pharmacy services based on a "lower of" methodology that includes the pharmacy's usual and customary charge; Estimated Acquisition Cost (EAC); Federal Upper Limit (FUL); State Maximum Allowable Cost (SMAC); Average Wholesale Price (AWP) minus a percentage; Wholesale Acquisition Price (WAC) plus a percentage; or AAC, if available.

Once a valid AAC and appropriate dispensing fee is established, the Department intends to seek approval to replace the "lower of" methodology with AAC as the pricing threshold. The rationale for moving to AAC is to establish a transparent pharmacy reimbursement system and to do so with stakeholder involvement and support. There are numerous rulings in both state and federal courts that solidly establish a pattern of inflated, inaccurate or fraudulent pricing resulting from current standard reimbursement benchmarks supplied by drug manufacturers, such as AWP or WAC. Once established, use of AAC allows the State to set reimbursement rates based on an actual acquisition cost (invoice data) and an appropriate dispensing fee. The comprehensive, statewide data collection resulting from the reporting of acquisition cost will allow for a thorough, statistically valid analysis of pricing, including an evaluation of outliers, and the development of a legitimate AAC. Without this data, AAC cannot be established.

COSTS:

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

Regulated entities could potentially incur minimal costs related to this amendment; such costs would be limited to administrative costs of identifying acquisition cost and any system updates needed to report such costs.

Costs to State and Local Government:

This amendment will not increase costs to the State or local governments.

Costs to the Department of Health:

The Department could incur minimal administrative costs related to the collection, analysis and maintenance of acquisition costs.

Local Government Mandates:

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

Paperwork:

This amendment could potentially impose additional paperwork for regulated entities if collection of acquisition cost is done through the use of a hard copy survey tool rather than electronic submission.

Duplication:

There are no duplicative or conflicting rules identified.

Alternatives:

The only potential alternative to requiring the reporting of acquisition cost is a voluntary survey, which is not considered feasible as it would not provide a statistically valid sample of costs.

Federal Standards:

The proposed regulations do not exceed any minimum federal standards.

Compliance Schedule:

The Department will work closely with regulated entities to ensure they are able to comply with the proposed regulation when it becomes effective.

Regulatory Flexibility Analysis

Effect of Rule:

This amendment affects the approximately 4,400 pharmacy providers enrolled in the Medicaid program that actively bill Medicaid for drugs. This amendment will require these businesses, some of which are small, to identify and report the acquisition cost of drugs dispensed to fee-for-service Medicaid beneficiaries. Medicaid will ultimately address additional costs with the development of an increased dispensing fee that regulated entities will participate in establishing.

The fifty-eight local social services districts share in the costs of services provided to eligible beneficiaries who receive Medicaid through their districts and would therefore benefit from a more transparent pharmacy reimbursement benchmark.

Compliance Requirements:

Small businesses will be required to identify the acquisition cost of drugs and report that cost to the Department in a manner to be specified by the Department. This amendment does not impose any new reporting, recordkeeping or other compliance requirements on local governments.

Professional Services:

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

Compliance Costs:

No initial capital costs will be imposed as a result of this rule. However, regulated entities, which include small businesses, could potentially incur minimal costs related to this amendment; such costs would be limited to administrative costs of identifying acquisition cost and any system updates needed to report such costs. Initial administrative costs and compliance costs for regulated entities will vary and will be dependent on each entity's product wholesalers and/or software vendors. Medicaid will address compliance costs with the development of an increased dispensing fee that regulated small businesses will participate in establishing.

There are no direct costs associated with this amendment for local governments.

Economic and Technological Feasibility:

The amendment requires regulated entities to submit additional information for drugs billed under the fee-for-service Medicaid program but will not affect the way local districts contribute their local share of Medicaid expenses for drugs. Therefore, there should be no technological difficulties associated with compliance with the proposed regulation for local governments and minimal, if any, technological difficulties for small businesses.

Minimizing Adverse Impact:

By engaging regulated entities in the development of procedures for reporting acquisition cost, the Department will minimize any adverse impact on small businesses. Additionally, the Department will work with small businesses to develop an appropriate dispensing fee that accurately reflects the costs associated with this amendment.

Small Business and Local Government Participation:

The Department meets on a regular basis with provider groups representing regulated entities, such as the Pharmacists Society of the State of New York (PSSNY) and the National Association of Chain Drug Stores (NACDS). Both of these groups have been informed of the proposed changes and have expressed concerns over administrative burdens. However, representatives of regulated entities have also welcomed the opportunity to collaborate with the Department in development of the proposed process. Upon promulgating the regulation, the Department will continue to work with the industry and assist as necessary with implementation of the new requirement.

Local government officials have consistently urged the Department to implement Medicaid cost savings programs.

Rural Area Flexibility Analysis

Effect on Rural Areas:

The proposed amendment will apply to approximately 4,400 Medicaid enrolled pharmacy providers. These regulated entities are located in rural, as well as suburban and metropolitan areas of the State.

Reporting, Recordkeeping and Other Compliance Requirements and Professional Services:

Regulated entities in rural areas will be required to identify the acquisition cost of drugs and report that cost to the Department in a manner to be specified by the Department. No new professional services will be required as a result of this amendment.

Costs:

Regulated entities in rural areas could potentially incur minimal costs related to this amendment; such costs would be limited to administrative costs of identifying acquisition cost and any system updates needed to report such costs. Initial administrative costs and compliance costs will vary and will be dependent on each entity's product wholesalers and software vendors. Medicaid will address compliance costs with the development of an increased dispensing fee that regulated entities in rural areas will participate in establishing.

Minimizing Adverse Impact:

By engaging regulated entities in rural areas in the development of procedures for reporting acquisition cost, the Department will minimize any adverse impact. Additionally, the Department will work with regulated entities in rural areas to develop an appropriate dispensing fee that accurately reflects the costs associated with this amendment.

Rural Area Participation:

The Department meets on a regular basis with provider groups representing regulated entities, such as the Pharmacists Society of the State of New York (PSSNY) and the National Association of Chain Drug Stores (NACDS). While both of these groups have expressed concerns over administrative burdens, representatives of regulated entities have welcomed the opportunity to collaborate with the Department in development of the proposed process and an appropriate dispensing fee. Upon promulgating the regulation, the Department will continue to work with the regulated entities in rural areas and assist as necessary with implementation of the new requirement.

Job Impact Statement

A Job Impact Statement is not required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature and purpose of the proposed regulation, that there will not be a substantial adverse impact on jobs or employment opportunities.

NOTICE OF ADOPTION

Qualified Health Information Technology Entities

I.D. No. HLT-37-11-00017-A

Filing No. 60

Filing Date: 2012-01-27

Effective Date: 2012-02-15

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

Action taken: Amendment of section 504.9 of Title 18 NYCRR.

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

Subject: Qualified Health Information Technology Entities.

Purpose: To broaden the definition of a Service Bureau to include Qualified Entities.

Text or summary was published in the September 14, 2011 issue of the Register, I.D. No. HLT-37-11-00017-P.

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

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

Assessment of Public Comment

The only comments received by the Department on the proposed regulation were submitted by an entity that anticipates applying to be recognized as a Qualified Health Information Technology Entity once the proposed rule is finalized. These comments and the Department of Health's responses are summarized below.

Comment:

The commenter states that the Medicaid enrollment process is designed for health care providers, not health information technology organizations such as Qualified Entities. As a result, this commenter is concerned that the enrollment process may impose unnecessary administrative burdens on Qualified Entities, which will divert limited resources away from their core mission without addressing the legitimate needs of the Medicaid program. In lieu of enrollment, the commenter recommends that the Medicaid program enter into specially tailored agreements with Qualified Entities that focus on the unique role played by these organizations.

Response:

The proposed regulations require Regional Health Information Organizations (RHIOs) or Qualified Entities (QEs) to enroll in the Medicaid program as service bureau providers. As such, RHIOs or QEs can obtain access to Medicaid data and other benefits of Medicaid enrollment in order to disseminate Medicaid data to their participating provider organizations as appropriate. While DOH does not look upon this process as burdensome, we will work with the Medicaid program and the QEs to develop a process that is both efficient and effective and ensure that there is a level playing field as to rules and procedures.

Comment:

This commenter requests a change in wording from "members" to "participants" in paragraph (h)(2) of the proposed regulation, which refers to QEs sharing information with their members. The commenter states that the term "members" suggests a level of ownership or control in the organization.

Response:

While the word "participants" may be more consistent with the terminology used in the New York eHealth Collaborative's Privacy and Security Policies, the intent of the language is the same. No change to the regulation was made in response to this comment.

Comment:

This commenter questions the use of the phrase "informed consent" in paragraph (h)(3)(a) of the proposed regulation, stating that this term is usually used in connection with medical treatment, and not in New York's confidentiality laws. The commenter recommends the term "consent" or "authorization" instead.

Response:

Informed consent connotes an understanding by the medical assistance recipient of what they are consenting to. The New York eHealth Collaborative's Privacy and Security Policies use the term "affirmative consent" for the same reason. The Department considers the terms "informed consent" and "affirmative consent" to be equivalent in this context. No change to the regulation was made in response to this comment.

Comment:

This commenter questions the definition of the term Qualified Entity in paragraph (h)(2) of the proposed regulation and states that the language used could be interpreted as requiring QEs to be listed in the consent form signed by the medical assistance recipient.

Response:

The Department believes the language of the proposed regulation clearly conveys its intent, that disclosures of recipient-specific information to QEs must be made with the consent of the medical assistance recipient. Therefore, no change was made to the regulation in response to this comment.

Comment:

The commenter recommends a change in the language of paragraph (h)(3)(c) of the proposed regulation, to obligate QEs to "require" their members to comply with all applicable confidentiality laws and regulations, rather than to "ensure" that they comply. The commenter is

concerned that a QE will be held responsible, and possibly sanctioned, for improper conduct committed by one of its members that is beyond its control.

Response:

The proposed language change does not change the intent of the regulation, and therefore no change to the regulation was made in response to this comment.

NOTICE OF ADOPTION

Hospital Quality Contribution

I.D. No. HLT-43-11-00017-A

Filing No. 62

Filing Date: 2012-01-27

Effective Date: 2012-02-15

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

Action taken: Amendment of Subpart 86-1 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 2807-d-1

Subject: Hospital Quality Contribution.

Purpose: To collect thirty million dollars annually for the Medical Indemnity Fund.

Text or summary was published in the October 26, 2011 issue of the Register, I.D. No. HLT-43-11-00017-P.

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

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

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Managed Care Organizations (MCOs)

I.D. No. HLT-44-11-00022-A

Filing No. 61

Filing Date: 2012-01-27

Effective Date: 2012-02-15

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

Action taken: Amendment of section 98-1.11 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 4403(2)

Subject: Managed Care Organizations (MCOs).

Purpose: To specify approval standards for asset transfers or loans proposed by MCOs.

Text or summary was published in the November 2, 2011 issue of the Register, I.D. No. HLT-44-11-00022-P.

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

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

Assessment of Public Comment

The agency received no public comment.

Long Island Railroad Company

NOTICE OF ADOPTION

To Add Outdoor Ticketing, Boarding or Platform Areas of Terminals or Stations to the Areas Where Smoking is Currently Prohibited

I.D. No. LIR-48-11-00005-A

Filing No. 75

Filing Date: 2012-01-31

Effective Date: 2012-02-15

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

Action taken: Amendment of section 1097.5(o) of Title 21 NYCRR.

Statutory authority: Public Authorities Law, section 1266(4)

Subject: To add outdoor ticketing, boarding or platform areas of terminals or stations to the areas where smoking is currently prohibited.

Purpose: To conform LIRR Rules to amendment of Public Health Law, article 13, section 1399-o and ensure continuation of enforcement powers.

Text or summary was published in the November 30, 2011 issue of the Register, I.D. No. LIR-48-11-00005-P.

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

Text of rule and any required statements and analyses may be obtained from: Priscilla Lundin, Long Island Rail Road Company, Jamaica Station, MC #1143, Jamaica, New York 11435, (718) 558-8246, email: plundin@lirr.org

Assessment of Public Comment

The Long Island Rail Road Company received one public comment. The comment was from the New York Chapter of the American Lung Association, which wrote in support of the proposed rule, did not suggest any alternatives and urged its adoption.

Office of Mental Health

EMERGENCY RULE MAKING

Clinic Treatment Programs

I.D. No. OMH-46-11-00006-E

Filing No. 64

Filing Date: 2012-01-30

Effective Date: 2012-01-30

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

Action taken: Amendment of Part 599 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09, 31.04, 43.01 and 43.02, art. 33; and Social Services Law, sections 364, 364-a and 365-m

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

Specific reasons underlying the finding of necessity: The amendments to the Clinic Treatment Programs regulations found at 14 NYCRR Part 599 are necessary to allow providers to seek reimbursement on a Federally-non-participating basis for certain off-site services. Without this rule, providers would be faced with the choice of having to perform these services without the benefit of being reimbursed for them, or ceasing to deliver these services. In the first instance, providing these services on an uncompensated basis would potentially undermine the fiscal viability of some providers. In the event the determination was made by a provider to cease furnishing such services off-site, access to such services would be reduced, to the detriment of the public health. The Clinic Treatment Program regulations resulted in major changes in the delivery and financing of mental health clinic services. When the regulations were promulgated, the Office understood that there would be issues that would arise

that may need clarification once providers had experience in operating under the new regulations. This emergency rule serves to clarify some of these areas. The absence of this rule would only serve to prolong the confusion regarding certain non-controversial provisions of the existing regulation. Lastly, the regulation includes requirements associated with the Behavioral Health Organization implementation.

Subject: Clinic Treatment Programs.

Purpose: Amend and clarify existing regulation and enable providers to seek reimbursement for certain services using State-only dollars.

Substance of emergency rule: This rule making amends Part 599 of Title 14 NYCRR which governs the licensing, operation, and Medicaid fee-for-service funding of mental health clinics. 14 NYCRR Part 599 was adopted as final on October 1, 2010. This regulation resulted in major changes in the delivery and financing of mental health clinic services. When the regulation was promulgated, the Office of Mental Health understood that there would be issues that would arise that may need clarification once providers and recipients of services had experience in operating under the new regulation. Some of these issues have arisen; this rule making is designed to address them. In addition, these regulations reflect some relatively minor program modifications that have occurred since the initial regulations were promulgated. Changes include:

- Clarification of the distinction between “injectable psychotropic medication administration” and “injectable psychotropic medication administration with monitoring and education” and the provisions regarding reimbursement for these services;

- Clarification of the definition of “health monitoring”, “hospital-based clinic”, “modifiers”, and “psychiatric assessment”, and inclusion of definitions for “Behavioral Health Organization” and “concurrent review”. This second Emergency filing also expands the definitions of “diagnostic and treatment center”, “hospital-based clinic” and “health monitoring”. The term “smoking status” has been changed to “smoking cessation” for both adults and children;

- Repeal of provisions requiring a treating clinician to determine the need for continued clinic treatment beyond 40 visits for adults and children;

- Amendment of the provisions regarding screening of clinic treatment staff by the New York Statewide Central Register of Child Abuse and Maltreatment;

- Clarification of requirements regarding required signatures on treatment plans. Note - this second Emergency filing further clarifies that, for recipients receiving services reimbursed by Medicaid on a fee-for-service basis, the signature of the physician is required on the treatment plan. For recipients receiving services that are not reimbursed by Medicaid on a fee-for-service basis, the signature of the physician, licensed psychologist, LCSW, or other licensed individual within his/her scope of practice involved in the treatment plan is required;

- Addition of provisions regarding reimbursement modifications for visits in excess of 30 and 50 respectively (excluding crisis visits) for fiscal years commencing on or after April 1, 2011. Note - in this second emergency filing, the Office has added “off-site visits, complex care management and health services” to the services excluded from the 30/50 visit limitation;

- Addition of “State-operated mental health clinic” to the peer group listing;

- Specification of time limits for services, including correction of an inaccurate time limit in existing regulation related to psychotropic medication treatment;

- Clarification of allowable Medicaid claims for services provided on the same day for an individual;

- Inclusion of requirements regarding duration of school-based services;

- Clarification of billing using the “physician modifier”;

- Amendment of the “Modifier Chart” in Section 599.14 to include only services provided on-site;

- Inclusion of provisions regarding the Office’s expectations concerning clinic programs cooperating with Behavioral Health Organizations;

- Existing regulations specify at Section 599.3(d) that Medicaid reimbursement of outreach services and off-site services is contingent upon Federal approval. The Office has recently been advised that Federal approval will not be granted for outreach and off-site services. In recognition of the fact that clinics continue to provide off-site services and have not been able to seek reimbursement for them, the Office will allow reimbursement for off-site Crisis Intervention-Brief Services for all Medicaid recipients, and for certain off-site services for children up to age 19 on a Federally-non-participating basis. This provision is retroactive to October 1, 2010, the effective date of 14 NYCRR Part 599. References to outreach services in the existing regulations have been eliminated in this second emergency adoption.

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. OMH-46-11-00006-EP, Issue of November 16, 2011. The emergency rule will expire March 29, 2012.

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

Regulatory Impact Statement

1. Statutory Authority: Sections 7.09 and 31.04 of the Mental Hygiene Law grant the Commissioner of Mental Health the power and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction, and to set standards of quality and adequacy of facilities, equipment, personnel, services, records and programs for the rendition of services for adults diagnosed with mental illness or children diagnosed with emotional disturbance, pursuant to an operating certificate.

Section 43.02(b) of the Mental Hygiene Law gives the Commissioner authority to request from operators of facilities licensed by the Office of Mental Health such financial, statistical and program information as the Commissioner may determine to be necessary.

Article 33 of the Mental Hygiene Law establishes basic rights of persons with mental illness.

Sections 364 and 364-a of the Social Services Law give the Office of Mental Health responsibility for establishing and maintaining standards for medical care and services in facilities under its jurisdiction, in accordance with cooperative arrangements with the Department of Health.

Section 365-m of the Social Services Law authorizes the Commissioner of the Office of Mental Health and the Commissioner of the Office of Alcoholism and Substance Abuse Services, in consultation with the Department of Health, to contract with regional behavioral health organizations to provide administrative and management services for the provision of behavioral health services.

Section 43.01 of the Mental Hygiene Law gives the Commissioner authority to set rates for outpatient services at facilities operated by the Office of Mental Health. Section 43.02 of the Mental Hygiene Law provides that payments under the medical assistance program for outpatient services at facilities licensed by the Office of Mental Health shall be at rates certified by the Commissioner of Mental Health and approved by the Director of the Budget.

2. Legislative Objectives: Chapter 57 of the Laws of 2006 directed the Office of Mental Health (Office) to conduct a study of the mental health reimbursement system. As a result of this study and subsequent to an extensive public process, the Office promulgated a new regulation at 14 NYCRR Part 599 for Clinic Treatment Services. This regulation furthers the legislative policy of providing high quality outpatient mental health services to individuals with mental illness in a cost-effective manner.

3. Needs and Benefits: The regulations governing Clinic Treatment Programs were adopted as final effective October 1, 2010. These regulations resulted in major changes in the delivery and financing of mental health clinic services. When the regulations were promulgated, the Office understood that there would be issues that would arise that may need clarification once providers and recipients of services had experience in operating under the new regulations. Some of these issues have arisen; these regulations are being issued to address them. In addition, these regulations reflect some relatively minor program modifications that have occurred since the initial regulations were promulgated. The changes include:

- Clarification of the distinction between “injectable psychotropic medication administration” and “injectable psychotropic medication administration with monitoring and education” and the provisions regarding reimbursement for these services. Services which are comprised solely of the administration of an injection continue to be reimbursable without any minimum duration of service. Services which also require monitoring and education will be reimbursed at a higher rate, but will require a minimum service duration of 15 minutes. Injectable psychotropic medication administration with monitoring and education is a required service for clinics serving adults. This service is optional for clinics serving only children. Both levels of services provided to a child up to age 19 off-site will be reimbursable on a Federally-non-participating basis. Off-site injectable psychotropic medication administration services that were provided on or after October 1, 2010, will be eligible for the off-site rate enhancement. These reimbursement standards are consistent with updated State Medicaid requirements;

- Clarification of the definition of “health monitoring”, “hospital-based clinic”, “modifiers”, “psychiatric assessment”, and “diagnostic and treatment center” and inclusion of definitions for “Behavioral Health Organization” and “concurrent review”;

- Repeal of provisions requiring a treating clinician to determine the need for continued clinic treatment beyond 40 visits for adults and children;

- Amendment of the provisions regarding screening of clinic treatment staff by the New York Statewide Central Register of Child Abuse and Maltreatment;

- Clarification of requirements regarding required signatures on treatment plans. The rule making further clarifies that, for recipients receiving services reimbursed by Medicaid on a fee-for-service basis, the signature of the physician is required on the treatment plan. For recipients receiving services that are not reimbursed by Medicaid on a fee-for-service basis, the signature of the physician, licensed psychologist, LCSW, or other licensed individual within his/her scope of practice involved in the treatment plan is required;

- Addition of provisions regarding reimbursement modifications for visits in excess of 30 and 50 respectively (excluding crisis visits, off-site visits, complex care management, and any services that are counted as health services) for fiscal years commencing on or after April 1, 2011;

- Addition of "State-operated mental health clinic" to the peer group listing;

- Specification of time limits for services, including correction of an inaccurate time limit in existing regulation related to psychotropic medication treatment;

- Clarification of allowable Medicaid claims for services provided on the same day for an individual;

- Inclusion of requirements regarding duration of school-based services;

- Clarification of billing using the "physician modifier";

- Amendment of the "Modifier Chart" in Section 599.14 to include only services provided on-site;

- Inclusion of provisions regarding the Office's expectations concerning clinic programs cooperating with Behavioral Health Organizations;

- Existing regulations specify at Section 599.3(d) that Medicaid reimbursement of outreach services and off-site services is contingent upon Federal approval. The Office has recently been advised that Federal approval will not be granted for outreach and off-site services. In recognition of the fact that clinics continue to provide off-site services and have not been able to seek reimbursement for them, the Office will allow reimbursement for off-site Crisis Intervention-Brief Services for all Medicaid recipients, and for certain off-site services for children up to age 19 on a Federally-non-participating basis. This provision is retroactive to October 1, 2010, the effective date of 14 NYCRR Part 599. References to outreach services in the existing regulations have been eliminated in this rule making.

4. Costs:

(a) cost to State government: The reimbursement for brief, off-site crisis procedures for all recipients and certain off-site procedures for children up to age 19 without Federal financial participation does increase the State's costs for clinic services above the previous estimate. The earlier estimate assumed Federal financial participation in all off-site services, irrespective of the age of the recipient, and anticipated paying a 100 percent increment over the equivalent on-site procedure for one off-site procedure per day per recipient. This amendment anticipates paying a 50 percent increment for one off-site procedure per day for children younger than 19 or a brief off-site crisis procedure without regard to the age of the recipient. Focusing only on the incremental cost for the children's off-site services, the Office projects that the additional State cost for these services only linked to this amendment is \$1.5 million annually. This is based on the volume of off-site services known to be delivered by clinics participating in the Office's Clinic Plus initiative for children and extrapolating this performance to all clinics serving children. It is anticipated that the additional cost of paying for off-site crisis services will be minimal.

(b) cost to local government: These regulatory amendments will not result in any additional costs to local government.

(c) cost to regulated parties: These regulatory amendments will not result in any additional costs to regulated parties.

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

6. Paperwork: No substantial increase in paperwork is anticipated as a result of the amendments to 14 NYCRR Part 599.

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

8. Alternatives: The only alternative to the regulatory amendment which was considered was inaction. Since inaction would perpetuate the inability of providers to seek reimbursement for certain off-site services and would prolong the confusion regarding non-controversial provisions of the existing regulation, that alternative was necessarily rejected.

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

10. Compliance Schedule: The regulatory amendments are effective immediately.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this notice because the amended rule will not have an adverse economic impact upon small businesses or local governments. In fact, these amendments will afford financial relief to providers who have been rendering certain services to clients but have been unable to be reimbursed for these services because Federal approval has not been granted. The amendments to 14 NYCRR Part 599 will enable providers to seek reimbursement on a Federally-non participating basis for certain off-site services. Further, the rule clarifies some areas of confusion within existing regulation and includes provisions regarding the Office of Mental Health's expectations pertaining to clinic treatment programs and Behavioral Health Organizations.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not submitted with this notice because its purpose is to enable providers to seek reimbursement on a Federally-non-participating basis for certain off-site services and to clear up areas of confusion within the existing regulation. In addition, the rule making includes provisions regarding the Office of Mental Health's expectations regarding clinic treatment programs and Behavioral Health Organizations. The amendments to 14 NYCRR Part 599 will not impose any adverse economic impact on rural areas. In fact, these amendments will afford financial relief to providers who are rendering certain services to clients but who, so far, have been unable to be reimbursed for these services because Federal approval has not been granted.

Job Impact Statement

A Job Impact Statement is not submitted with this notice because the purpose of rule making is to clarify issues which have resulted in confusion within existing regulation. In addition, the rule includes provisions regarding Behavioral Health Organizations, and serves to enable providers to seek reimbursement on a Federally-non-participating basis for certain off-site services. There will be no adverse impact on jobs and employment opportunities as a result of this rulemaking.

Metro-North Commuter Railroad

NOTICE OF ADOPTION

To Add Outdoor Ticketing, Boarding or Platform Areas of Terminals or Stations to the Areas Where Smoking is Currently Prohibited

I.D. No. MCR-48-11-00004-A

Filing No. 76

Filing Date: 2012-01-31

Effective Date: 2012-02-15

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

Action taken: Amendment of section 1085.5(o) of Title 21 NYCRR.

Statutory authority: Public Authorities Law, section 1266(4)

Subject: To add outdoor ticketing, boarding or platform areas of terminals or stations to the areas where smoking is currently prohibited.

Purpose: To conform MNR Rules to amendment to Public Health Law, article 13, section 1399-o and ensure continuation of enforcement powers.

Text or summary was published in the November 30, 2011 issue of the Register, I.D. No. MCR-48-11-00004-P.

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

Text of rule and any required statements and analyses may be obtained from: Susan H. Sarch, Metro-North Commuter Railroad Company, 347 Madison Avenue, 19th Floor, New York, New York 10017, (212) 340-2543, email: sarch@mnr.org

Assessment of Public Comment

Metro-North Commuter Railroad Company received one public comment. The comment was from the New York Chapter of the American Lung Association, which wrote in support of the proposed rule, did not suggest any alternatives and urged its adoption.

Public Service Commission

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Petition of Consolidated Edison and Orange and Rockland Utilities, Inc. to Transfer Certain Equipment to GenOn Bowline, LLC

I.D. No. PSC-07-12-00003-EP

Filing Date: 2012-01-26

Effective Date: 2012-01-26

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

Proposed Action: The PSC adopted an order approving the transfer of equipment from Consolidated Edison Company of New York, Inc. (Con Edison) and Orange and Rockland Utilities, Inc. (O&R) to GenOn Bowline, LLC., so that GenOn Bowline, LLC. can complete necessary repairs to Transmission Line 68 without the further delay of waiting for ordered equipment to be delivered by suppliers.

Statutory authority: Public Service Law, section 70

Specific reasons underlying the finding of necessity: This action is taken on an emergency basis pursuant to State Administrative Procedures Act (SAPA) § 202(6). Failure to approve the Petition for transfer of equipment on an emergency basis could result in diminished reliability of Orange and Rockland Utilities, Inc.'s system during the spring/summer 2012 loading period. Such diminished reliability would adversely impact the public health and general welfare of the citizens of New York. As a result, compliance with the advance notice and comment requirements of SAPA § 202(1) would be contrary to the public interest, and the immediate authorization to transfer the equipment is necessary for the preservation of the public health, safety and general welfare.

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

Subject: Petition of Consolidated Edison and Orange and Rockland Utilities, Inc. to transfer certain Equipment to GenOn Bowline, LLC.

Purpose: Consideration of Petition of Con Edison and Orange and Rockland to transfer certain Equipment to GenOn Bowline, LLC.

Substance of emergency/proposed rule (Full text is posted at the following State website: www.dps.ny.gov): The Public Service Commission adopted an order approving on a permanent basis, subject to the terms and conditions set forth in the order, the joint petition of Consolidated Edison Company of New York, Inc. (Con Edison) and Orange and Rockland Utilities, Inc. (O&R) to transfer certain equipment to GenOn Bowline, LLC. GenOn will replace the original equipment with similar replacement equipment once such equipment arrives from suppliers. The transfer of the equipment is necessary for GenOn Bowline, LLC. to effect necessary repairs to a transmission line in advance of the spring/summer 2012 loading period. Failure to make the necessary repairs could negatively impact the reliability of O&R's system during the spring/summer 2012 loading period.

This notice is intended: to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire April 24, 2012.

Text of rule may be obtained from: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann.ayer@dps.ny.gov

Data, views or arguments may be submitted to: Jaclyn A. Brillinger, 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

A regulatory impact statement is 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.

Regulatory Flexibility Analysis

A regulatory flexibility analysis is 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.

Rural Area Flexibility Analysis

A rural area flexibility analysis is 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.

Job Impact Statement

A job impact statement is 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-E-0011SA1)

NOTICE OF ADOPTION

Petition for the Submetering of Electricity

I.D. No. PSC-23-11-00010-A

Filing Date: 2012-01-25

Effective Date: 2012-01-25

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

Action taken: On 1/19/12, the PSC adopted an order approving the petition of Park Towers South Company, LLC to submeter electricity at 315/330 West 58th Street, New York, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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

Subject: Petition for the submetering of electricity.

Purpose: To approve the petition of Park Towers South Company, LLC to submeter electricity at 315/330 West 58th St., New York, New York.

Substance of final rule: The Commission, on January 19, 2012 adopted an order approving the petition of Park Towers South Company, LLC to submeter electricity at 315/330 West 58th Street, New York, New York, located in the territory of Consolidated Edison Company of New York, Inc., subject to the terms and conditions set forth in the order.

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

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

Assessment of Public Comment

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

(11-E-0239SA1)

NOTICE OF ADOPTION

Petition for the Submetering of Electricity

I.D. No. PSC-42-11-00017-A

Filing Date: 2012-01-25

Effective Date: 2012-01-25

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

Action taken: On 1/19/12, the PSC adopted an order approving the petition of Lane Towers Owners, Inc. to submeter electricity at 107-40 Queens Boulevard, Forest Hills, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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

Subject: Petition for the submetering of electricity.

Purpose: To approve the petition of Lane Towers Owners, Inc. to submeter electricity at 107-40 Queens Boulevard, Forest Hills, New York.

Substance of final rule: The Commission, on January 19, 2012 adopted an order approving the petition of Lane Towers Owners, Inc. to submeter electricity at 107-40 Queens Boulevard, Forest Hills, New York, located in the territory of Consolidated Edison Company of New York, Inc., subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-

2655, email: leann_ayer@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(11-E-0529SA1)

NOTICE OF ADOPTION

Petition for the Submetering of Electricity

I.D. No. PSC-47-11-00006-A

Filing Date: 2012-01-25

Effective Date: 2012-01-25

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

Action taken: On 1/19/12, the PSC adopted an order approving the petition of 48-52 Franklin, LLC to submeter electricity at 50 Franklin Street, New York, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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

Subject: Petition for the submetering of electricity.

Purpose: To approve the petition of 48-52 Franklin, LLC to submeter electricity at 50 Franklin Street, New York, New York.

Substance of final rule: The Commission, on January 19, 2012 adopted an order approving the petition of 48-52 Franklin, LLC to submeter electricity at 50 Franklin Street, New York, New York, located in the territory of Consolidated Edison Company of New York, Inc., subject to the terms and conditions set forth in the order.

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

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

Assessment of Public Comment

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

(11-E-0424SA1)

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

Petition for the Submetering of Electricity

I.D. No. PSC-07-12-00012-P

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

Proposed Action: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by 8 East 102nd Street LLC to submeter electricity at 4 East 102 Street, New York, New York.

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

Subject: Petition for the submetering of electricity.

Purpose: To consider the request of 8 East 102nd Street LLC to submeter electricity at 4 East 102 Street, New York, New York.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by 8 East 102nd Street LLC to submeter electricity at 4 East 102 Street, New York, New York located in the service territory of Consolidated Edison Company of New York, Inc.

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

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

tary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: Secretary@dps.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-0468SP1)

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

To Consider Modifying a Commission Order

I.D. No. PSC-07-12-00013-P

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

Proposed Action: The Commission is considering whether to modify its Order dated 3/25/08, to allow installation of isolation transformers as warranted by public safety considerations and also allow installations in the base of traffic signal structures.

Statutory authority: Public Service Law, sections 5(1), 65(1) and 66(1)

Subject: To consider modifying a Commission order.

Purpose: Discontinue system wide installation of isolation transformers in street lights and traffic signals.

Substance of proposed rule: In Case 07-E-0523, the Public Service Commission (Commission) approved the proposal by Consolidated Edison of New York, Inc. (Con Edison or Company) to install isolation transformers on its underground secondary distribution system in order to eliminate stray voltage conditions associated with streetlights and traffic signals. The Commission's Order dated 3/25/08, directed Con Edison to perform as many installations as can reasonably and cost effectively be accomplished.

Con Edison filed a petition with the Commission in which it states that the Company and the City of New York Department of Transportation have instituted several effective measures that have substantially reduced the risk of electric shock from streetlights and traffic signals. And, as a result of these mitigation efforts, across-the-board installation of isolation transformers throughout the entire underground system is no longer reasonable or cost effective in reducing the number of electric shocks from streetlights and traffic signals. Accordingly, Con Edison requests that the Commission modify its Order to authorize the Company to discontinue the system-wide installation of isolation transformers for street lights and traffic signals. Noting that isolation transformer installation at particular locations may be warranted by public safety considerations, Con Edison requests that the Commission further modify its Order to provide that Con Edison install isolation transformers for such street light and traffic signal locations as may be warranted by public safety considerations, and that the Company be authorized to make installations in the bases of traffic signal poles instead of in the manhole or service boxes supplying power to the traffic signals. Specifically, Con Edison would install isolation transformers for selected street lights or traffic signals presenting an elevated risk of shock.

The Company estimates that the cost of its modified installation program will be about \$11 million through 2025 versus a cost of about \$167 million to deploy isolation transformers at the remaining 119,700 locations throughout the underground distribution system through 2025 – a net capital savings of about \$156 million. The Commission may apply its decision in this case to other utilities.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann.ayer@dps.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-0523SP10)

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

Allocation of Customer-Sited Tier Funds; Funding and Capacity Caps

I.D. No. PSC-07-12-00014-P

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

Proposed Action: The Commission is considering a petition by the New York State Energy Research and Development Authority (NYSERDA) requesting the allocation of unencumbered Renewable Portfolio (RPS) funds and other modifications.

Statutory authority: Public Service Law, sections 4(1), 5(2) and 66(1)

Subject: Allocation of Customer-Sited Tier funds; funding and capacity caps.

Purpose: To encourage electric energy generation for the State’s consumers from renewable resources.

Substance of proposed rule: The Commission is considering whether to adopt, modify, or reject, in whole or in part, potential modifications to the Renewable Portfolio Standard (RPS) program related to the use of unencumbered funds in the Customer-Sited Tier program from year 2011 budgets by the New York State Energy Research and Development Authority (NYSERDA) as administrator of the RPS program. In particular, the Commission is considering the “Petition for Modification Proposal Regarding Unallocated CST Funds” dated January 30, 2012 wherein NYSEDA requests (a) the allocation of unencumbered Customer-Sited Tier program funds from year 2011 budgets into those for 2012; (b) authorization for the Solar Photovoltaic (PV) Program to use funds reallocated into the incentive budget in months when demand exceeds the \$2 million per month schedule; and (c) authorization to revise the PV program categories to residential and non-residential.

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

Data, views or arguments may be submitted to: Jaelyn 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.
 (03-E-0188SP30)

Racing and Wagering Board

NOTICE OF ADOPTION

Testing of Certain Licensees and Officials in Horse Racing Activities for Blood Alcohol Content in Excess of .05 Percent

I.D. No. RWB-43-11-00003-A

Filing No. 74

Filing Date: 2012-01-31

Effective Date: 2012-04-27

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

Action taken: Addition of section 4042.6; and amendment of section 4104.12 of Title 9 NYCRR.

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

Subject: Testing of certain licensees and officials in horse racing activities for Blood Alcohol Content in excess of .05 percent.

Purpose: To detect and deter alcohol intoxication by licensees and officials, thereby ensuring safe operations and integrity of racing.

Text or summary was published in the October 26, 2011 issue of the Register, I.D. No. RWB-43-11-00003-P.

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

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

Assessment of Public Comment

The Board received a letter from the Empire State Horsemen’s Alliance. The letter included correspondence which was originally sent to the Board during the preliminary rule drafting process in August 2011. In their letter, they state that the clause in 4104.12(c)(2) which states “The presence of .05 percent alcohol in the blood by weight per volume” in the rule should include the language “or more” when referencing the blood alcohol content. In fact, that revision was included in the proposed rulemaking, which states “The presence of .05 percent or more alcohol in the blood by weight per volume. . .” The Board intended for the rule, as originally written, to include .05 percent or above since any amount over and above necessarily includes .05 percent. The Board made the revision to eliminate confusion and since it was implied in the original rule, it is not considered an alternative to the original rule.

The Alliance also stated concerns that the rule would be applied arbitrarily to licensed persons at the harness track and specifically would subject owners to alcohol level testing even if they were not driving, training, grooming or in any other way functioning as an observer of their horse. The Alliance noted that the Board already has a rule, 9 NYCRR 4104.10(b), that authorizes officials to exclude owners from the paddock for improper decorum. Third, the Alliance also took issue with the penalties, including revocation of a license and a requirement that a licensee seek treatment prior to his or her return to harness racing. Since the existing harness rule already authorizes the Board to administer alcohol testing and impose penalties as it deems appropriate, and the proposed rule merely offer clarifying language in the application of the existing rule, the Board has decided to keep intact the proposed rule without the modification suggested by the Alliance. Furthermore, there has been no known case where the existing alcohol testing rule has been applied arbitrarily or penalties have been imposed by the Board that were alleged to have been “shocking the conscience” or “embarks more on social welfare than paddock safety.” These comments were considered when they were first submitted in August and again when they were resubmitted on October 28, 2011. No changes were made to the proposed rule pursuant to these comments.

NOTICE OF ADOPTION

Use of Cellular Telephones in the Paddock

I.D. No. RWB-43-11-00004-A

Filing No. 69

Filing Date: 2012-01-30

Effective Date: 2012-02-15

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

Action taken: Addition of section 4104.14 to Title 9 NYCRR.

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

Subject: Use of cellular telephones in the paddock.

Purpose: To allow cellular telephones and other electronic communication devices in designated areas of a harness race paddock.

Text or summary was published in the October 26, 2011 issue of the Register, I.D. No. RWB-43-11-00004-P.

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

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

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Minimum Diameter of a Riding Crop Used in Thoroughbred Racing

I.D. No. RWB-44-11-00001-A

Filing No. 70

Filing Date: 2012-01-30

Effective Date: 2012-02-15

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

Action taken: Amendment of section 4035.9(a)(1)(iii) of Title 9 NYCRR.

Statutory authority: Racing, Pari-Mutuel Wagering and Breeding Law, sections 101(1), 205 and 218

Subject: Minimum diameter of a riding crop used in thoroughbred racing.

Purpose: Require the use of a padded riding crop with a minimum shaft diameter of 3/8th of an inch, which is more humane to the horse.

Text or summary was published in the November 2, 2011 issue of the Register, I.D. No. RWB-44-11-00001-P.

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

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

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Trifecta Wager in Thoroughbred Horse Racing

I.D. No. RWB-44-11-00002-A

Filing No. 71

Filing Date: 2012-01-30

Effective Date: 2012-02-15

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

Action taken: Amendment of section 4011.22(i) of Title 9 NYCRR.

Statutory authority: Racing, Pari-Mutuel Wagering and Breeding Law, sections 101 and 235

Subject: Trifecta wager in thoroughbred horse racing.

Purpose: To amend the trifecta wager rule to allow wagering when there are five betting entries in the racing fields.

Text or summary was published in the November 2, 2011 issue of the Register, I.D. No. RWB-44-11-00002-P.

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

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

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Generally Accepted Auditing Standards for Off-Track Betting Corporations

I.D. No. RWB-44-11-00020-A

Filing No. 72

Filing Date: 2012-01-30

Effective Date: 2012-02-15

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

Action taken: Amendment of sections 5208.1 through 5208.6 of Title 9 NYCRR.

Statutory authority: Racing, Pari-Mutuel Wagering and Breeding Law, sections 101, 516, 517, 520, 524 and 621

Subject: Generally accepted auditing standards for off-track betting corporations.

Purpose: To establish uniform auditing standards for off-track betting corporations.

Text or summary was published in the November 2, 2011 issue of the Register, I.D. No. RWB-44-11-00020-P.

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

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

Assessment of Public Comment

The agency received no public comment.

Department of Taxation and Finance

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Continuing Education Training for Assessors and County Directors

I.D. No. TAF-07-12-00007-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 188-2.8, 188-2.9, 188-4.8 and 188-4.9 of Title 9 NYCRR.

Statutory authority: Real Property Tax Law, sections 202(1)(k), 310(5)(b), 318 and 1530

Subject: Continuing education training for assessors and county directors.

Purpose: To reduce the continuing education requirement for assessors and county directors of real property tax service agencies.

Text of proposed rule: Section 1. The introduction to subdivision (a) of section 188-2.8 and paragraph (2) of such subdivision are amended to read as follows:

(a) Each appointed and sole elected assessor must comply with the applicable continuing education requirement set forth herein. All other elected assessors may voluntarily participate in the continuing education program [but] and are subject to the same requirements for [all purposes] continuing education credit and reimbursement as provided in this Subpart.

(2) [Each] Effective October 1, 2011, each appointed or sole elected assessor must successfully complete an average of [24] 12 continuing education credits every year. A "continuing education year" is defined as beginning on October 1 and ending on September 30 of the following year. "Continuing education credit" means the number of contact hours awarded for attendance at approved courses, conferences, and seminars. Continuing education credits are awarded on an hour for hour basis in full hour amounts only. [If an assessor successfully completes more than 24 continuing education credits in one year, as many as 24 of the excess credits may be applied toward the requirement for the following year.]

(i) If an assessor successfully completes more than 12 continuing education credits in one continuing education year, as many as 12 of the excess credits may be applied toward the requirement for only the next continuing education year. Continuing education credit requirements already satisfied for the 2010-2011 and 2011-2012 continuing education years will remain satisfied.

(ii) If an assessor has not satisfied the required number of continuing education credits for the prior year, continuing education credits successfully completed in the current year will first be applied retroactively to satisfy the prior continuing education year requirement. In no case shall credit be awarded retroactively to satisfy more than one continuing education year.

Section 2. Paragraph (4) of subdivision (a) of section 188-2.8 is repealed.

Section 3. Subdivision (f) of section 188-2.8 is amended to read as follows:

(f) Continuing education credits for the attainment of professional designations set forth in RPTL section 318(3)(b) shall be awarded on an [hour-for-hour] hour for hour basis for qualifying examinations which are successfully completed. Demonstration appraisals accepted as a requirement for a professional designation shall be awarded [45] 24 continuing education credits.

Section 4. Subdivision (g) of section 188-2.9 is amended to read as follows:

(g) For reimbursement of expenses for training [attended on or after October 1, 2009] *during the 2009-2010 continuing education year*, any assessor who has more than 24 excess credits [on that date] shall apply 24 credits to satisfying the continuing education requirement in [2009-10] *2009-2010* and any additional remaining credits to satisfying the continuing education requirement in [2010-11] *2010-2011*. Any remaining credits shall be applied to satisfying the continuing education requirement in [2011-12] *2011-2012*.

Section 5. Paragraph (1) of subdivision (a) of section 188-4.8 is amended to read as follows:

(1) [A] *Effective October 1, 2011*, a county director must successfully complete an average of [24] 12 continuing education credits every year. A "continuing education year" is defined as beginning on October 1 and ending on September 30 of the following year. "Continuing education credit" means the number of contact hours awarded for attendance at approved courses, conferences, and seminars. Continuing education credits are awarded on an hour for hour basis in full hour amounts only. [If a county director successfully completes more than 24 continuing education credits in one year, as many as 24 of the excess credits may be applied toward the requirement for the following year.]

(i) *If a county director successfully completes more than 12 continuing education credits in one continuing education year, as many as 12 of the excess credits may be applied toward the requirement for only the next continuing education year. Continuing education credit requirements already satisfied for the 2010-2011 and 2011-2012 continuing education years will remain satisfied.*

(ii) *If a county director has not satisfied the required number of continuing education credits for the prior year, continuing education credits successfully completed in the current year will first be applied retroactively to satisfy the prior continuing education year requirement. In no case shall credit be awarded retroactively to satisfy more than one continuing education year.*

Section 6. Subdivision (c) of section 188-4.8 is repealed.

Section 7. Subdivisions (d) through (f) of section 188-4.8 are renumbered to (c) through (e):

Section 8. Newly renumbered subdivision (c) of section 188-4.8 is amended to read as follows:

(c) Continuing education credits for the attainment of professional designations set forth in RPTL section 318(3)(b) shall be awarded on an [hour-for-hour] *hour for hour* basis for qualifying examinations which are successfully completed. Demonstration appraisals accepted as a requirement for a professional designation shall be awarded [45] 24 continuing education credits.

Section 9. Subdivision (c) of section 188-4.9 is amended to read as follows:

(c) For reimbursement of expenses for training [attended on or after October 1, 2009] *during the 2009-2010 continuing education year*, any director who has more than 24 excess credits [on that date] shall apply 24 credits to satisfying the continuing education requirement in [2009-10] *2009-2010* and any additional remaining credits to satisfying the continuing education requirement in [2010-11] *2010-2011*. Any remaining credits shall be applied to satisfying the continuing education requirement in [2011-12] *2011-2012*.

Text of proposed rule and any required statements and analyses may be obtained from: John W. Bartlett, Tax Regulations Specialist 4, Department of Taxation and Finance, Taxpayer Guidance Division, Building 9, W.A. Harriman Campus, Albany, NY 12227, (518) 457-2254, email: tax.regulations@tax.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: Real Property Tax Law, sections 202(1)(k), 310(5)(b), 318 and 1530. Section 202(1)(k) of the Real Property Tax Law authorizes the Commissioner in relation to real property tax administration to adopt and amend such rules and regulations, not inconsistent with law, as may be necessary for the exercise of his or her powers and the performance of his or her duties. Section 310(5)(b) of the Real Property Tax Law requires appointed assessors and any elected assessor to a six-year term to complete additional courses in a continuing education and training program as prescribed by the Commissioner. Section 318 provides that the expense of required training shall be a charge upon the state, subject to the appropriation of funds. Section 1530 of the Real Property Tax Law requires county real property tax service agency directors to complete courses in a continuing education and training program as prescribed by the Commissioner; the section also provides that expenses for such training shall be a charge upon the state.

2. Legislative objective: The rule further defines the legislative requirement for continued professional training of assessors and county directors.

3. Needs and benefits: Under Real Property Tax Law, section 310(5)(b), the Commissioner has the responsibility for administering the continuing education training program for assessors. Section 1530 (3)(b) of the Real Property Tax Law establishes a similar program for directors of county real property tax service agencies. Both programs were designed to provide for educational course requirements beyond the statutorily mandated basic course of training. 9 NYCRR, Part 188 contains the various standards and requirements for assessors and county directors. The Commissioner is authorized to enforce these continuing education and training program requirements.

From its inception in 1983, the continuing education credit hour requirement ranged from 9 to 12 credit hours per year. In 1990, the continuing education credit requirement was changed substantially to mandate 24 hours, rather than a required average number of credit hours per year. At any point in time, over 500 certified assessors and county directors that gained certification are required to participate in the continuing education program. Participants that are not in compliance are subject to removal from office (RPTL §§ 322 and 1530). With a recent reduction in the allocation for training reimbursement, and feedback from certain members of the assessment community, we did a benchmark comparison of requirements with other States. In comparison with 33 other States that responded to a 2009 survey conducted by the International Association of Assessing Officers (IAAO), 2/3 of the States require an average of 15 or fewer continuing education credits per year. Therefore, to provide mandate relief to the assessors and county directors of real property tax service agencies who must earn continuing education, returning to a requirement of 12 credits rather than 24 will ensure that a reasonable level of education is maintained without imposing an excessive burden. It will also bring New York State requirements in line with other states.

4. Costs: (a) To State government: The cost of providing reimbursement for training is reduced. This proposal involves minor changes to an ongoing program without increasing the workload.

(b) To local governments: None. The Real Property Tax Law provides that actual and necessary expenses incurred in satisfying these requirements are reimbursed by the State to the extent funds are appropriated by the Legislature. Rules are in place to allow proration of reimbursement funds when necessary. If fund appropriations are reduced and the training requirements remain unchanged, assessors and county directors would seek reimbursement from their local governments.

(c) To private parties: None.

(d) Overall: The amount of required reimbursement provided to local officials would be less, due to the reduction of the continuing education requirement.

5. Local government mandates: None. The continuing education requirements would be reduced by 50 percent. The rules also provide that assessors who have already met their continuing education requirements for 2010-2011 or 2011-2012 would retain their status as such.

6. Paperwork: This proposal does not increase existing paperwork requirements. It is possible that the proposal decreases the paperwork required for submission of requests for course approval.

7. Duplication: There are no comparable State or Federal requirements.

8. Alternatives: Retain the existing requirement for 24 continuing education credits each year. If appropriated funds are inadequate to cover expenses, either the localities or individuals themselves would incur the expense for required training.

9. Federal standards: There are no Federal regulations concerning the subject.

10. Compliance schedule: The revised continuing education credit requirement would be in place for the continuing education year starting on October 1, 2011. However, the rules also provide that assessors and county directors who have already met their continuing education requirements for 2010-2011 or 2011-2012 would retain their status as such.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this rule because this rule will not impose any adverse economic impact or reporting, recordkeeping, or other compliance requirements on small businesses or local governments. The rule does not distinguish between different types and sizes of regulated parties. The rule does not distinguish between regulated parties located in different geographical areas.

The purpose of these amendments is to provide mandate relief to local government officials who are required to complete continuing education training. The rule reduces the continuing education credit requirement of an assessor or county director of real property tax services by 50 percent.

Outreach was conducted with two outside stakeholder groups; the Training Advisory Group (TAG) and the Real Property Tax Administration Committee (RPTAC) and their feedback was considered. In addition to ORPTS educational services staff, TAG is comprised of Assessors,

County Directors, and 'at-large members' who represent a cross section of large and small assessing units from both the upstate and downstate areas as well as members from the education and appraisal sector. TAG provides advice for the development and delivery of training programs for the assessment community. TAG members had varying opinions on the proposal to reduce the number of credit hours required for continuing education. Some felt that with the complexity of the job, the 24 hour requirement should remain intact. Others recognized that this requirement is placing a burden on assessors in small or rural towns and they would welcome a reduction.

In addition to ORPTS executive staff, RPTAC is comprised of Assessors and County Directors of Real Property Tax Services who likewise represent a cross section of large and small assessing units from both the upstate and downstate areas. The assessor members of RPTAC were not in favor of reducing the required number of credit hours required for continuing education. Similar to TAG, some felt that with the complexity of the job, the 24 hour requirement should remain intact. The County Directors, however, were unanimous in their support for reducing the requirement for continuing education credits. Not only were they speaking for their own membership, but also for the assessors that work within their Counties. They based their support on feedback from within their assessment communities, information presented by ORPTS from benchmark studies, and recognition that the economic landscape has changed since the requirements were increased in the early 1990's.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not being submitted with this rule because it will not impose any adverse impact on rural areas or any reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas. The rule does not distinguish between regulated parties located in different geographical areas.

The purpose of these amendments is to provide mandate relief to local government officials who are required to complete continuing education training. The rule reduces the continuing education credit requirement of assessors and county directors of real property tax services by 50 percent.

Job Impact Statement

A Job Impact Statement is not being submitted with this rule because it is evident from the subject matter of the rule that it would have no adverse impact on jobs and employment opportunities.

The purpose of these amendments is to provide mandate relief to local government officials who are required to complete continuing education training. The rule reduces the continuing education credit requirement of assessors and county directors of real property tax services by 50 percent.

New York State Thruway Authority

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Delete Obsolete References to Interstate 84 ("I-84") from 21 NYCRR Section 105.3

I.D. No. THR-07-12-00008-P

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

Proposed Action: Amendment of section 105.3 of Title 21 NYCRR.

Statutory authority: Public Authorities Law, sections 354(5), (15) and 361(1)(a); and Vehicle and Traffic Law, section 1630

Subject: Delete obsolete references to Interstate 84 ("I-84") from 21 NYCRR section 105.3.

Purpose: The Thruway Authority's jurisdiction no longer includes I-84 and this proposed rule would delete the obsolete references.

Text of proposed rule: § 105.3 Prohibited advertising devices.

(b) Whenever an off-premises advertising device prohibited under subdivision (a) of this section, but lawful under prior law, is located in areas within 660 feet of the nearest edge of the right-of-way of [Interstates 84 or] *Interstate 287*, and construction of same at its present location commenced [with respect to Interstate 84 on or before September 1, 1992 and] with respect to Interstate 287 on or before April 1, 1991, the same may continue to be maintained, subject to permitting under this Part, for a reasonable period not to exceed the longer of two years from commencement of construction or the period which the owner of the advertising device can demonstrate is necessary to avoid substantial financial loss. In determining what constitutes substantial financial loss, the authority may

consider such factors as initial capital investment, investment realization at the time of the permit application, life expectancy of the investment, the existence or non-existence of a lease obligation, and existence of a contingency clause permitting termination of the lease. Failure to apply for a permit under this Part shall constitute presumptive evidence that immediate removal of the off-premises advertising device will cause no substantial economic loss.

Text of proposed rule and any required statements and analyses may be obtained from: Kathy Clark, New York State Thruway Authority, 200 Southern Blvd., Albany, NY 12209, (518) 436-2876, email: kathy.clark@thruway.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:

Public Authorities Law (PAL) section 354, subdivision 5, authorizes the Thruway Authority to make "rules and regulations governing the use of the thruways and all other properties and facilities under its jurisdiction..." Subdivision 15 of that section authorizes the Thruway Authority to "do all things necessary or convenient to carry out its purposes and exercise the powers expressly given in this title." Subdivision 1(a) of section 361 of PAL authorizes the Authority "to promulgate such rules and regulations for the use and occupancy of the thruway as may be necessary and proper for the public safety and convenience, for the preservation of its property and for the collection of tolls..." Furthermore, section 1630 of the Vehicle and Traffic Law authorizes the Authority to regulate traffic on and charge tolls for the use of its facilities.

2. Legislative Objectives:

Sections 10 and 11 of Chapter 53 of the Laws of New York of 1991 authorized the Thruway Authority ("Authority") to acquire by transfer without consideration from the State acting through the Commissioner of the New York State Department of Transportation ("DOT") the highway connection presently known as I-84 together with any other rights in land necessary for the proper and safe operation and maintenance of said highway connection pursuant to an Agreement between the Commissioner of the DOT and the Chairman of the Authority. On March 19, 1992, the Authority and DOT entered into the I-84 Agreement, which set forth that the Authority was to be responsible for the performance of operation and maintenance of I-84, that after July 1, 1996, the Authority would have the right, with one year's notice, to terminate said Agreement and upon such termination, the Authority was to have no further operational, maintenance or financial obligations with respect to I-84 and the property was to revert to DOT. By letter dated October 30, 2006, the Authority gave the required one year's notice. Subsequently, the Authority and DOT have entered into annual contracts for the Authority solely to perform maintenance and operations on I-84 on behalf of the DOT. The property, however, remains under the jurisdiction of the DOT and as such, the references to I-84 in this Thruway Authority regulation must be removed.

3. Needs and Benefits:

The Thruway Authority gave the required one year notice to the Department of Transportation that the property known as I-84 was to revert to the DOT and as such, reference to I-84 in Thruway Authority regulations must be removed. This amendment will remove from Thruway Authority regulation 21 NYCRR section 105.3 the references to Interstate 84 as it is no longer under the jurisdiction of the Thruway Authority.

4. Costs:

There is no cost to regulated parties for the implementation of and continuing compliance with the regulation. There are no additional administrative costs for implementation of the revised regulation.

5. Local Government Mandates:

This rule imposes no program, service, duty, or responsibility on local government.

6. Paperwork:

There is no prescribed paperwork required.

7. Duplication:

There is no duplication of State or Federal law.

8. Alternatives:

The Thruway Authority considered a no action alternative but chose to pursue this rule and eliminate the reference to I-84 to avoid confusion of the jurisdictional responsibilities of I-84 and provide consistency with the Authority's return of I-84 to DOT.

9. Federal Standards:

There is no specific Federal requirement.

10. Compliance Schedule:

Ongoing.

Regulatory Flexibility Analysis

This regulation will not impose any adverse economic impact on reporting, recordkeeping or other compliance requirements on small businesses

or local governments. As such, a Regulatory Flexibility Analysis is not required.

Rural Area Flexibility Analysis

This regulation does not impose any adverse impact on rural areas whether through reporting, recordkeeping or other compliance requirements on public or private entities in rural areas; as such, a Rural Area Flexibility Analysis is not required.

Job Impact Statement

Based on the nature of the proposed rule, it will not have a substantial adverse impact on jobs and employment opportunities. As such, a Job Impact Statement is not required.

Urban Development Corporation

EMERGENCY RULE MAKING

Bonding Guarantee Assistance Program

I.D. No. UDC-07-12-00004-E

Filing No. 59

Filing Date: 2012-01-26

Effective Date: 2012-01-26

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

Action taken: Addition of Part 4253 to Title 21 NYCRR.

Statutory authority: Urban Development Corporation Act, section 5(4); L. 1968, ch. 174; L. 1994, ch. 169, section 16-f

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

Specific reasons underlying the finding of necessity: The current economic crisis, including high unemployment and the immediate lack of capital for job generating small business, are the reasons for the emergency adoption of this Rule which is required for the immediate implementation of the Bonding Guarantee Assistance Program. The Program will provide surety companies the additional financial backing needed in order to induce such companies to issue payment and performance bonds for contractors that are small businesses, certified minority-owned enterprises or women-owned business enterprises, in order for such contractors to meet payment and performance bonding requirements for construction projects, including but not limited to, government sponsored, transportation related construction projects and to provide technical assistance in completing bonding applications for such contractors seeking surety bonding in preparation for bidding on construction projects, including transportation related projects. This assistance will sustain and increase employment generated by these businesses.

Subject: Bonding Guarantee Assistance Program.

Purpose: Provide the basis for administration of the Bonding Guarantee Assistance Program.

Text of emergency rule: *Bonding Guarantee Assistance Program*

21 NYCRR Part 4253

Statutory Authority

*Section 16-f of the New York State Urban Development Corporation Act,
Chapter 174 of the Laws of 1968, as amended*

Section I Purpose

The purpose of this rule and these regulations is to effectuate section 16-f of the New York State Urban Development Corporation Act, that authorizes the Bonding Guarantee Assistance Program, and to provide for the implementation and administration of the program by the New York State Urban Development Corporation which is authorized by the Program (i) to provide to surety companies the additional financial backing needed in order to induce such companies to issue payment and performance bonds for contractors that are small businesses, as defined in this rule, and certified, pursuant to article fifteen-A of the Executive Law, minority-owned business enterprises or women-owned business enterprises, in order for such contractors to meet payment and performance bonding requirements for construction projects, including but not limited

to, government sponsored, transportation related construction projects and (ii) to provide technical assistance in completing bonding applications for such contractors seeking surety bonding in preparation for bidding on construction projects, including transportation related projects.

Section II Definitions

a) "Agent" shall mean a third party that has entered into an agreement with the Corporation for the purpose of administering the Program.

b) "Bid Bond" shall mean a written guaranty provided to a principal by a surety on behalf of a contractor who is submitting a bid, in order to ensure that upon acceptance of the bid by the principal, the contractor will proceed with the contract and will replace the bid bond with a performance bond.

c) "Program" shall mean the Bonding Guarantee Assistance Program created pursuant to section 16-f of the New York State Urban Development Corporation Act.

d) "Certified" shall mean certification of a business enterprise as a Minority-Owned Business Enterprise or a Women-Owned Business Enterprise pursuant to article 15-A of the Executive Law.

e) "Corporation" shall mean the new York State Urban Development Corporation d/b/a Empire State Development, a corporate governmental agency of the State of New York, constituting a political subdivision and public benefit corporation created by chapter one hundred seventy-four of the Laws of nineteen hundred sixty-eight, as amended.

f) "Minority-Owned Business Enterprise" shall mean a business enterprise, including a sole proprietorship, partnership or corporation that is: (i) at least fifty-one percent owned by one or more Minority Group Members; (ii) an enterprise in which such minority ownership is real, substantial and continuing; (iii) an enterprise in which such minority ownership has and exercises the authority to control independently the day-to-day business decisions of the enterprise; (iv) an enterprise authorized to do business in this state and independently owned and operated; (v) an enterprise owned by an individual or individuals, whose ownership, control and operation are relied upon for certification, with a personal net worth that does not exceed three million five hundred thousand dollars, as adjusted annually on the first of January for inflation according to the consumer price index of the previous year; and (vi) an enterprise that is a Small Business, unless the term Minority-Owned Business Enterprise is otherwise defined in section 310 of the Executive Law, in which case the definition shall be as set forth for such term in such section.

g) Minority Group Members shall mean persons who are:

1) Black;

2) Hispanic persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American descent or either Indian or Hispanic origin, regardless of race;

3) Asian and Pacific Islander persons having origins in the Far East, Southeast Asia, the Indian sub-continent or the Pacific Islands; or

4) American Indian or Alaskan Native persons having origins in any of the original people of North America and maintaining identifiable tribal affiliations through membership and participation or community identification, unless the term Minority Group Member is otherwise defined in section 310 of the Executive Law, in which case the definition shall be as set forth for such term in such section.

h) "Payment bond" shall mean a written guaranty provided to a principal by a surety on behalf of a contractor that guarantees that a contractor will pay suppliers, laborers, and subcontractors subject to contract terms for labor and materials.

i) "Performance bond" shall mean a written guaranty provided to a principal by a surety on behalf of a contractor that guarantees that a contractor will adhere to the terms and conditions of a contract.

j) "Small Business" shall mean a business that is resident and authorized to do business in the State, independently owned and operated, not dominant in its field, whose primary place of business is in New York State, and that employs one hundred or fewer persons on a full time basis, unless such term is otherwise defined in section 131 of the Economic Development Law, in which case the definition shall be as set forth for such term in such section.

k) "State" shall mean the State of New York.

l) "Surety Company" shall mean a surety company that has a certificate of solvency from, and its rates approved by, the New York State Department of Financial Services and/ or appears in the most current edition of the U.S. Department of Treasury Circular 570 as eligible to issue bonds in connection with procurement contracts for the United States of America.

m) "Women-Owned Business Enterprise" shall mean a business enterprise, including a sole proprietorship, partnership or corporation

that is: (i) at least fifty-one percent owned by one or more United States citizens or permanent resident aliens who are women; (ii) an enterprise in which the ownership interest of such women is real, substantial and continuing; (iii) an enterprise in which such women ownership has and exercises the authority to control independently the day-to-day business decisions of the enterprise; (iv) an enterprise authorized to do business in State and independently owned and operated; (v) an enterprise owned by an individual or individuals, whose ownership, control and operation are relied upon for certification, with a personal net worth that does not exceed three million five hundred thousand dollars, as adjusted annually on the first of January for inflation according to the consumer price index of the previous year; and (vi) an enterprise that is a Small Business, unless the term Women-Owned Business Enterprise is otherwise defined in section 310 of the Executive Law, in which case the definition shall be as set forth for such term in such section.

Section III Program Overview

1) The amount of additional Program assistance provided to a Surety Company with respect to each contract shall generally not be greater than the amount necessary to induce such Surety Company to issue the bonds required for the contract, and in no event shall exceed fifty percent of the face value of bonds to be issued by the Surety Company for such contract.

2) The Corporation may provide to Small Businesses, Certified Minority-Owned Business Enterprises and Certified Women-Owned Business Enterprises seeking surety bonding in preparation for bidding on construction projects, including transportation related projects, technical assistance in completing bonding applications. The Corporation may refer such businesses to various business service providers or the Department of Economic Development for technical assistance as such businesses may need, including, but not limited to:

a. a review of the applicant's market and business competitive strategy;

b. consultation and review of the development and planned implementation of a working capital budget;

c. assistance with applications for the receipt of funding from other financial sources and providing referrals to other appropriate public and private sources of financing; and

d. assistance from the regional offices of the Department of Economic Development, pursuant to article 11 of the Economic Development Law, and the Entrepreneurial Assistance Program, pursuant to article 9 of such law, and any other such program receiving State funds from the New York State Urban Development Corporation Act or the Department of Economic Development or any other state agency that is intended to provide technical assistance to Small Businesses, Certified Minority-owned Business Enterprises and Certified Women-owned Business Enterprises.

Section IV Eligible Contractors

In order to be eligible for consideration for Program assistance, a contractor must be a Small Business, a Certified Minority-Owned Business Enterprise or a Certified Women-Owned Business Enterprise that is unable to obtain a bond from a Surety Company without Program assistance.

Preference for Program assistance is given to Minority-Owned Business Enterprises and Women-Owned Business Enterprises.

The Corporation may provide each Surety Company that participates in the Program with additional requirements or guidelines on contractor eligibility, such as minimum years in businesses, contract performance history, revenue limits or minimums, or other factors. The Surety Company may be required to verify information regarding Program eligible contractors or to secure such assurances from prospective Program eligible contractors as the Corporation may deem necessary.

Section V Eligible Surety Companies

In order to be eligible to participate in the Program, a surety company must, among other requirements to be determined by the Corporation:

i. have a certificate of solvency (pursuant to section 111 of the Insurance Law) from, and have its rates approved by, the New York State Department of Financial Services and/or appear in the most current edition of the U.S. Department of Treasury Circular 570 as eligible to issue bonds in connection with procurement contracts for the United States of America;

ii. have a satisfactory performance record regarding contractor default, termination of contracts, application of satisfactory underwriting standards and principles and practices for evaluating contractor credit and capacity and processing claims, including diligent and commercially reasonable recovery efforts; and

iii. be rated B+ or higher if rated by A.M Best's Key Rating Guide Property/Casualty.

Section VI Financial Backing Program Assistance

Program assistance is limited to the financial backing necessary to secure Bid Bonds, Performance Bonds, and Payment Bonds issued in connection with contract bids or awards. Such Program assistance shall be in such form as the Corporation may determine, and may include irrevocable standby letters of credits issued to a Surety Company by a financial institution for the account of the Corporation in connection with the Surety Company providing such bonds on behalf of a Program eligible contractor with respect to a contract. The amount of such Program assistance provided to a Surety Company with respect to each contract shall generally not be greater than the amount necessary to induce such Surety Company to issue the bonds required for the contract, and in no event shall exceed fifty percent of the face value of bonds to be issued by the Surety Company for such contract. Generally, a Surety Company may not receive Program assistance for more than two contracts for the same contractor at the same time.

Section VII Program Administration

1) In order for a Surety Company to participate in the Program, the Surety Company shall enter into a Program participation agreement with the Corporation in such form as the Corporation or the Agent may prescribe. Such agreements may include provisions for proof of contractor default; termination of contracts; underwriting standards and principles and practices used in evaluating credit and capacity; and requirements for the claims process, including requirements that the Surety Company conduct diligent and commercially reasonable recovery efforts.

2) The Corporation shall conduct the oversight and management of the Program, and the Corporation may engage an Agent for administration and implementation of the Program.

3) The Corporation may contract with one or more financial institutions in order that such financial institution will provide to Surety Companies, as additional financial backing Program assistance, letters of credit or other guarantees for the account of the Corporation.

4) The Corporation or the Agent shall evaluate applications for Program Assistance and make determinations as to business creditworthiness and whether to provide the requested additional financial backing Program assistance. Evaluations of eligible contractors may, among other things, include review of financial information, contract performance history, documents submitted to the Surety Company and other business information.

5) The Corporation may facilitate the provision of technical assistance to eligible Small Businesses and Certified Minority-Owned Business Enterprises and Certified Women-Owned Business Enterprises in accordance with applicable law and regulations.

6) The Corporation or the Agent shall prepare annual reports for the Program.

Section VIII Fees

A participating Surety Company may charge application fees, commitment fees, bonding premiums and other reasonable fees and expenses pursuant to a schedule of fees and expenses adopted by the Surety Company and approved in writing by the Corporation. The Corporation may require a contractor participating in the Program to pay the Corporation for its out-of-pocket costs in connection with the Program assistance for the contractor, including, without limiting the foregoing, the costs with respect to letter of credit and other guarantees to be provided to a Surety Company in connection with bonds for such contractor's contract.

Section IX Confidentiality and State Employees

a) To the extent permitted by law, all information regarding the financial condition, marketing plans, customer lists, or other trade secrets and proprietary information of a person or entity requesting assistance from the Program administered through the participating Surety Company, shall be confidential and exempt from public disclosures.

b) No full time employee of the State of New York or any agency, department, authority or public benefit corporation thereof shall be eligible to receive assistance under this Program.

Section X Non-Discrimination and Affirmative Action

The Corporation's affirmative action and non-discrimination policies and programs are grounded in both public policy and applicable law, including but not limited to, Section 2879 of the Public Authorities Law, Article 15 of the Executive Law, Article 15-A of the Executive Law and Section 6254(11) of the Unconsolidated Laws. These laws mandate the Corporation to take affirmative action in implementing programs. The Corporation has charged the affirmative action department with overall responsibility to ensure that the spirit of these mandates is incorporated into the Corporation's policies and projects. Where applicable, the Affirmative Action department will work with applicants in developing an ap-

appropriate Affirmative Action Program for business and employment opportunities generated by the Corporation's participation of the Program.

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires April 24, 2012.

Text of rule and any required statements and analyses may be obtained from: Antovk Pidedjian, New York State Urban Development Corporation, 633 Third Avenue, 37th Floor, New York, NY 10017, (212) 803-3792, email: apidedjian@esd.ny.gov

Regulatory Impact Statement

1. **Statutory Authority:** Section 9-c of the New York State Urban Development Corporation Act Chapter 174 of the Laws of 1968 (Uncon. Laws section 6259-c), as amended (the "Act"), provides, in part, that the Corporation shall, assisted by the Commissioner of Economic Development and in consultation with the Department of Economic Development, promulgate rules and regulations in accordance with the State Administrative Procedure Act.

Section 16-f of the Act provides for the creation of the Bonding Guarantee Assistance Program (the "Program") and authorizes the New York State Urban Development Corporation d/b/a Empire State Development (the "Corporation"), within available appropriations, to provide small businesses and minority and women-owned business enterprises the additional financial backing needed in order to induce surety companies to issue payment and performance bonds necessary for such contractors to meet payment and performance bonding requirements for construction projects, including but not limited to, government sponsored, transportation related construction projects and to provide technical assistance in completing bonding applications for such contractors seeking surety bonding in preparation for bidding on construction projects, including transportation related projects.

2. **Legislative Objectives:** Section 16-f of the Act (Uncon. Laws section 6266-f, added by Chapter 169 of the Laws of 1994) sets forth the Legislative objective of authorizing the Corporation, within available appropriations, to provide the assistance described above. The adoption of 21 NYCRR Part 4253 will further these goals by setting forth the types of available assistance, evaluation criteria, the application process and related matters for the Program.

3. **Needs and Benefits:** The State has allocated \$10,405,173.00 for this program. The Bond Guarantee Assistance Program will provide assistance to New York's eligible small businesses, minority-owned business enterprises and women-owned business enterprises, in order to provide the collateral support necessary to secure surety bonds. These businesses have been determined to be a major source of employment throughout New York State. These businesses have historically had difficulties obtaining financing or refinancing in order to remain competitive and grow their operations, and the current economic difficulties have exacerbated this problem. Providing assistance to these businesses should sustain and potentially increase the employment provided by such businesses, especially during this period of historically high unemployment and underemployment. The rule defines eligible and ineligible businesses and eligible uses of the assistance and other criteria to be applied to qualify small businesses for the collateral support.

4. **Costs:** The Program is funded by a State appropriation in the amount of \$10,405,173.00 dollars. Pursuant to the rule, the amount of such assistance provided to a surety company with respect to each contract shall not be greater than the amount necessary to induce such surety company to issue the bonds required for the contract, and in no event shall exceed fifty percent of the face value of bonds to be issued by the surety company for such contract. The costs to a participating surety company would depend on the extent to which they participate in the Program and their effectiveness and efficiency providing assistance.

5. **Paperwork/Reporting:** There are no additional reporting or paperwork requirements as a result of this rule for Program participants except those required by the statute creating the Program such as an annual report on the organization's lending activity and providing information in connection with an audit by the Corporation with respect to the organization's use of Program funds. Standard applications and documents used for most other assistance by the Corporation will be employed in keeping with the Corporation's overall effort to facilitate the application process for all of the Corporation's clients.

6. **Local Government Mandates:** The Program imposes no mandates - program, service, duty, or responsibility - upon any city, county, town, village, school district or other special district.

7. **Duplication:** The regulations do not duplicate any existing state or federal rule.

8. **Alternatives:** While surety companies already provide business credit through surety bonding, access to such credit remains difficult to obtain for contractors that are small businesses and/or certified minority-owned enterprises or women-owned business enterprises. The State has established the Program in order to enhance the access of such businesses to

such credit, and the proposed rule provides the regulatory basis for inducing surety companies to provide credit for contractors that are small businesses and/or certified minority-owned enterprises or women-owned business enterprises.

9. **Federal Standards:** There are no minimum federal standards related to this regulation. The regulation is not inconsistent with any federal standards or requirements.

10. **Compliance Schedule:** The regulation shall take effect immediately upon adoption.

Regulatory Flexibility Analysis

a) **Effects of Rule:** In the rule: "Small business" is defined as a business that is resident and authorized to do business in the State, independently owned and operated, not dominant in its field, and employs one hundred or fewer persons on a full time basis; "Women owned Business Enterprise" is defined as a business enterprise, including a sole proprietorship, partnership or corporation that is: (i) at least fifty-one percent owned by one or more United States citizens or permanent resident aliens who are women; (ii) an enterprise in which the ownership interest of such women is real, substantial and continuing; (iii) an enterprise in which such women ownership has and exercises the authority to control independently the day-to-day business decisions of the enterprise; (iv) an enterprise authorized to do business in State and independently owned and operated; (v) an enterprise owned by an individual or individuals, whose ownership, control and operation are relied upon for certification, with a personal net worth that does not exceed three million five hundred thousand dollars, as adjusted annually on the first of January for inflation according to the consumer price index of the previous year; and (vi) an enterprise that is a Small Business, unless the term Women-Owned Business Enterprise is otherwise defined in section 310 of the Executive Law, in which case the definition shall be as set forth for such term in such section; "Minority-Owned Business Enterprise" is defined as a business enterprise, including a sole proprietorship, partnership or corporation that is: (i) at least fifty-one percent owned by one or more Minority Group Members; (ii) an enterprise in which such minority ownership is real, substantial and continuing; (iii) an enterprise in which such minority ownership has and exercises the authority to control independently the day-to-day business decisions of the enterprise; (iv) an enterprise authorized to do business in this state and independently owned and operated; (v) an enterprise owned by an individual or individuals, whose ownership, control and operation are relied upon for certification, with a personal net worth that does not exceed three million five hundred thousand dollars, as adjusted annually on the first of January for inflation according to the consumer price index of the previous year; and (vi) an enterprise that is a Small Business, unless the term Minority-Owned Business Enterprise is otherwise defined in section 310 of the Executive Law, in which case the definition shall be as set forth for such term in such section; and "Surety Company" is defined as a surety company that has a certificate of solvency from, and its rates approved by, the New York State Department of Financial Services and/or appears in the most current edition of the U.S. Department of Treasury Circular 570 as eligible to issue bonds in connection with procurement contracts for the United States of America. The rule will facilitate the statutory Program's purpose of having New York State Urban Development Corporation d/b/a Empire State Development (the "Corporation") provide assistance to surety companies in order to provide financial backing to eligible small businesses, certified minority-owned business enterprises or certified women-owned business enterprises to secure bid bonds, performance bonds and payment bonds issued in connection with contract bids or awards. The amount of such assistance provided to small businesses and minority and women-owned small businesses with respect to each contract shall not be greater than the amount necessary to induce such surety company to issue the bonds required for the contract, and in no event shall exceed fifty percent of the face value of bonds to be issued by the surety company for such contract.

1. **Compliance Requirements:** There are no compliance requirements for local governments in these regulations. Small businesses must comply with the compliance requirements applicable to all participating surety companies. This is a voluntary program. Companies not wishing to undertake the compliance obligations need not participate.

2. **Professional Services:** Applicants do not need to obtain professional services to comply with these regulations.

3. **Compliance Costs:** There are no compliance costs for local governments in these regulations. Small businesses bear no costs, other than the fees imposed by surety companies for the surety bond or by banks for issuing a letter of credit. This program is voluntary. If it is not financially advantageous for a company to participate, then it is not required to do so.

4. **Economic and Technological Feasibility:** There are no compliance costs for small businesses and local governments in these regulations so there is no basis for determining the economic and technological feasibility for compliance with the rule by small businesses and local governments.

5. **Minimizing Adverse Impact:** This rule has no adverse impacts on

small businesses or local governments because it is designed to provide letters of credit to enhance the ability of small businesses to secure surety bonding.

6. Small Business and Local Government Participation: Small business contractors have repeatedly identified securing surety bonds as a major obstacle to securing government and private contracts.

Rural Area Flexibility Analysis

1. Types and Estimated Numbers of Rural Areas: Surety companies serving all of the 44 counties defined as rural by the Executive Law § 481(7), are eligible to apply for the Bonding Guarantee Assistance Program (the “Program”) assistance pursuant to a State-wide request for proposals.

2. Reporting, Recordkeeping and Other Compliance Requirements and Professional Services: The rule will not impose any new or additional reporting or recordkeeping requirements other than those that would be required of any surety company receiving similar assistance regarding such matters as financial condition, required matching funds, and utilization of Program funds, and the statutorily required annual report on the use of Program funds; no additional acts will be needed to comply other than the said reporting requirements and the making of surety bonds to small businesses in the normal course of the business for any surety company that receives Program assistance; and, it is not anticipated that applicants will have to secure any additional professional services in order to comply with this rule.

3. Costs: The costs to surety companies that participate in the Program would depend on the extent to which they choose to participate in the Program, including the amount of required matching funds for their surety bonds to small businesses and the administrative costs in connection with such small business surety bonds and the fees, if any, charged to small businesses in connection with surety bonds to such businesses that include Program funds.

4. Minimizing Adverse Impact: The purpose of the Program is to provide surety companies the additional financial backing needed in order to induce such companies to issue payment and performance bonds for contractors that are small businesses, certified minority-owned enterprises or women-owned business enterprises, in order for such contractors to meet payment and performance bonding requirements for construction projects, including but not limited to, government sponsored, transportation related construction projects and to provide technical assistance in completing bonding applications for such contractors seeking surety bonding in preparation for bidding on construction projects, including transportation related projects. This rule provides a basis for cooperation between the State and surety companies, including surety companies that serve rural areas of the State, in order to maximize the Program’s effectiveness and minimize any negative impacts for such surety companies and the small businesses, including small businesses located in rural areas of the State that such surety companies serve.

5. Rural Area Participation: This rule maximizes geographic participation by not limiting applicants to those located only in urban areas or only in rural areas. A number of surety companies that engage in underwriting surety bonds to rural and urban small businesses responded to a survey circulated by the Corporation regarding implementation of the Program. Their comments were considered in the rulemaking process.

Job Impact Statement

These regulations will not adversely affect jobs or employment opportunities in New York State. The regulations are intended to improve the economy of New York by providing small businesses greater access to surety bonds required to participate in the construction industry. The Program includes minorities, women and other New Yorkers who have difficulty accessing regular credit markets.

There will be no adverse impact on job opportunities in the state.