

RULE MAKING ACTIVITIES

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

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

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

Department of Audit and Control

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Relates to Transfer, Tier Reinstatement and Payment of Contributions by Certain Members Joining the Retirement System After 1/1/10

I.D. No. AAC-47-12-00007-P

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

Proposed Action: Addition of Part 382 to Title 2 NYCRR.

Statutory authority: Retirement and Social Security Law, section 613

Subject: Relates to transfer, tier reinstatement and payment of contributions by certain members joining the retirement system after 1/1/10.

Purpose: Clarifies provisions of the RSSL relating to Uniformed Court Officers and Peace Officers in the Unified Court System.

Text of proposed rule: PART 382

UNIFORMED COURT OFFICERS OR PEACE OFFICERS IN THE
UNIFIED COURT SYSTEM

§ 382.1 Background and Determination.

Chapter 504 of the Laws of 2009 amended the Retirement and Social Security law and the General Municipal Law, in relation to persons joining a public retirement system on or after January 1, 2010. Section 9-a of Part B of Chapter 504 of the Laws of 2009 amended Section 613 of the Retirement and Social Security Law by adding subdivision (f) which empowered the Comptroller to promulgate regulations as may be necessary and appropriate with respect to the deduction from a members' an-

nual wages for the 4% contributions required from all Uniformed Court Officers and Peace Officers in the Unified Court System who first join the New York State and Local Employees' Retirement System on or after January 1, 2010. This Part is promulgated to establish the consequences of transfer, tier reinstatement and the payment of contributions for additional service upon the contributions made by Uniformed Court Officers and Peace Officers in the Unified Court System.

§ 382.2 Transfers.

Effect of transfer on contributions made pursuant to Sections 609 and 613 of the Retirement and Social Security Law, as amended by Chapter 504 of the Laws of 2009:

A member employed as a Uniformed Court Officer or Peace Officer in the Unified Court System, who joins the New York State and Local Employees' Retirement System on or after 1/1/2010, and who transfers a membership from another public retirement system of the state with a date of membership on or after 07/27/76 shall not be entitled to a refund of the 4% contribution made by such member prior to the effective date of transfer.

§ 382.3 Tier Reinstatements.

Effect of Tier Reinstatement on contributions made pursuant to Sections 609 and 613 of the Retirement and Social Security Law, as amended by Chapter 504 of the Laws of 2009:

A member, employed as a Uniformed Court Officer or Peace Officer in the Unified Court System, who joins the New York State and Local Employees' Retirement System on or after 1/1/2010, and who reinstates a previously withdrawn or terminated membership from a public retirement system of the state pursuant to Section 645 of the Retirement and Social Security Law, shall cease to make contributions at the rate of 4% of annual wages and commence to make contributions at the rate of 3% of annual wages according to the following:

(a) If the member's authorization for tier reinstatement is received by the retirement system within 30 days from notification and request for payment, cession of the 4% contributions shall be the first day of the month of the latest date of membership; or

(b) If the members' authorization for tier reinstatement is received by the retirement system more than 30 days from notification and request for payment, cession of the 4% contributions shall be the first day of the month in which such authorization is so received.

§ 382.4 Payment of Additional Contributions.

Sections 603 and 613 of the Retirement and Social Security Law, as amended by Chapter 504 of the Laws of 2009 establish that a member, employed as a Uniformed Court Officer or Peace Officer in the Unified Court System, who joins the New York State and Local Employees' Retirement System on or after 1/1/2010, shall retire without reduction at age 55 and upon completion of 30 years of service, provided that the 4% contributions are made for all years of creditable service. Payment of the additional 1% contributions for service other than as a Uniformed Court Officer or Peace Officer in the Unified Court System may be made as follows at the option of the member:

(a) At any time during the member's career, by either lump sum or payroll deductions. However, once paid, these contributions will not be refunded except upon withdrawal and termination of a nonvested membership or the death of the member in service; or

(b) At retirement. In the event that such amount is not paid at retirement, the actuarial equivalent shall be deducted from the member's retirement allowance.

Such additional contributions shall include appropriate interest in an amount to bring the total contribution balance to what it would have been had the contributions been made in a timely manner.

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

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 9-a of Part B of Chapter 504 of the Laws of 2009 amended Section 613 of the Retirement and Social Security Law by adding a new subdivision (f) which empowered the Comptroller to promulgate regulations as may be necessary and appropriate with respect to the deduction from a members' annual wages for the 4% contributions required from all Uniformed Court Officers and Peace Officers in the Unified Court System who first join the New York State and Local Employees' Retirement System on or after January 1, 2010.

2. Legislative objectives: This Part is promulgated pursuant to such statutory authority to establish the consequences of transfer, tier reinstatement and the payment of contributions for additional service upon the contributions made by Uniformed Court Officers and Peace Officers in the Unified Court System.

3. Needs and benefits: The addition of this regulation provides members and participating employers with more specific guidance to aid them in determining the consequences of an individual's transfer, tier reinstatement and the payment of contributions for additional service upon the contributions made by Uniformed Court Officers and Peace Officers in the Unified Court System.

4. Costs: There will be no additional cost to the employer or Office of the State Comptroller.

5. Local government mandates: The proposed rule clarifies the law relating to certain contributions and does not impose any local government mandate.

6. Paperwork: There is no additional paperwork required.

7. Duplication: This action does not conflict with or duplicate any state or federal requirements.

8. Alternatives: No significant alternatives were considered.

9. Federal standards: Not applicable.

10. Compliance schedule: Not applicable.

Regulatory Flexibility Analysis

The Office of the State Comptroller finds that the rule will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on small businesses or local governments because it relates to contributions by certain members of the retirement system.

Rural Area Flexibility Analysis

The Office of the State Comptroller finds that that this rule will not impose any adverse impact on rural areas or reporting, recordkeeping or other compliance requirements on public or private entities in rural areas because it relates to payment of member contributions by certain members of the retirement system.

Education Department

EMERGENCY RULE MAKING

Elementary and Secondary Education Act (ESEA) Flexibility and School District Accountability

I.D. No. EDU-27-12-00011-E

Filing No. 1095

Filing Date: 2012-11-06

Effective Date: 2012-11-10

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

Action taken: Addition of section 100.18; and amendment of sections 100.2(m), 100.17, 120.3 and 120.4 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided), 210(not subdivided), 215(not subdivided), 305(1) and (2), 309(not subdivided) and 3713(1) and (2)

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

Specific reasons underlying the finding of necessity: The purpose of the proposed rule making is to implement New York State's approved Elementary and Secondary Education Act (ESEA) Flexibility Waiver Request.

On February 28, 2012, the New York State Education Department

submitted to the United States Education Department (USDE) an ESEA Flexibility Waiver Request. On May 29, 2012, the USDE Secretary, based upon his authority to issue waivers pursuant to section 9401 of the ESEA, approved the Waiver Request.

The proposed rule making adds a new section 100.18 and amends Commissioner's Regulations sections 100.2(m), 100.17, 120.3 and 120.4 to align the Commissioner's Regulations with the approved ESEA Flexibility Waiver, and addresses the Regents Reform Agenda and New York State's updated accountability system. Adoption of the proposed amendment is necessary to ensure a seamless transition to the revised school and school district accountability plan under the Waiver and will allow school districts the option to demonstrate improvements, using options that closely align with the federal school turnaround principles described in Race to the Top and School Improvement Grant requirements.

The proposed amendment was adopted as an emergency rule at the June 18-19, 2012 Regents meeting, effective July 1, 2012. At the September 10-11, 2012 Regents meeting, the June emergency rule was repealed and the proposed rule was revised and adopted as a second emergency action, effective September 11, 2012.

The proposed rule has now been adopted as a permanent rule at the November 5-6, 2012 Regents meeting. Pursuant to SAPA § 203(1), the earliest effective date of the proposed amendment, if adopted at the November Regents meeting, would be November 21, 2012, the date a Notice of Adoption will be published in the State Register. However, the September emergency rule will expire on November 9, 2012, 60 days after its filing with the Department of State on September 11, 2012. A lapse in the rule's effective date will disrupt implementation of school/school district accountability requirements for the 2012-2013 school year pursuant to the approved ESEA Flexibility Waiver and statutory requirements. Emergency action is therefore necessary for the preservation of the general welfare to ensure that the proposed rule adopted by emergency action at the June Regents meeting, and revised and adopted by emergency action at the September Regents meeting, remains continuously in effect until the effective date of its permanent adoption.

Subject: Elementary and Secondary Education Act (ESEA) Flexibility and school district accountability.

Purpose: To implement New York State's approved ESEA Flexibility Waiver.

Substance of emergency rule: The Commissioner of Education proposes to add section 100.18 and amend sections 100.2(m), 100.17, 120.3 and 120.4 of the Commissioner's Regulations, relating to Elementary and Secondary Education Act (ESEA) Flexibility and school and school district accountability. On May 29, 2012, the Secretary for the United States Department of Education, based upon his authority to issue waivers pursuant to section 9401 of the ESEA, approved New York State's ESEA Flexibility Waiver Request.

The proposed rule implements the approved Waiver Request and was adopted as an emergency rule at the June 18-19, 2012 Regents meeting. At the September 10-11, 2012 Regents meeting, the June emergency rule was repealed, and the proposed rule was revised and adopted as an emergency rule, effective September 11, 2012. The September emergency rule expired on November 9, 2012. At the November 5-6, 2012 Regents meeting, the proposed rule was adopted as a permanent rule, effective November 28, 2012, and also adopted as an emergency rule, effective November 10, 2012 to ensure that the emergency rule remains continuously in effect until the effective date of the rule's permanent adoption.

The following is a summary of the provisions of the November emergency rule:

- 100.18 ESEA Accountability System – this new section relates to the specific revisions necessary to conform Commissioner's Regulations to New York's updated accountability system, as a result of the approved ESEA Flexibility Request, and includes the following:

- Subdivision (a) Applicability states that the provisions of section 100.18 are applicable, in lieu of specified paragraphs of section 100.2(p) of the Commissioner's Regulations, during the period of the Elementary and Secondary Education Act (ESEA) waiver, and any revisions and extensions thereof, except as otherwise provided in section 100.18.

- Subdivision (b) Definitions defines various terms used in the section, including performance levels that incorporate measures of growth at the elementary/middle-level and college and career readiness standards at the high school level.

- Subdivision (c) Procedure for Registration of Public Schools provides the procedures for the registration of new schools and determination of their accountability status.

- Subdivision (d) provides that the registration of a public school remains in effect until revoked by the Board of Regents or until a school is closed by a school district.

- Subdivision (e) System of Accountability for student success requires the Commissioner to annually review the performance of each school

district, public school, and charter school in the State and make Adequate Yearly Progress determinations regarding the performance of their accountability groups in elementary/middle and high school ELA and mathematics, elementary/middle level science and graduation rate.

- Subdivision (f) Adequate Yearly Progress provides the rules for making Adequate Yearly Progress determinations.
 - Subdivision (g) Differentiated accountability for school districts provides the process by which schools are identified as Priority Schools, Focus Schools, or Schools Requiring a Local Assistance Plan and districts are identified as Focus Districts. The subdivision also specifies the requirement for parental and public notification of such designations.
 - Subdivision (h) Interventions specifies the interventions that occur in identified schools and districts; including the appointment of an Integrated Intervention Team and district and/or school participation in a diagnostic review; and development and implementation of a District Comprehensive Improvement Plan or a Local Assistance Plan or a School Comprehensive Education Plan. The subdivision further specifies the requirements for such plans, including the requirement that each Priority School implement a whole school reform model no later than the beginning of the 2014-2015 school year.
 - Subdivision (i) Removal from accountability designation provides the procedures by which a public school or a charter school may be removed from Priority or Focus status and a school district may be removed from Focus District status.
 - Subdivision (j) Public school, school district and charter school performance criteria establishes the Performance Criteria (Elementary-Middle Level and High School English language arts and mathematics, Elementary-Middle Level science and graduation rate) used to make school and school district accountability determinations; the Annual Measurable Objectives for English language arts, mathematics, and science; and the goals and progress targets for the four year and five year graduation rate cohorts. The subdivision also defines the annual high school cohort, the annual high school alternative cohort, and the graduation rate cohorts.
 - Subdivision (k) Identification of schools for public school registration review specifies the processes by which schools will be identified for registration review, including special provisions for transfer high schools and schools in Special Act School Districts.
 - Subdivision (l) Public school registration review specifies the actions that occur when schools are identified for registration review, including:
 - notification by the Commissioner to the district and district notification to parents and the public;
 - appointment by the Commissioner of an Integrated Intervention Team to make recommendations to the Commissioner as to whether the school shall continue to implement its current improvement plan, as modified by recommendations of the integrated intervention team; implement a new Comprehensive Improvement Plan, which may contain a new whole school reform model; or be phased out or closed;
 - requirement that after the Commissioner approves or modifies and approves the recommendations of the Integrated Intervention Team, the district develops and implement a plan based on the recommendations.
- This subdivision also establishes the process by which the Board of Regents may revoke the registration of a school and specifies that the Commissioner shall develop a plan to ensure that the educational welfare of the pupils of the school is protected and require that the school district implement it.
- Subdivision (m) Removal of schools from registration review, school phase-out or closure explains the process by which schools may be removed from registration review, including schools that are being redesigned as part of an approved District Comprehensive Improvement Plan.
 - 100.2(m) Public reporting requirements for the Local Assistance Plan – revisions to this section relate to replacing the reference to the overview of school performance and instead reference the New York State Report Card. In addition, 100.2(m)(6) and (7) relating to the requirements for a Local Assistance Plan have been revised and incorporated into section 100.18.
 - 100.17 Distinguished Educator Program – revisions to this section relate to replacing the reference to schools designated for improvement, corrective action or restructuring and instead referencing schools designated as Priority or Focus.
 - 120.3 Public School Choice – revisions to this section relate to replacing the requirement for schools designated for improvement, corrective action or restructuring to offer public school choice and instead require it be offered to schools designated as Priority or Focus.
 - 120.4 Supplemental Education Services (SES) – revisions to this section relate to New York no longer requiring districts to offer SES or set aside a portion of their Title I allocation to pay for SES. The revisions clarify that districts can choose to offer SES, and pay for the services using other funding resources.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-27-12-00011-EP, Issue of July 3, 2012. The emergency rule will expire January 4, 2013.

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

Education Law section 101 continues existence of Education Department, with Board of Regents as its head, and authorizes Regents to appoint Commissioner of Education as Department's Chief Administrative Officer, which is charged with general management and supervision of all public schools and educational work of State.

Education Law section 207 empowers Regents and Commissioner to adopt rules and regulations to carry out State education laws and functions and duties conferred on Department.

Education Law section 210 authorizes Regents to register domestic and foreign institutions in terms of State standards, and fix the value of degrees, diplomas and certificates issued by institutions of other states or countries and presented for entrance to schools, colleges and professions in the State.

Education Law section 215 authorizes Commissioner to require schools and school districts to submit reports containing such information as Commissioner shall prescribe.

Education Law section 305(1) and (2) provide Commissioner, as chief executive officer of the State's education system, with general supervision over all schools and institutions subject to the Education Law, or any statute relating to education, and responsibility for executing all educational policies of the Regents. Section 305(20) provides Commissioner shall have such further powers and duties as charged by Regents.

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

Education Law section 3713(1) and (2) authorize State and school districts to accept federal law making appropriations for educational purposes and authorize Commissioner to cooperate with federal agencies to implement such law.

2. LEGISLATIVE OBJECTIVES:

The proposed rule is consistent with the above statutory authority and is necessary to implement Regents policy relating to public school and district accountability.

3. NEEDS AND BENEFITS:

The rule is necessary to conform Commissioner's Regulations to New York's Elementary and Secondary Education Act (ESEA) Flexibility Waiver (New York's updated accountability system), as approved by the U.S. Department of Education Secretary on May 29, 2012, and address the Regents Reform Agenda. The State and local educational agencies (LEAs), including school districts and charter schools, are required to comply with the ESEA as a condition to their receipt of federal funds under Title I of the ESEA Act of 1965, as amended.

The rule will ensure a seamless transition to the revised accountability plan as authorized under the approved Waiver, and provide school districts with opportunity to demonstrate improvements using options that closely align with federal school turnaround principles described in Race to the Top and the School Improvement Grant requirements.

4. COSTS:

Cost to the State:

None.

Costs to local government:

The rule does not generally impose any new costs, but rather requires, in some instances, that LEAs spend an amount equal to a percentage of their Title I, Title IIA, and Title II funds on specific programs and activities. The rule also provides LEAs with additional flexibility in how they use program funds.

Based upon either a LEA's choice to implement flexibilities granted by the rule and/or the requirements described in the rule to implement certain activities based upon a school or LEA's accountability status, there may be some associated costs. For LEAs with schools receiving Title I, IIA or III funding, these funds may be used to pay the associated costs. LEAs with Title I funded schools that are designated as Priority or Focus, will also be required to set-aside 5-15% of their Title I, IIA, III funding to implement programs and services in Priority and Focus Schools chosen from a menu of program and services established by the Commissioner.

In some instances, LEAs newly identified as Focus Districts with schools that are designated as Priority or Focus that do not receive Title I funding may incur costs. These costs will generally be limited to the cost

of site visits and implementation of any elements of District Comprehensive Education Plans and Comprehensive Education Plans that involve activities that are in addition to the district's or the school's regular educational program and that the district chooses not to fund through reallocation of existing resources.

In other instances, LEAs and their schools will be designated as in Good Standing, when under the present accountability system these LEAs and schools might otherwise have been designated as in improvement, corrective action or restructuring. In these cases, LEAs may incur cost savings as they will no longer be required to participate in site visits or in the other required interventions for LEAs and districts with such designations.

Because of the number of LEAs and schools involved, and the fact that the allowable services and activities to be provided will vary greatly from LEA-to-LEA, as well as school-to-school, depending on the school and LEA designation, the LEAs' choices, and the needs presented in each school, a complete cost statement cannot be provided. No additional costs have been identified with respect to the implementation of the updated accountability system, given the similarities in current requirements and an inability to determine differences aside from those in respect to depth of focus.

Cost to private regulated parties:

None.

Cost to regulating agency for implementation and continued administration of this rule:

None.

5. LOCAL GOVERNMENT MANDATES:

The rule is necessary to assist school districts to be able to meet the provisions of the Waiver and will result in districts making significant changes to the educational programs of schools designated as Priority and/or Focus. The Waiver allows the State to:

- Revise Annual Measurable Objective (AMO) timeframe by which schools and districts are expected to ensure that all students are proficient in English language arts (ELA) and mathematics and make the goals more realistic and attainable.

- Use standards on Regents ELA and mathematics examinations that are better aligned to college- and career- readiness to hold schools and districts accountable.

- Discontinue identification of schools for improvement, corrective action and restructuring and instead identify Priority and Focus Schools.

- Identify Focus Districts as a means to ensure districts take dramatic actions in support of schools where performance of disaggregated groups of students is among the lowest in the State and not showing progress.

- Replace current ESEA system of supports and interventions in identified schools and districts with one that better builds the capacity of districts to assist schools to implement transformation and turnaround.

- Use both proficiency and growth measures to make accountability determinations at the elementary and middle school levels.

- Create a single diagnostic tool ("The Diagnostic Tool for School and District Effectiveness") for use throughout the school and district improvement continuum to drive supports and interventions.

- Reframe existing ESEA set-asides to support enhanced implementation of Regents' Reform Agenda in Priority and Focus Schools, expanded learning time opportunities for students, and increased parental involvement and engagement.

- Give districts more flexibility in use of Federal funding as required as a condition of Waiver approval.

6. PAPERWORK:

A school district seeking to register a school shall submit a petition for registration pursuant to 100.18(c)(1).

If a district merges two or more schools, transfers organizational responsibility for one or more grades from one school to another, or closes a registered school, the district shall inform the Commissioner pursuant to 100.18(c)(4) and 100.18(d).

For each school year, public schools, school districts, and charter schools, in which no students or pursuant to 100.18(f)(2) fewer than 30 students participate in State assessments for English language arts or mathematics or in which the majority of students are not continuously enrolled, shall conduct a self-assessment of their academic program and school learning environment, pursuant to 100.18(f)(6).

For each preliminarily identified Priority School, Focus District or Focus Charter School, the district or charter school may present additional data and information concerning extenuating or extraordinary circumstances to establish cause to not be identified as a Focus District, a Priority School, or a Priority or Focus Charter School pursuant to 100.18(g)(3)(i).

Charter schools and districts may appeal a preliminarily identification of a school or district, pursuant to 100.18(g)(3)(ii).

Upon identification as a Focus District, the district must identify a specified minimum number of schools upon which it will focus its support and intervention efforts, pursuant to 100.18(g)(5).

A Focus District, that has been identified as a Focus District solely

because it has one or more Priority Schools in the school district, may petition the Commissioner to substitute for good cause one or more schools selected by the Commissioner to be Focus Schools, pursuant to 100.18(g)(5)(ii).

A Focus District may petition for good cause to substitute one or more lower ranked schools on the list selected by the district for higher ranked schools, pursuant to 100.18(g)(5)(ix)(d).

Upon receipt of a Priority or Focus accountability designation, a district or charter school shall notify public of issuance of such designation, pursuant to 100.18(g)(7).

Commencing in the 2012-2013 school year, each Focus District shall participate annually in a diagnostic review using a diagnostic tool of quality indicators, pursuant to 100.18(h).

Commencing with the plan for the 2012-2013 school year, each Focus District shall develop and implement a District Comprehensive Improvement Plan, pursuant to 100.18(h)(2)(ii).

Commencing with the plan for the 2012-13 school year, each Priority and Focus School located in a Focus District shall develop and implement a Comprehensive Education Plan pursuant to 100.18(h)(2)(iii). No later than September 30, 2012, each Focus District with one or more Priority Schools shall submit the schedule by which each of the district's Priority Schools shall implement, as part of the school's Comprehensive Improvement Plan, a whole school reform model.

A district that has not been identified as Focus but in which one or more schools require a Local Assistance Plan shall develop such plan pursuant to 100.18(h)(2)(iv).

A district or charter school may petition for a school to be removed from Priority status, pursuant to 100.18(i). Commencing with 2011-2012 and 2012-2013 school year results, and each consecutive two year period thereafter, a school district may petition to have its Focus designation revised pursuant to 100.18(i)(2).

Commencing with 2011-2012 and 2012-13 school year results and for each consecutive two year period thereafter, a charter school may petition for the charter school to be removed from Focus status, pursuant to 100.19(i)(2)(iv).

Pursuant to 100.18(k)(6), the district may present additional data and relevant information concerning extenuating or extraordinary circumstances faced by a school to establish cause to not identify the school for registration review. Pursuant to 100.18(k)(5), for each school identified as a poor learning environment and placed under preliminary registration review, the district may present evidence that the conditions in the school do not threaten the health or safety or educational welfare of students and do not adversely affect student performance.

A district shall take appropriate action to notify the public that a school has been placed under registration review, pursuant to 100.18(l)(1).

Upon approval of the integrated intervention team's recommendations, the Commissioner shall direct the district to submit a revised improvement plan, a new comprehensive improvement plan, or a plan for phase out or closure pursuant to 100.18(l)(3), and may require a district to submit such reports and data as necessary to monitor the implementation of the plans, pursuant to 100.18(l)(4).

Within 15 days of receiving notice of the Commissioner's recommendation to revoke registration, the district may submit a written response to the recommendation, pursuant to 100.18(l)(7).

If a school has demonstrated progress necessary to be removed from registration review, the superintendent may petition to remove the school from registration review pursuant to 100.18(m).

If a district seeks to phase out or close a school under registration review or is required to close or phase-out a school, the district shall submit a plan identifying the intervention that will be implemented and will result in phase out or closure, pursuant to 100.18(m)(5).

If a district seeks to redesign a school under registration review or a persistently lowest achieving school, the district shall submit a petition and redesign plan, pursuant to 100.18(m)(6).

7. DUPLICATION:

The rule does not duplicate existing State or federal regulations.

8. ALTERNATIVES:

There were no significant alternatives and none were considered.

9. FEDERAL STANDARDS:

The rule is necessary to conform the Commissioner's Regulations to New York's approved ESEA Flexibility Waiver.

10. COMPLIANCE SCHEDULE:

It is anticipated parties will be able to achieve compliance with the rule by its effective date.

Regulatory Flexibility Analysis

Small Businesses:

The proposed rule relates to public school and school district accountability and is necessary to conform the Commissioner's Regulations to New York State's Elementary and Secondary Education Act (ESEA) Flexibility Waiver Request; which was approved by the Secretary to the United

States Education Department on May 29, 2012 pursuant to ESEA section 9401. The purpose of the rule is to ensure a seamless transition to the revised accountability plan as authorized under the ESEA Flexibility Waiver. The State and local educational agencies (LEAs) are required to comply with the ESEA as a condition to their receipt of federal funds under Title I of the ESEA Act of 1965, as amended.

The rule applies to public schools, school districts and charter schools that receive funding as LEAs pursuant to the ESEA, and does 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 rule applies to public schools, school districts and charter schools that receive funding as LEAs pursuant to the Elementary and Secondary Education Act of 1965, as amended.

2. COMPLIANCE REQUIREMENTS:

The rule is necessary to assist school districts to be able to meet the provisions of the Waiver and will result in districts making significant changes to the educational programs of schools designated as Priority and/or Focus. The Waiver allows the State to:

- Revise Annual Measurable Objective (AMO) timeframe by which schools and districts are expected to ensure that all students are proficient in English language arts (ELA) and mathematics and make the goals more realistic and attainable.

- Use standards on Regents ELA and mathematics examinations that are better aligned to college- and career- readiness to hold schools and districts accountable.

- Discontinue identification of schools for improvement, corrective action and restructuring and instead identify Priority and Focus Schools.

- Identify Focus Districts as a means to ensure districts take dramatic actions in support of schools where performance of disaggregated groups of students is among the lowest in the State and not showing progress.

- Replace current ESEA system of supports and interventions in identified schools and districts with one that better builds the capacity of districts to assist schools to implement transformation and turnaround.

- Use both proficiency and growth measures to make accountability determinations at the elementary and middle school levels.

- Create a single diagnostic tool ("The Diagnostic Tool for School and District Effectiveness") for use throughout the school and district improvement continuum to drive supports and interventions.

- Reframe existing ESEA set-asides to support enhanced implementation of Regents' Reform Agenda in Priority and Focus Schools, expanded learning time opportunities for students, and increased parental involvement and engagement.

- Give districts more flexibility in use of Federal funding as required as a condition of Waiver approval.

A school district seeking to register a school shall submit a petition for registration pursuant to 100.18(c)(1).

If a district merges two or more schools, transfers organizational responsibility for one or more grades from one school to another, or closes a registered school, the district shall inform the Commissioner pursuant to 100.18(c)(4) and 100.18(d).

For each school year, public schools, school districts, and charter schools, in which no students or pursuant to 100.18(f)(2) fewer than 30 students participate in State assessments for English language arts or mathematics or in which the majority of students are not continuously enrolled, shall conduct a self-assessment of their academic program and school learning environment, pursuant to 100.18(f)(6).

For each preliminarily identified Priority School, Focus District or Focus Charter School, the district or charter school may present additional data and information concerning extenuating or extraordinary circumstances to establish cause to not be identified as a Focus District, a Priority School, or a Priority or Focus Charter School pursuant to 100.18(g)(3)(i).

Charter schools and districts may appeal a preliminary identification of a school or district, pursuant to 100.18(g)(3)(ii).

Upon identification as a Focus District, the district must identify a specified minimum number of schools upon which it will focus its support and intervention efforts, pursuant to 100.18(g)(5).

A Focus District, that has been identified as a Focus District solely because it has one or more Priority Schools in the school district, may petition the Commissioner to substitute for good cause one or more schools selected by the Commissioner to be Focus Schools, pursuant to 100.18(g)(5)(ii).

A Focus District may petition for good cause to substitute one or more lower ranked schools on the list selected by the district for higher ranked schools, pursuant to 100.18(g)(5)(ix)(d).

Upon receipt of a Priority or Focus accountability designation, a district or charter school shall notify public of issuance of such designation, pursuant to 100.18(g)(7).

Commencing in the 2012-2013 school year, each Focus District shall participate annually in a diagnostic review using a diagnostic tool of quality indicators, pursuant to 100.18(h).

Commencing with the plan for the 2012-2013 school year, each Focus District shall develop and implement a District Comprehensive Improvement Plan, pursuant to 100.18(h)(2)(ii).

Commencing with the plan for the 2012-13 school year, each Priority and Focus School located in a Focus District shall develop and implement a Comprehensive Education Plan pursuant to 100.18(h)(2)(iii). No later than September 30, 2012, each Focus District with one or more Priority Schools shall submit the schedule by which each of the district's Priority Schools shall implement, as part of the school's Comprehensive Improvement Plan, a whole school reform model.

A district that has not been identified as Focus but in which one or more schools require a Local Assistance Plan shall develop such plan pursuant to 100.18(h)(2)(iv).

A district or charter school may petition for a school to be removed from Priority status, pursuant to 100.18(i). Commencing with 2011-2012 and 2012-2013 school year results, and each consecutive two year period thereafter, a school district may petition to have its Focus designation revised pursuant to 100.18(i)(2).

Commencing with 2011-2012 and 2012-13 school year results and for each consecutive two year period thereafter, a charter school may petition for the charter school to be removed from Focus status, pursuant to 100.19(i)(2)(iv).

Pursuant to 100.18(k)(6), the district may present additional data and relevant information concerning extenuating or extraordinary circumstances faced by a school to establish cause to not identify the school for registration review. Pursuant to 100.18(k)(5), for each school identified as a poor learning environment and placed under preliminary registration review, the district may present evidence that the conditions in the school do not threaten the health or safety or educational welfare of students and do not adversely affect student performance.

A district shall take appropriate action to notify the public that a school has been placed under registration review, pursuant to 100.18(l)(1).

Upon approval of the integrated intervention team's recommendations, the Commissioner shall direct the district to submit a revised improvement plan, a new comprehensive improvement plan, or a plan for phase out or closure pursuant to 100.18(l)(3), and may require a district to submit such reports and data as necessary to monitor the implementation of the plans, pursuant to 100.18(l)(4).

Within 15 days of receiving notice of the Commissioner's recommendation to revoke registration, the district may submit a written response to the recommendation, pursuant to 100.18(l)(7).

If a school has demonstrated progress necessary to be removed from registration review, the superintendent may petition to remove the school from registration review pursuant to 100.18(m).

If a district seeks to phase out or close a school under registration review or is required to close or phase-out a school, the district shall submit a plan identifying the intervention that will be implemented and will result in phase out or closure, pursuant to 100.18(m)(5).

If a district seeks to redesign a school under registration review or a persistently lowest achieving school, the district shall submit a petition and redesign plan, pursuant to 100.18(m)(6).

3. PROFESSIONAL SERVICES:

The rule imposes no additional professional service requirements.

4. COMPLIANCE COSTS:

The rule does not generally impose any new costs, but rather requires, in some instances, that LEAs spend an amount equal to a percentage of their Title I, Title IIA, and Title II funds on specific programs and activities. The rule also provides LEAs with additional flexibility in how they use program funds.

Based upon either a LEA's choice to implement flexibilities granted by the rule and/or the requirements described in the rule to implement certain activities based upon a school or LEA's accountability status, there may be some associated costs. For LEAs with schools receiving Title I, IIA or III funding, these funds may be used to pay the associated costs. LEAs with Title I funded schools that are designated as Priority or Focus, will also be required to set-aside 5-15% of their Title I, IIA, III funding to implement programs and services in Priority and Focus Schools chosen from a menu of program and services established by the Commissioner.

In some instances, LEAs newly identified as Focus Districts with schools that are designated as Priority or Focus that do not receive Title I funding may incur costs. These costs will generally be limited to the cost of site visits and implementation of any elements of District Comprehensive Education Plans and Comprehensive Education Plans that involve activities that are in addition to the district's or the school's regular

educational program and that the district chooses not to fund through reallocation of existing resources.

In other instances, LEAs and their schools will be designated as in Good Standing, when under the present accountability system these LEAs and schools might otherwise have been designated as in improvement, corrective action or restructuring. In these cases, LEAs may incur cost savings as they will no longer be required to participate in site visits or in the other required interventions for LEAs and districts with such designations.

Because of the number of LEAs and schools involved, and the fact that the allowable services and activities to be provided will vary greatly from LEA-to-LEA, as well as school-to-school, depending on the school and LEA designation, the LEAs' choices, and the needs presented in each school, a complete cost statement cannot be provided. No additional costs have been identified with respect to the implementation of the updated accountability system, given the similarities in current requirements and an inability to determine differences aside from those in respect to depth of focus.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The rule imposes no technological requirements on school districts. Costs are discussed under the Compliance Costs section above.

6. MINIMIZING ADVERSE IMPACT:

The rule is necessary to conform the Commissioner's Regulations to New York State's Elementary and Secondary Education Act (ESEA) Flexibility Waiver Request; which was approved by the Secretary to the United States Education Department on May 29, 2012 pursuant to ESEA section 9401. The State and local educational agencies (LEAs) are required to comply with the ESEA as a condition to their receipt of federal funds under Title I of the ESEA Act of 1965, as amended.

The rule adds a new section 100.18 and revises sections 100.2(m), 100.17, 120.3, and 120.4 of the Commissioner's Regulations to align New York's public school and school district accountability system to the approved Waiver, address the Regents Reform Agenda, and ensure a seamless transition to the revised accountability plan as authorized under the approved ESEA Flexibility Waiver. The rule will provide school districts with the opportunity to demonstrate improvements using options that closely align with the federal school turnaround principles described in federal Race to the Top and School Improvement Grant requirements. The rule has been carefully drafted to meet specific federal and State requirements.

7. LOCAL GOVERNMENT PARTICIPATION:

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

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed rule applies to public schools, school districts and charter schools that receive funding as LEAs pursuant to the Elementary and Secondary Education Act (ESEA) of 1965, as amended, 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 rule is necessary to assist school districts to be able to meet the provisions of the Waiver and will result in districts making significant changes to the educational programs of schools designated as Priority and/or Focus. The Waiver allows the State to:

- Revise Annual Measurable Objective (AMO) timeframe by which schools and districts are expected to ensure that all students are proficient in English language arts (ELA) and mathematics and make the goals more realistic and attainable.
- Use standards on Regents ELA and mathematics examinations that are better aligned to college- and career- readiness to hold schools and districts accountable.
- Discontinue identification of schools for improvement, corrective action and restructuring and instead identify Priority and Focus Schools.
- Identify Focus Districts as a means to ensure districts take dramatic actions in support of schools where performance of disaggregated groups of students is among the lowest in the State and not showing progress.
- Replace current ESEA system of supports and interventions in identified schools and districts with one that better builds the capacity of districts to assist schools to implement transformation and turnaround.
- Use both proficiency and growth measures to make accountability determinations at the elementary and middle school levels.
- Create a single diagnostic tool ("The Diagnostic Tool for School and District Effectiveness") for use throughout the school and district improvement continuum to drive supports and interventions.
- Reframe existing ESEA set-asides to support enhanced implementa-

tion of Regents' Reform Agenda in Priority and Focus Schools, expanded learning time opportunities for students, and increased parental involvement and engagement.

- Give districts more flexibility in use of Federal funding as required as a condition of Waiver approval.

A school district seeking to register a school shall submit a petition for registration pursuant to 100.18(c)(1).

If a district merges two or more schools, transfers organizational responsibility for one or more grades from one school to another, or closes a registered school, the district shall inform the Commissioner pursuant to 100.18(c)(4) and 100.18(d).

For each school year, public schools, school districts, and charter schools, in which no students or pursuant to 100.18(f)(2) fewer than 30 students participate in State assessments for English language arts or mathematics or in which the majority of students are not continuously enrolled, shall conduct a self-assessment of their academic program and school learning environment, pursuant to 100.18(f)(6).

For each preliminarily identified Priority School, Focus District or Focus Charter School, the district or charter school may present additional data and information concerning extenuating or extraordinary circumstances to establish cause to not be identified as a Focus District, a Priority School, or a Priority or Focus Charter School pursuant to 100.18(g)(3)(i).

Charter schools and districts may appeal a preliminarily identification of a school or district, pursuant to 100.18(g)(3)(ii).

Upon identification as a Focus District, the district must identify a specified minimum number of schools upon which it will focus its support and intervention efforts, pursuant to 100.18(g)(5).

A Focus District, that has been identified as a Focus District solely because it has one or more Priority Schools in the school district, may petition the Commissioner to substitute for good cause one or more schools selected by the Commissioner to be Focus Schools, pursuant to 100.18(g)(5)(ii).

A Focus District may petition for good cause to substitute one or more lower ranked schools on the list selected by the district for higher ranked schools, pursuant to 100.18(g)(5)(ix)(d).

Upon receipt of a Priority or Focus accountability designation, a district or charter school shall notify public of issuance of such designation, pursuant to 100.18(g)(7).

Commencing in the 2012-2013 school year, each Focus District shall participate annually in a diagnostic review using a diagnostic tool of quality indicators, pursuant to 100.18(h).

Commencing with the plan for the 2012-2013 school year, each Focus District shall develop and implement a District Comprehensive Improvement Plan, pursuant to 100.18(h)(2)(ii).

Commencing with the plan for the 2012-13 school year, each Priority and Focus School located in a Focus District shall develop and implement a Comprehensive Education Plan pursuant to 100.18(h)(2)(iii). No later than September 30, 2012, each Focus District with one or more Priority Schools shall submit the schedule by which each of the district's Priority Schools shall implement, as part of the school's Comprehensive Improvement Plan, a whole school reform model.

A district that has not been identified as Focus but in which one or more schools require a Local Assistance Plan shall develop such plan pursuant to 100.18(h)(2)(iv).

A district or charter school may petition for a school to be removed from Priority status, pursuant to 100.18(i). Commencing with 2011-2012 and 2012-2013 school year results, and each consecutive two year period thereafter, a school district may petition to have its Focus designation revised pursuant to 100.18(i)(2).

Commencing with 2011-2012 and 2012-13 school year results and for each consecutive two year period thereafter, a charter school may petition for the charter school to be removed from Focus status, pursuant to 100.19(i)(2)(iv).

Pursuant to 100.18(k)(6), the district may present additional data and relevant information concerning extenuating or extraordinary circumstances faced by a school to establish cause to not identify the school for registration review. Pursuant to 100.18(k)(5), for each school identified as a poor learning environment and placed under preliminary registration review, the district may present evidence that the conditions in the school do not threaten the health or safety or educational welfare of students and do not adversely affect student performance.

A district shall take appropriate action to notify the public that a school has been placed under registration review, pursuant to 100.18(l)(1).

Upon approval of the integrated intervention team's recommendations, the Commissioner shall direct the district to submit a revised improvement plan, a new comprehensive improvement plan, or a plan for phase out or closure pursuant to 100.18(l)(3), and may require a district to submit such reports and data as necessary to monitor the implementation of the plans, pursuant to 100.18(l)(4).

Within 15 days of receiving notice of the Commissioner's recommen-

dition to revoke registration, the district may submit a written response to the recommendation, pursuant to 100.18(1)(7).

If a school has demonstrated progress necessary to be removed from registration review, the superintendent may petition to remove the school from registration review pursuant to 100.18(m).

If a district seeks to phase out or close a school under registration review or is required to close or phase-out a school, the district shall submit a plan identifying the intervention that will be implemented and will result in phase out or closure, pursuant to 100.18(m)(5).

If a district seeks to redesign a school under registration review or a persistently lowest achieving school, the district shall submit a petition and redesign plan, pursuant to 100.18(m)(6).

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

3. COMPLIANCE COSTS:

The rule does not generally impose any new costs, but rather requires, in some instances, that LEAs spend an amount equal to a percentage of their Title I, Title IIA, and Title II funds on specific programs and activities. The rule also provides LEAs with additional flexibility in how they use program funds.

Based upon either a LEA's choice to implement flexibilities granted by the rule and/or the requirements described in the rule to implement certain activities based upon a school or LEA's accountability status, there may be some associated costs. For LEAs with schools receiving Title I, IIA or III funding, these funds may be used to pay the associated costs. LEAs with Title I funded schools that are designated as Priority or Focus, will also be required to set-aside 5-15% of their Title I, IIA, III funding to implement programs and services in Priority and Focus Schools chosen from a menu of program and services established by the Commissioner.

In some instances, LEAs newly identified as Focus Districts with schools that are designated as Priority or Focus that do not receive Title I funding may incur costs. These costs will generally be limited to the cost of site visits and implementation of any elements of District Comprehensive Education Plans and Comprehensive Education Plans that involve activities that are in addition to the district's or the school's regular educational program and that the district chooses not to fund through reallocation of existing resources.

In other instances, LEAs and their schools will be designated as in Good Standing, when under the present accountability system these LEAs and schools might otherwise have been designated as in improvement, corrective action or restructuring. In these cases, LEAs may incur cost savings as they will no longer be required to participate in site visits or in the other required interventions for LEAs and districts with such designations.

Because of the number of LEAs and schools involved, and the fact that the allowable services and activities to be provided will vary greatly from LEA-to-LEA, as well as school-to-school, depending on the school and LEA designation, the LEAs' choices, and the needs presented in each school, a complete cost statement cannot be provided. No additional costs have been identified with respect to the implementation of the updated accountability system, given the similarities in current requirements and an inability to determine differences aside from those in respect to depth of focus.

4. MINIMIZING ADVERSE IMPACT:

The rule is necessary to conform the Commissioner's Regulations to New York State's Elementary and Secondary Education Act (ESEA) Flexibility Waiver Request; which was approved by the Secretary to the United States Education Department on May 29, 2012 pursuant to ESEA section 9401. The State and local educational agencies (LEAs) are required to comply with the ESEA as a condition to their receipt of federal funds under Title I of the ESEA Act of 1965, as amended.

The rule adds a new section 100.18 and revises sections 100.2(m), 100.17, 120.3, and 120.4 of the Commissioner's Regulations to align New York's public school and school district accountability system to the approved Waiver, address the Regents Reform Agenda, and ensure a seamless transition to the revised accountability plan as authorized under the approved ESEA Flexibility Waiver. The rule will provide school districts with the opportunity to demonstrate improvements using options that closely align with the federal school turnaround principles described in federal Race to the Top and School Improvement Grant requirements. The rule has been carefully drafted to meet specific federal and State requirements. Since these requirements apply to all local educational agencies in the State that receive ESEA funds, it is not possible to adopt different standards for school districts in rural areas.

5. RURAL AREA PARTICIPATION:

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

Job Impact Statement

The proposed rule making relates to public school and school district accountability and is necessary to conform the Commissioner's Regula-

tions to New York State's Elementary and Secondary Education Act (ESEA) Flexibility Waiver Request; which was approved by the Secretary to the United States Education Department on May 29, 2012 pursuant to ESEA section 9401. The purpose of the proposed rule is to ensure a seamless transition to the revised accountability plan as authorized under the ESEA Flexibility Waiver. The State and local educational agencies (LEAs) are required to comply with the ESEA as a condition to their receipt of federal funds under Title I of the ESEA Act of 1965, as amended.

The proposed rule applies to public schools, school districts and charter schools that receive funding as LEAs pursuant to the ESEA, and will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the proposed rule 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.

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Elementary and Secondary Education Act (ESEA) Flexibility and School District Accountability

I.D. No. EDU-27-12-00011-A

Filing No. 1096

Filing Date: 2012-11-06

Effective Date: 2012-11-28

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

Action taken: Addition of section 100.18; and amendment of sections 100.2(m), 100.17, 120.3 and 120.4 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided), 210(not subdivided), 215(not subdivided), 305(1) and (2), 309(not subdivided) and 3713(1) and (2)

Subject: Elementary and Secondary Education Act (ESEA) Flexibility and school district accountability.

Purpose: To implement New York State's approved ESEA Flexibility Waiver.

Substance of final rule: The Commissioner of Education proposes to add section 100.18 and amend sections 100.2(m), 100.17, 120.3 and 120.4 of the Commissioner's Regulations, relating to Elementary and Secondary Education Act (ESEA) Flexibility and school and school district accountability. On May 29, 2012, the Secretary for the United States Department of Education, based upon his authority to issue waivers pursuant to section 9401 of the ESEA, approved New York State's ESEA Flexibility Waiver Request.

The proposed rule implements the approved Waiver Request and was adopted as an emergency rule at the June 18-19, 2012 Regents meeting. At the September 10-11, 2012 Regents meeting, the June emergency rule was repealed, and the proposed rule was revised and adopted as an emergency rule, effective September 11, 2012. The September emergency rule expired on November 9, 2012. At the November 5-6, 2012 Regents meeting, the proposed rule was adopted as a permanent rule, effective November 28, 2012, and also adopted as an emergency rule, effective November 10, 2012, to ensure that the emergency rule remains continuously in effect until the effective date of the rule's permanent adoption.

The following is a summary of the provisions of the adopted permanent rule:

- 100.18 ESEA Accountability System – this new section relates to the specific revisions necessary to conform Commissioner's Regulations to New York's updated accountability system, as a result of the approved ESEA Flexibility Request, and includes the following:

- Subdivision (a) Applicability states that the provisions of section 100.18 are applicable, in lieu of specified paragraphs of section 100.2(p) of the Commissioner's Regulations, during the period of the Elementary and Secondary Education Act (ESEA) waiver, and any revisions and extensions thereof, except as otherwise provided in section 100.18.

- Subdivision (b) Definitions defines various terms used in the section, including performance levels that incorporate measures of growth at the elementary/middle-level and college and career readiness standards at the high school level.

- Subdivision (c) Procedure for Registration of Public Schools provides the procedures for the registration of new schools and determination of their accountability status.

- Subdivision (d) provides that the registration of a public school remains in effect until revoked by the Board of Regents or until a school is closed by a school district.

- Subdivision (e) System of Accountability for student success requires the Commissioner to annually review the performance of each school district, public school, and charter school in the State and make Adequate Yearly Progress determinations regarding the performance of their accountability groups in elementary/middle and high school ELA and mathematics, elementary/middle level science and graduation rate.

- Subdivision (f) Adequate Yearly Progress provides the rules for making Adequate Yearly Progress determinations.

- Subdivision (g) Differentiated accountability for school districts provides the process by which schools are identified as Priority Schools, Focus Schools, or Schools Requiring a Local Assistance Plan and districts are identified as Focus Districts. The subdivision also specifies the requirement for parental and public notification of such designations.

- Subdivision (h) Interventions specifies the interventions that occur in identified schools and districts; including the appointment of an Integrated Intervention Team and district and/or school participation in a diagnostic review; and development and implementation of a District Comprehensive Improvement Plan or a Local Assistance Plan or a School Comprehensive Education Plan. The subdivision further specifies the requirements for such plans, including the requirement that each Priority School implement a whole school reform model no later than the beginning of the 2014-2015 school year.

- Subdivision (i) Removal from accountability designation provides the procedures by which a public school or a charter school may be removed from Priority or Focus status and a school district may be removed from Focus District status.

- Subdivision (j) Public school, school district and charter school performance criteria establishes the Performance Criteria (Elementary-Middle Level and High School English language arts and mathematics, Elementary-Middle Level science and graduation rate) used to make school and school district accountability determinations; the Annual Measurable Objectives for English language arts, mathematics, and science; and the goals and progress targets for the four year and five year graduation rate cohorts. The subdivision also defines the annual high school cohort, the annual high school alternative cohort, and the graduation rate cohorts.

- Subdivision (k) Identification of schools for public school registration review specifies the processes by which schools will be identified for registration review, including special provisions for transfer high schools and schools in Special Act School Districts.

- Subdivision (l) Public school registration review specifies the actions that occur when schools are identified for registration review, including:

- notification by the Commissioner to the district and district notification to parents and the public;

- appointment by the Commissioner of an Integrated Intervention Team to make recommendations to the Commissioner as to whether the school shall continue to implement its current improvement plan, as modified by recommendations of the integrated intervention team; implement a new Comprehensive Improvement Plan, which may contain a new whole school reform model; or be phased out or closed;

- requirement that after the Commissioner approves or modifies and approves the recommendations of the Integrated Intervention Team, the district develops and implement a plan based on the recommendations.

This subdivision also establishes the process by which the Board of Regents may revoke the registration of a school and specifies that the Commissioner shall develop a plan to ensure that the educational welfare of the pupils of the school is protected and require that the school district implement it.

- Subdivision (m) Removal of schools from registration review, school phase-out or closure explains the process by which schools may be removed from registration review, including schools that are being redesigned as part of an approved District Comprehensive Improvement Plan.

- 100.2(m) Public reporting requirements for the Local Assistance Plan – revisions to this section relate to replacing the reference to the overview of school performance and instead reference the New York State Report Card. In addition, 100.2(m)(6) and (7) relating to the requirements for a Local Assistance Plan have been revised and incorporated into section 100.18.

- 100.17 Distinguished Educator Program – revisions to this section relate to replacing the reference to schools designated for improvement, corrective action or restructuring and instead referencing schools designated as Priority or Focus.

- 120.3 Public School Choice – revisions to this section relate to replacing the requirement for schools designated for improvement, corrective action or restructuring to offer public school choice and instead require it be offered to schools designated as Priority or Focus.

- 120.4 Supplemental Education Services (SES) – revisions to this section relate to New York no longer requiring districts to offer SES or set aside a portion of their Title I allocation to pay for SES. The revisions

clarify that districts can choose to offer SES, and pay for the services using other funding resources.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 100.17(c)(3) and 100.18(m)(5).

Revised rule making(s) were previously published in the State Register on September 26, 2012.

Text of rule and any required statements and analyses may be obtained from: Mary Gammon, State Education Department, Office of Counsel, State Education Building Room 148, 89 Washington Ave., Albany, NY 12234, (518) 474-8869, email: legal@mail.nysed.gov

Revised Regulatory Impact Statement

Since publication of a Notice of Emergency Adoption and Revised Rule Making in the State Register on September 26, 2012, nonsubstantial revisions were made to the proposed rule as follows:

1. In section 100.17(c)(3)(i)(a), a redundant repetition of the phrase “of this Part” was deleted.

2. In section 100.18(m)(5) a redundant repetition of the word “to” was deleted.

The above changes do not require any changes to the previously published Regulatory Impact Statement.

Revised Regulatory Flexibility Analysis

Since publication of a Notice of Emergency Adoption and Revised Rule Making in the State Register on September 26, 2012, nonsubstantial revisions were made to the proposed rule, as set forth in the Statement Concerning the Regulatory Impact Statement submitted herewith.

The above revisions do not require any further changes to the previously published Regulatory Flexibility Analysis.

Revised Rural Area Flexibility Analysis

Since publication of a Notice of Emergency Adoption and Revised Rule Making in the State Register on September 26, 2012, nonsubstantial revisions were made to the proposed rule, as set forth in the Statement Concerning the Regulatory Impact Statement submitted herewith.

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

Revised Job Impact Statement

Since publication of a Notice of Emergency Adoption and Revised Rule Making in the State Register on September 26, 2012, nonsubstantial revisions were made to the proposed rule, as set forth in the Statement Concerning the Regulatory Impact Statement submitted herewith.

The proposed rule, as revised, relates to public school and school district accountability and is necessary to conform the Commissioner’s Regulations to New York State’s Elementary and Secondary Education Act (ESEA) Flexibility Waiver Request; which was approved by the Secretary to the United States Education Department on May 29, 2012 pursuant to ESEA section 9401. The purpose of the revised proposed rule is to ensure a seamless transition to the revised accountability plan as authorized under the ESEA Flexibility Waiver. The State and local educational agencies (LEAs) are required to comply with the ESEA as a condition to their receipt of federal funds under Title I of the ESEA Act of 1965, as amended.

The revised proposed rule applies to public schools, school districts and charter schools that receive funding as LEAs pursuant to the ESEA, and will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the revised proposed rule 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.

Assessment of Public Comment

The agency received no public comment.

Department of Environmental Conservation

NOTICE OF ADOPTION

Mandatory V-Notching Rules for Legal Size Female Egg-Bearing American Lobster

I.D. No. ENV-31-12-00001-A

Filing No. 1097

Filing Date: 2012-11-06

Effective Date: 2012-11-21

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

Action taken: Addition of section 44.1(r); and amendment of section 44.7 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 3-0301, 13-0105 and 13-0329

Subject: Mandatory V-notching rules for legal size female egg-bearing American lobster.

Purpose: To implement ASMFC American Lobster Fishery Management Plan Addendum XVII and remain in compliance with ASMFC.

Text or summary was published in the August 1, 2012 issue of the Register, I.D. No. ENV-31-12-00001-EP.

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

Text of rule and any required statements and analyses may be obtained from: Kim McKown, New York State Department of Environmental Conservation, 205 North Belle Mead Road, Suite 1, East Setauket, NY 11733, (631) 444-0454, email: kamckown@gw.dec.state.ny.us

Additional matter required by statute: Pursuant to the State Environmental Quality Review Act, a negative declaration is on file with the department.

Assessment of Public Comment

The agency received no public comment.

Department of Financial Services

EMERGENCY RULE MAKING

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

I.D. No. DFS-47-12-00001-E

Filing No. 1085

Filing Date: 2012-10-31

Effective Date: 2012-11-01

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

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

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

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

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

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

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

Litigation commenced in June, 2011 challenged the methodology used by the Banking Department to assess mortgage bankers. On May 3, 2012, the Appellate Division invalidated this methodology for the 2010 State Fiscal Year, finding that the former Banking Department had not followed the requirements of the State Administrative Procedures Act.

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

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

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

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

Text of emergency rule: Part 501

BANKING DIVISION ASSESSMENTS

§ 501.1 Background.

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

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

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

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

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

§ 501.2 Definitions.

The following definitions apply in this Part:

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

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

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

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

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

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

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

(e) "Supervisory Component" for an individual institution means the product of the average number of hours attributed to supervisory oversight by examiners and specialists of all institutions of a similar size and type, as determined by the Superintendent, in the applicable Industry Group, or the applicable sub-group, and the average hourly cost of the examiners and specialists assigned to the applicable Industry Group or sub-group.

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

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

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

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

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

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

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

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

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

§ 501.3 Billing and Assessment Process.

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

§ 501.4 Computation of Assessment.

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

§ 501.5 Penalties/Enforcement Actions.

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

§ 501.6 Effective Date.

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire January 28, 2013.

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

Regulatory Impact Statement

1. Statutory authority.

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

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

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

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

2. Legislative objectives.

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

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

While this type of allocation had been the practice of the former Banking Department for many decades, Homestead found that a change to the methodology for mortgage bankers to include secondary market and servicing income should be accomplished through formal regulations subject to the SAPA process. Given the nature of the Banking Division's assessment methodology - - the calculation and payment of the assessment is ongoing throughout the year and any period of uncertainty as to the applicable rule would be extremely disruptive - - the Department has determined that it is necessary to adopt the rule on an emergency basis so as to avoid any possibility of disrupting the funding of its operations.

3. Needs and benefits.

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

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

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

4. Costs.

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

5. Local government mandates.

None.

6. Paperwork.

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

7. Duplication.

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

8. Alternatives.

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

9. Federal standards.

Not applicable.

10. Compliance schedule.

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

Regulatory Flexibility Analysis**1. Effect of the Rule:**

The regulation does not have any impact on local governments.

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

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

2. Compliance Requirements:

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

3. Professional Services:

None.

4. Compliance Costs:

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

5. Economic and Technological Feasibility:

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

6. Minimizing Adverse Impacts:

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

7. Small Business and Local Government Participation:

This regulation does not impact local governments.

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

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

Rural Area Flexibility Analysis**1. Effect of the Rule:**

The regulation does not have any impact on local governments.

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

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

2. Compliance Requirements:

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

3. Professional Services:

None.

4. Compliance Costs:

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

5. Economic and Technological Feasibility:

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

6. Minimizing Adverse Impacts:

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

7. Rural Area Participation:

This regulation does not impact local governments.

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

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

Job Impact Statement

The regulation is not expected to have an adverse effect on employment. All institutions regulated by the Banking Division (the "Banking Division") of the Department of Financial Services are currently subject to assessment by the Department. The regulation simply formalizes the assessment methodology used by the Banking Division. It makes only one change from the allocation methodology used by the former Banking Department in the previous state fiscal years.

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

EMERGENCY RULE MAKING

Public Retirement Systems**I.D. No.** DFS-47-12-00002-E**Filing No.** 1086**Filing Date:** 2012-10-31**Effective Date:** 2012-10-31

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

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

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

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

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

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

This regulation was previously promulgated on an emergency basis on June 18, 2009, September 16, 2009, January 5, 2010, April 2, 2010, May 28, 2010, July 29, 2010, September 23, 2010, November 19, 2010, January 18, 2011, March 21, 2011, May 19, 2011, August 16, 2011, November 10, 2011, February 7, 2012, May 7, 2012, and August 3, 2012. The Department is currently working with the Governor's Office to make additional revisions to the regulation.

Subject: Public Retirement Systems.

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

Text of emergency rule: Section 136-2.2 is amended to read as follows:
§ 136-2.2 Definitions.

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

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

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

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

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

[(e)](b) Consultant or advisor shall mean any person (other than an OSC employee) or entity retained by the [fund] Fund to provide technical or professional services to the [fund] Fund relating to investments by the [fund] Fund, including outside investment counsel and litigation counsel,

custodians, administrators, broker-dealers, and persons or entities that identify investment objectives and risks, assist in the selection of [money] investment managers, securities, or other investments, or monitor investment performance.

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

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

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

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

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

[(g)](h) Placement agent or intermediary shall mean any person or entity, including registered lobbyists, directly or indirectly engaged and compensated by an investment manager (other than [an] a regular employee of the investment manager) to promote investments to or solicit investment by [assist the investment manager in obtaining investments by the fund, or otherwise doing business with] the [fund] Fund, whether compensated on a flat fee, a contingent fee, or any other basis. Regular employees of an investment manager are excluded from this definition unless they are employed principally for the purpose of securing or influencing the decision to secure a particular transaction or investment by the Fund. [obtaining investments or providing other intermediary services with respect to the fund.] For purpose of this paragraph, the term "employee" shall include any person who would qualify as an employee under the federal Internal Revenue Code of 1986, as amended, but shall not include a person hired, retained or engaged by an investment manager to secure or influence the decision to secure a particular transaction or investment by the Fund.]

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

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

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

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

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

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

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

(d) Placement agents or intermediaries: In order to preserve the inde-

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

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

(g) The Comptroller shall:

(1) file with the superintendent an annual statement in the format prescribed by Section 307 of the Insurance Law, including the [retirement system's] *Retirement System's* financial statement, together with an opinion of an independent certified public accountant on the financial statement;

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

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

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

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

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire January 28, 2013.

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

Regulatory Impact Statement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- A ban on political contributions by any employee of any placement agent seeking to do business with the Fund;
- A requirement that any placement agent seeking to do business with the Fund be registered as a broker dealer with the SEC and ensure that its professionals have passed the appropriate Series qualifications administered by Financial Industry Regulatory Authority ("FINRA");
- A requirement that any placement agent seeking to do business in New York register with the Department; and

• A requirement that any placement agent representing an investment manager before the Fund fully disclose the contractual arrangement between it and the manager, including the fee arrangement and the scope of services to be provided.

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

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

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

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

Regulatory Flexibility Analysis

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

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

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

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

This rule will affect investment managers and other intermediaries (other than OSC employees) who provide technical or professional services to the Fund related to Fund investments. The rule will prohibit investment managers from using the services of a placement agent unless such agent is a regular employee of the investment manager and is acting in a broader capacity than just providing specific investment advice to the Fund. In addition, the rule is also directed to placement agents, who as a result of this rule, will no longer be engaged directly or indirectly by investment managers that do business with the Fund. Some investment

managers and placement agents may come within the definition of “small business” set forth in section 102(8) of the State Administrative Procedure Act, because they are independently owned and operated, and employ 100 or fewer individuals.

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

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

2. Compliance requirements: None.

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

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

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

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

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

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

Rural Area Flexibility Analysis

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

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

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

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

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

Job Impact Statement

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

EMERGENCY RULE MAKING

Provider Requirements for Insurance Reimbursement of Applied Behavior Analysis

I.D. No. DFS-47-12-00003-E

Filing No. 1087

Filing Date: 2012-10-31

Effective Date: 2012-10-31

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

Action taken: Addition of Part 440 to Title 11 NYCRR.

Statutory authority: Financial Services Law, sections 202 and 302; Insurance Law, sections 301, 3216, 3221 and 4303; and Public Health Law, section 4406

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

Specific reasons underlying the finding of necessity: Chapters 595 and 596 of the Laws of 2011 require all policies and contracts subject to sections 3216(i)(25), 3221(1)(17) and 4303(ee) of the Insurance Law, which are issued, renewed, modified, altered or amended on or after November 1, 2012, to provide coverage for autism spectrum disorder, including behavioral health treatment in the form of applied behavior analysis ("ABA").

Chapters 595 and 596 of the Laws of 2011 also require that the Superintendent of Financial Services (the "Superintendent"), in consultation with the Commissioners of Health and Education, promulgate regulations that establish standards of professionalism, supervision and relevant experience for individuals who provide or supervise behavioral health treatment in the form of ABA.

In response to the statutory directive, the Superintendent seeks to promulgate new 11 NYCRR 440 (Insurance Regulation 201). The Superintendent, in consultation with the Commissioners of Health and Education, has determined that 11 NYCRR 440 will require that certified behavior analysts who supervise ABA aides and ABA aides who work under the supervision of behavior analysts, meet the necessary minimum standards of education, training and relevant experience to ensure individuals with autism spectrum disorder ("ASD") receive ABA services from qualified providers.

This rule also is necessary to ensure that as of November 1, 2012, insurers and health maintenance organizations ("HMOs") establish adequate provider networks and provider credentialing requirements that comply with this rule so that those entities may effectively provide insurance coverage for critical ABA services to those individuals diagnosed with ASD, and for whom out-of-pocket costs for those services are prohibitively expensive.

In light of the foregoing, it is critical that this new 11 NYCRR 440 be adopted as promptly as possible, and this rule must be promulgated on an emergency basis for the furtherance of the public health and general welfare.

Subject: Provider Requirements for Insurance Reimbursement of Applied Behavior Analysis.

Purpose: Establish standards of professionalism, supervision and relevant experience for providers of Applied Behavior Analysis.

Text of emergency rule: 11 NYCRR 440

(INSURANCE REGULATION 201)

PROVIDER REQUIREMENTS FOR INSURANCE REIMBURSEMENT OF APPLIED BEHAVIOR ANALYSIS

Section 440.0 Purpose.

The purpose of this Part is to establish standards of professionalism,

supervision, and relevant experience for individuals who provide or supervise the provision of behavioral health treatment in the form of applied behavior analysis, for insurance coverage pursuant to Insurance Law sections 3216(i)(25), 3221(l)(17) and 4303(ee).

Section 440.1 Definitions.

For purposes of this Part:

(a) Applied behavior analysis or ABA means the design, implementation, and evaluation of environmental modifications, using behavioral stimuli and consequences, to produce socially significant improvement in human behavior, including the use of direct observation, measurement, and functional analysis of the relationship between environment and behavior.

(b) Applied behavior analysis aide or ABA aide means an individual who has met the education and experience requirements of this Part or, with respect to ABA provided to children receiving early intervention program services pursuant to an individual family services plan under Title II-A of Article 25 of the Public Health Law, an individual who meets the minimum qualifications set forth in 10 NYCRR 69-4.25(e).

(c) Applied behavior analysis provider or ABA provider means:

(1) an ABA aide who, under supervision of a certified behavior analyst, directly provides ABA pursuant to an ABA treatment plan to an individual diagnosed with ASD, or

(2) a certified behavior analyst who directly provides or supervises an ABA aide in the provision of ABA.

(d) Autism spectrum disorder or ASD shall have the meaning ascribed by Insurance Law section 3216(i)(25)(C)(i).

(e) Behavior analyst means an individual certified as a behavior analyst pursuant to a behavior analyst certification board.

(f) Behavior analyst certification board means:

(1) the Behavior Analyst Certification Board, Inc., a nonprofit corporation established to meet professional credentialing needs identified by behavior analysts, governments, and consumers of behavior analysis services; or

(2) another nationally recognized association that has a certification process for ABA providers designated by the Superintendent of Financial Services, in consultation with the Commissioners of Health and Education.

(g) Behavioral health treatment means, when prescribed or ordered for an individual diagnosed with autism spectrum disorder by a licensed physician or licensed psychologist, counseling and treatment programs when provided by a licensed provider, and ABA when provided or supervised by a certified behavior analyst, that are necessary to develop, maintain, or restore, to the maximum extent practicable, the functioning of an individual. Treatment programs include ABA treatment plans developed by a licensed provider and delivered either directly by a certified behavior analyst or by an ABA aide under the direction and supervision of a certified behavior analyst.

(h) Certified behavior analyst means a licensed provider who is certified as a behavior analyst pursuant to a behavior analyst certification board.

(i) Licensed provider means a psychiatrist, psychologist or licensed clinical social worker, or an individual licensed or otherwise authorized under Education Law Title VIII to practice a profession for which ABA is within the scope of that profession.

Section 440.2 Scope of professional practice.

(a) Pursuant to Education Law Title VIII, an ABA provider or supervisor is strictly prohibited from performing, or delegating the performance of, any service or intervention that is included in the scope of practice of any profession licensed or otherwise authorized by the State, unless the provider or supervisor has the appropriate license, certification or registration, or are otherwise authorized by law to provide the service or intervention.

(b) Nothing in this Part shall be deemed to expand or diminish the scope of practice of any profession licensed under Education Law Title VIII, or give authorization to provide services included within such scopes of practice to any individual not otherwise authorized to provide such services under Title VIII of the Education Law.

(c) An insurer may deny coverage for ABA provided pursuant to an individualized education plan under Education Law Article 89. Nothing in this Part shall be deemed to restrict or supersede any requirements prescribed by the Commissioner of Education pursuant to Education Law Article 89 relating to the qualifications of individuals providing special education or related services to children with disabilities, including ABA.

Section 440.3 Supervision of ABA aides.

(a) A certified behavior analyst who supervises and oversees the provision of ABA by ABA aides shall meet the following minimum education, training and experience requirements:

(1) documented completion of a minimum of 20 hours of continuing education or 12 credits of matriculated or non-matriculated relevant coursework in behavioral interventions, including at a minimum the following content areas:

(i) basic principles, processes, and concepts of behavior analysis;
 (ii) clinical application of ABA, including behavior assessment, selecting intervention outcomes and strategies, behavior change procedures and systems support, data collection and analyses to measure and monitor progress, including measurement of behavior and displaying and interpreting data; and
 (iii) ethical issues related to the delivery of behavior interventions using ABA techniques; and

(2) a minimum of two years of documented full-time professional supervised work experience providing behavior interventions using ABA to individuals with ASD for whom such services have been proven effective in peer-reviewed, scientific research. The experience must include at a minimum:

(i) performing behavior assessments;
 (ii) developing and evaluating individualized ABA services;
 (iii) employing an array of scientifically validated, behavior analytic procedures, including discrete trial intervention, modeling, incidental teaching, and other naturalistic teaching methods, activity-embedded instruction, task analysis, and chaining;
 (iv) using ABA methods in one-to-one intervention, small and large group intervention, and in transitions across those situations;
 (v) using behavior change procedures and systems supports;
 (vi) measuring behavior and displaying and interpreting behavior data;

(vii) conducting functional assessments (including functional analyses) of challenging behavior and selecting the specific assessment methods that are best suited to the behavior and the context; and

(viii) assessing, monitoring, documenting, evaluating, and modifying ABA techniques as necessary to promote the progress of the individual receiving ABA.

(3) The requirements set forth in this subdivision may be satisfied through coursework or experience submitted for professional licensure under Education Law Title VIII.

(b) A certified behavior analyst who supervises and oversees the provision of ABA by ABA aides shall be responsible for:

(1) developing individual ABA plans in collaboration with, as appropriate, the parents or caregivers of the individual receiving ABA, as well as psychiatrists, psychologists, licensed clinical social workers, behavior analysts and ABA aides;

(2) directing the implementation of the individual ABA plans and the ongoing monitoring, systematic measurement, data collection, and documentation of the progress of the individual receiving ABA;

(3) modifying the individual ABA plans as necessary to promote progress toward goals, generalization of learning, and where applicable, transitioning of the individual receiving ABA across service delivery environments and settings;

(4) providing assistance, training, and support as needed by the parents or caregivers of the individual receiving ABA, as applicable, to assist them in follow-through specified in the individual's ABA plan and to enhance development, behavior, and functioning;

(5) supervising ABA aides, including:

(i) a minimum of six hours per month in the first three months of employment of an ABA aide, and a minimum of four hours per month thereafter, of direct on-site observation of each ABA aide assigned to the individual receiving ABA; and

(ii) a minimum of two hours per month of indirect supervision of an ABA aide assigned to an individual receiving ABA, in a group or individual format, including:

(a) weekly review and signed approval of the record of the individual receiving ABA, progress notes and data, correspondence, and evaluation of written reports;

(b) participation in telephone conferences with the ABA aide and, as appropriate, the parent or caregiver of the individual receiving ABA;

(c) ensuring proper documentation of the intervention provided and the response of the individual receiving ABA;

(d) ensuring that the ABA aide follows the modifications in the plan of the individual receiving ABA; and

(e) other supervision and support that the ABA aide needs to successfully implement the ABA plan of the individual receiving ABA;

(6) ensuring that no responsibilities are delegated to the ABA aide that are included in the scope of any profession in Education Law Title

VIII, for which the ABA aide is not licensed or otherwise authorized to perform pursuant to that Title; and

(7) convening a minimum of two team meetings per month with the ABA aide, as well as other providers, as appropriate, who are delivering services to the individual receiving ABA to review the progress, identify problems or concerns, and modify intervention strategies as necessary to enhance the development, behavior, and functioning of the individual receiving ABA.

Section 440.4 Qualifications for ABA aides.

An ABA aide shall meet the following minimum qualifications:

(a) A minimum level of education, as established by meeting at least one of the following requirements, except where Education Law Title VIII requires a higher level of education or authorization to provide ABA in the setting where the ABA aide will provide ABA:

(1) a high school diploma or its equivalent; and

(i) two years of full-time direct, supervised work experience providing services to children with disabilities; or

(ii) current matriculation in a degree program that is an approved professional preparation program for licensure under Education Law Title VIII for a profession that includes ABA within its scope, or a teacher preparation program leading to teacher certification;

(2) an associate's degree or higher level degree in a profession listed in Education Law Title VIII or in teaching;

(3) certification as a teaching assistant; or

(4) certification as a behavior analyst or assistant behavior analyst pursuant to a behavior analyst certification board;

(b) Prior to the provision of any services to any individual without direct, on-site supervision, completion of a child abuse and neglect identification and reporting workshop and a minimum of 20 hours of training or in-service in behavior interventions using ABA techniques within the past five years, including at a minimum:

(1) basic principles of behavior analysis;

(2) the application of these principles in behavior intervention, including collection of data as needed for monitoring progress;

(3) ethical issues related to the delivery of applied behavior interventions; and

(4) overview of autism and pervasive developmental disorder;

(c) Completion of a minimum of ten hours of additional training or in-service annually in topics pertaining to ABA and ASD; and

(d) An ABA aide providing ABA to a child receiving early intervention program services pursuant to an individual family services plan under Title II-A of Article 25 of the Public Health Law must meet the requirements set forth in 10 NYCRR 69-4.25(e).

Section 440.5 Duties of ABA aides.

Under the supervision and direction of a certified behavior analyst in accordance with this Part, an ABA aide shall:

(a) assist in the recording and collection of data needed to monitor progress;

(b) participate in required team meetings; and

(c) complete any other activities as directed by his or her supervisor and as necessary to assist in the implementation of an individual ABA plan.

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 January 28, 2013.

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

Regulatory Impact Statement

1. Statutory authority: Financial Services Law sections 202 and 302, Insurance Law sections 301, 1109, 3216, 3221 and 4303 and Public Health Law section 4406.

Section 301 of the Insurance Law and sections 202 and 302 of the Financial Services Law authorize the Superintendent of Financial Services (the "Superintendent") to prescribe regulations interpreting the provisions of the Insurance Law and to effectuate any power granted to the Superintendent under the Insurance Law.

Insurance Law section 1109 authorizes the Superintendent to promulgate regulations to effectuate the purposes and provisions of the Insurance Law and Article 44 of the Public Health Law with respect to contracts between a health maintenance organization ("HMO") and its subscribers.

Insurance Law section 3216 establishes requirements for individual accident and health insurance policies and sets forth the benefits that must be covered under such contracts.

Insurance Law section 3221 establishes requirements and standard provisions for group or blanket accident and health insurance policies and sets forth the benefits that must be covered under such contracts.

Insurance Law section 4303 governs accident and health insurance contracts written by not-for-profit corporations and sets forth the benefits that must be covered under such contracts.

Public Health Law section 4406 provides that the contract between an HMO and an enrollee is subject to regulation by the Superintendent as if it were a health insurance subscriber contract, and that it shall include, but not be limited to, all mandated benefits required by Article 43 of the Insurance Law.

2. Legislative objectives: In November 2011, Chapters 595 and 596 of the Laws of 2011 amended Insurance Law sections 3216, 3221 and 4303 to expand health insurance coverage for the screening, diagnosis and treatment of autism spectrum disorder ("ASD"). The amendments also directed the Superintendent, in consultation with the Commissioners of Health and Education, to promulgate regulations that set forth the standards of professionalism, supervision and relevant experience of individuals who provide behavioral health treatment in the form of applied behavior analysis ("ABA"), under the supervision of a certified behavior analyst. Chapters 595 and 596 take effect on November 1, 2012.

3. Needs and benefits: Prior to the enactment of Chapters 595 and 596, state law did not provide health insurers and HMOs sufficient clarity or an affirmative obligation to cover costs related to treatments for ASD. As a result, individuals diagnosed with an ASD who required treatment in addition to an individualized family service plan, individualized education plan or an individualized service plan had to pay out-of-pocket for expensive services. The law, as amended, will ensure that insurance coverage is extended to individuals diagnosed with ASD for treatment such as ABA, thus alleviating the financial burdens placed on the parents and caregivers of those individuals. This rule is being promulgated pursuant to the new statutory amendments to establish the education, training and supervision requirements of ABA providers in order to be eligible for health insurance reimbursement under the statute, and also ensuring that only qualified ABA providers will be rendering services to individuals with ASD.

4. Costs: This rule imposes no compliance costs upon state or local governments. However, potential providers of ABA may incur additional costs to fulfill the educational and training requirements of the rule in order to become eligible for reimbursement from health insurance coverage for providing ABA. Those costs are likely to be offset by the additional revenue obtained from being able to provide the services outside of an educational setting. Nonetheless, the Department is unable to estimate the cost of such compliance because the cost depends on the number of ABA providers who intend to provide treatment to individuals with ASD for reimbursement through health insurance, and ABA providers are not regulated by the Department.

Insurers and HMOs also may incur compliance costs from having to develop an ABA provider eligibility database, and may also have to expand their networks if they do not include an adequate number of ABA providers. Those costs may be passed on to consumers in the form of higher premiums, but the long-term benefits of having properly credentialed ABA providers to treat individuals with ASD greatly outweigh the costs.

5. Local government mandates: This rule imposes no new mandates on any county, city, town, village, school district, fire district or other special district.

6. Paperwork: Insurers and HMOs will be required to submit to the Department of Financial Services (the "Department") new health insurance policy forms and rates to add the new coverage for the screening, diagnosis and treatment of ASD, but that requirement is imposed by the statutory mandate, not this rule.

7. Duplication: There are no federal or other New York State requirements that duplicate, overlap or conflict with this regulation.

8. Alternatives: The Department, in consultation with the Department of Health and the State Education Department, considered various ways to establish the necessary standards of this regulation, such as delegating credentialing responsibility to the Behavior Analyst Certification Board, Inc. However, doing so would violate scope of practice requirements under the Education Law when ABA is not provided pursuant to an individualized family service plan, individualized education plan or an individualized service plan. This rule is modeled after existing Department of Health regulation 10 NYCRR 69-4.1 et seq., which governs the coverage of ABA under the New York early intervention program.

9. Federal standards: There are no federal minimum standards or regulations regarding professionalism, supervision and relevant experience for individuals who provide ABA under the supervision of a certified behavior analyst as defined under Insurance Law sections 3216(i)(25), 3221(l)(17) and 4303(ee).

10. Compliance schedule: Because the law goes into effect on November 1, 2012, this rule takes effect upon filing with the Secretary of State.

Regulatory Flexibility Analysis

1. Effect of the rule: This rule will impact insurers and health maintenance organizations ("HMOs") in New York State, none of which fall within the definition of "small business" set forth in section 102(8) of the State Administrative Procedure Act. However, this rule may affect providers of applied behavior analysis ("ABA") to treat autism spectrum disorder ("ASD"), some of which are small businesses, because some ABA providers may be required to obtain additional education, training and experience in order to become eligible for health insurance reimbursement for rendering ABA. However, this rule will not impact providers of ABA in an educational setting, and costs likely will be offset by increased revenue resulting from health insurance reimbursement for ABA providers' services.

The Department is unable to quantify the number of small businesses affected by this rule because ABA providers are not regulated by the Department of Financial Services (the "Department"), and the Department has established no reporting requirements with respect to these small businesses, nor does the Department maintain records of ABA providers in this state.

2. Compliance requirements: This rule will not impose any reporting, recordkeeping, or other compliance requirements on small businesses, sole proprietors or local governments. The rule only establishes standards of professionalism, training and experience required to be eligible for insurance reimbursement for providing ABA.

3. Professional services: This rule does not require the use of professional services.

4. Compliance costs: This rule will not impose any compliance costs on local governments but may impose additional costs on small businesses that provide ABA to those with ASD, because of the education, training and experience required to become eligible for health insurance reimbursement for providing ABA. Any such costs are likely to be more than offset by increased revenue as a result of health insurance reimbursement for these services. Nonetheless, the Department is unable to estimate the cost of such compliance because the cost depends on the number of ABA providers who intend to provide treatment to individuals with ASD for reimbursement through health insurance, and ABA providers are not regulated by the Department.

5. Economic and technological feasibility: Compliance with the rule should be economically and technologically feasible because it requires no action on the part of local governments and most small businesses. While small businesses that provide ABA may incur some costs in education and/or training of its employees, such costs are likely to be more than offset by increased revenue as a result of health insurance reimbursement for their services.

6. Minimizing adverse impact: Although ABA providers that are small businesses may incur additional costs to fulfill the education, training and experience requirements of this rule, those costs likely will be offset by the additional revenue that will be generated from health insurance reimbursement for their services.

7. Small business and local government participation: This rule does not impact local government. However, because this rule is being promulgated on an emergency basis, the Department is unable to give public and private interested parties an opportunity to participate in the rule making process before the rule is promulgated. The Department intends to subsequently file a notice of proposed rulemaking and public and private interested parties will have an opportunity to comment on the rule once it is published in the State Register.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: Applied behavior analysis ("ABA") providers affected by this rule operate throughout this state, including rural areas as defined under State Administrative Procedure Act section 102(10).

2. Reporting, recordkeeping and other compliance requirements; and professional services: This rule will not impose any reporting, recordkeeping, or other compliance requirements on ABA providers located in rural areas. The rule only establishes standards of professionalism, training and experience required to be eligible for insurance reimbursement for providing ABA.

3. Costs: This rule may impose additional costs on ABA providers located in rural areas, because of the education, training and experience required to become eligible for health insurance reimbursement for providing ABA. Any such costs are likely to be more than offset by increased revenue as a result of health insurance reimbursement for ABA providers' services.

4. Minimizing adverse impact: Although ABA providers in rural areas may incur additional costs to fulfill the education, training and experience requirements of this rule, those costs likely will be offset from the additional revenue that will be generated from health insurance reimbursement for their services.

5. Rural area participation: Because this rule is being promulgated on

an emergency basis, the Department is unable to give public and private interested parties an opportunity to participate in the rulemaking process before the rule is promulgated. The Department intends to subsequently file a notice of proposed rulemaking and public and private interested parties will have an opportunity to comment on the rule once it is published in the State Register.

Job Impact Statement

1. Nature of impact: In November 2011, Chapters 595 and 596 of the Laws of 2011 amended Insurance Law sections 3216, 3221 and 4303 to expand health insurance coverage for the screening, diagnosis and treatment of autism spectrum disorder ("ASD"). The amendments also directed the Superintendent of Financial Services, in consultation with the Commissioners of Health and Education, to promulgate regulations that set forth the standards of professionalism, supervision and relevant experience of individuals who provide behavioral health treatment in the form of applied behavior analysis ("ABA"). Chapters 595 and 596 take effect on November 1, 2012.

This rule should have no adverse impact on jobs and employment opportunities because it merely implements the statutory charge to establish standards of professionalism, supervision and relevant experience of individuals who provide behavioral health treatment in the form of ABA. These standards are designed to ensure that individuals with autism spectrum disorders receive treatment for those disorders from only qualified ABA providers.

2. Categories and numbers affected: This rule will impact providers of ABA because some ABA providers may be required to obtain additional education, training and experience in order to become eligible for health insurance reimbursement for providing ABA. However, this rule will not impact those ABA providers in an educational setting, and costs likely will be offset by the increased revenue resulting from health insurance reimbursement for ABA services.

The Department is unable to quantify the number of ABA providers affected by this rule because they are not regulated by the Department and the Department has established no reporting requirements with respect to these providers, nor does the Department maintain records of ABA providers in this state.

3. Regions of adverse impact: ABA providers operate in all regions of the state. Therefore, there are no regions of the state where the rule would have a disproportionate adverse impact on jobs or employment opportunities.

4. Minimizing adverse impact: Although ABA providers may incur additional costs to fulfill the education, training and experience requirements of this rule, those costs likely will be offset by the additional revenue that will be generated from health insurance reimbursement for ABA providers' services.

5. Self-employment opportunities: This rule will have a positive impact on ABA providers who are self-employed because opportunities will be available to provide ABA services outside of an educational setting for reimbursement through health insurance, especially with the increasing number of individuals being diagnosed with ASD, and for whom ABA is critical.

convenience stores, gas stations and smoke shops as "bath salts," plant food and other ordinary household goods, and which are not approved by the federal Food and Drug Administration (FDA):

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

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

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

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

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

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

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

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

Department of Health

EMERGENCY RULE MAKING

Synthetic Phenethylamines and Synthetic Cannabinoids (SP & SC) Prohibited

I.D. No. HLT-39-12-00009-E

Filing No. 1094

Filing Date: 2012-11-05

Effective Date: 2012-11-05

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

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

Statutory authority: Public Health Law, section 225

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

Specific reasons underlying the finding of necessity: The following chemical compounds are commonly packaged and marketed online, in

of poisoning. Therefore, it is clear that many additional New York residents have been harmed as a result of using products containing synthetic cannabinoids.

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

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

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

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

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

Part 9

Synthetic Phenethylamines and Synthetic Cannabinoids Prohibited

§ 9.1 Definitions.

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

3,4-Methylenedioxyamphetaminone (Methylone);

4-Methoxyamphetaminone;

3-Fluoromethcathinone;

4-Fluoromethcathinone;

Ethylpropion (Ethcathinone);

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

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

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

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

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

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

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

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

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

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

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

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

iii) *Naphthoylpyrroles*. Any compound containing a 3-(1-naphthoyl)pyrrole structure with substitution at the nitrogen atom of the pyrrole ring

by an alkyl, haloalkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl, 1-(N-methyl-2-piperidinyl)methyl, or 2-(4-morpholinyl)ethyl group, whether or not further substituted in the pyrrole ring to any extent and whether or not substituted in the naphthyl ring to any extent. (Other names in this structural class include but are not limited to: JWH 307).

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

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

vi) *Cyclohexylphenols*. Any compound containing a 2-(3-hydroxycyclohexyl)phenol structure with substitution at the 5-position of the phenolic ring by an alkyl, haloalkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl, 1-(N-methyl-2-piperidinyl)methyl, or 2-(4-morpholinyl)ethyl group, whether or not substituted in the cyclohexyl ring to any extent. (Other names in this structural class include but are not limited to: CP 47,497 (and homologues (analogs)), cannabicyclohexanol, and CP 55,940).

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

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

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

x) (6aS,10aS)-9-(hydroxymethyl)-6,6-demethyl-3-(2-methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo{c}chromen-1-ol (Dezanabinol or HU-211).

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

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

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

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

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

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

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

(a) public officers or their employees in the lawful performance of their

official duties requiring possession of synthetic phenethylamines or synthetic cannabinoids, or products containing the same;

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

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

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

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

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

§ 9.4 Penalties. A violation of any provision of this Part is subject to all civil and criminal penalties as provided for by law. For purposes of civil penalties, each packet, individual container or other separate unit of synthetic phenethylamine or synthetic cannabinoid, or product containing the same, that is possessed, manufactured, distributed, sold, or offered for sale, shall constitute a separate violation under this Part.

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

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt 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-39-12-00009-P, Issue of September 26, 2012. The emergency rule will expire January 3, 2013.

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

Regulatory Impact Statement

Statutory Authority:

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

Legislative Objectives:

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

Needs and Benefits:

This regulation pertains to synthetic phenethylamines that are commonly packaged and marketed online, in convenience stores, gas stations and smoke shops as "bath salts," plant food and other ordinary household goods, and which are not approved by the federal Food and Drug Administration ("FDA"). The compounds stimulate the body's central nervous system, and cause effects similar to those caused by cocaine and amphetamines, including but not limited to increased heart rate and blood

pressure, hallucinations, paranoia, suicidal thoughts, violent behavior, nausea and vomiting. Some synthetic phenethylamines are also commonly referred to as "designer drugs" because they are specifically synthesized with a similar, but slightly modified structure of a Schedule I controlled substance in order to avoid existing drug laws, and can be continually chemically modified to avoid legal repercussions, while maintaining their intended effects and usages. Certain synthetic phenethylamines are prevalent drugs of abuse.

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

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

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

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

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

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

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

Costs:

Costs to Private Regulated Parties:

The regulation imposes no new costs for private regulated parties.

Costs to State Government and Local Government:

State and local governments will incur costs for enforcement. Exact costs cannot be predicted at this time because the extent of the need for

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

Local Government Mandates:

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

Paperwork:

The regulation imposes no new reporting or filing requirements.

Duplication:

On May 20, 2011, the Commissioner of Health of the State of New York issued an Order for Summary Action banning the sale and distribution of certain products containing synthetic cathinone (a category of phenethylamines). On March 28, 2012, the Commissioner of Health of the State of New York issued an Order for Summary Action banning the sale and distribution of products containing synthetic cannabinoids. These Commissioner's Orders, unlike this regulation, are not enforceable by local governments or criminal authorities, and the sole enforcement mechanism for violations of the Order is a civil enforcement proceeding for an injunction and civil penalties through the State Attorney General. In addition, the Commissioner's Orders do not prohibit possession or manufacture of some synthetic phenethylamines and/or synthetic cannabinoids. Further, the Commissioner's Orders are only binding on and enforceable against those individuals and entities who received personal service of the Commissioner's Orders.

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

Alternatives:

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

Federal Standards:

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

Compliance Schedule:

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

Regulatory Flexibility Analysis

Effect of Rule:

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

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

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

Compliance Requirements:

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

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

Professional Services:

Small businesses will need no additional professional services to comply.

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

Compliance Costs:

Costs to Private Regulated Parties:

The regulation imposes no new costs for private regulated parties.

Costs to State Government and Local Government:

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

Economic and Technological Feasibility:

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

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

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

Minimizing Adverse Impact:

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

Small Business and Local Government Participation:

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

Cure Period:

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

Rural Area Flexibility Analysis

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

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

Job Impact Statement

Nature of the Impact:

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

Categories and Numbers Affected:

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

Regions of Adverse Impact:

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

Minimizing Adverse Impact:

Not applicable.

Public Service Commission

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Temporary Waiver and Suspension of Electric, Gas and Steam Tariff Provisions Requiring the Imposition of Late Payment Charges

I.D. No. PSC-47-12-00004-EP

Filing Date: 2012-11-02

Effective Date: 2012-11-02

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

Proposed Action: Temporary waiver of certain late payment charges.

Statutory authority: Public Service Law, sections 30, 51, 65, 66, 78, 79 and 80

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

Specific reasons underlying the finding of necessity: An immediate waiver and suspension of late payment charges is necessary because numerous customers in the affected areas may have lost their homes or have been forced to evacuate. Other customers may still not have their electric, internet, and/or telephone services restored. Many customers have also not been able to return to work. Nonresidential customers are also experiencing these problems. Thus, customers will likely have trouble in making timely payment of their electric, gas and steam bills. Compliance with the State Administrative Procedure Act is not possible because to do so could be detrimental to the health, safety and general welfare of the people of the State of New York, and immediate waiver of the applicable tariff provisions requiring the imposition of late payment charges will provide important benefits for customers who have suffered the hardships associated with Sandy and the loss of critical utility services. Delaying this action would be harmful to the public interest.

Subject: Temporary waiver and suspension of electric, gas and steam tariff provisions requiring the imposition of late payment charges.

Purpose: Temporary waiver and suspension of electric, gas and steam tariff provisions requiring the imposition of late payment charges.

Substance of emergency/proposed rule: On November 2, 2012, the Public Service Commission issued an Order, on an emergency basis, directing a temporary waiver and suspension of electric, gas and steam tariff provisions that require the imposition of a late payment charge on bills not paid in a timely manner. As a result of Sandy, over a million utility customers lost electric, gas and/or steam service, as well as postal service, telephone or internet service, banking service, or payment services that are otherwise available to them. In the extraordinary post-hurricane conditions, it is necessary to temporarily adopt new procedures which work well while these unusual conditions are present. In the absence of Commission action, certain tariff provisions might require utilities to impose late payment charges, since such charges would be inappropriate under current circumstances. This Order authorizes a temporary waiver and suspension of such charges commencing immediately and continuing through December 15, 2012. During this period, the Commission will continue to monitor storm restoration efforts and determine whether a further suspension of such tariff provisions is necessary.

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 January 30, 2013.

Text of rule may be obtained from: Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223-1350, (518) 486-2655, email: Deborah.Swatling@dps.ny.gov

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

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

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

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

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

(12-M-0501EP1)

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Temporary Waiver of the Notification Requirement Contained in 16 NYCRR Section 261.53

I.D. No. PSC-47-12-00005-EP

Filing Date: 2012-11-02

Effective Date: 2012-11-02

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

Proposed Action: The Public Service Commission adopted an order temporarily waiving the notification requirement contained in 16 NYCRR Section 261.53 that could delay restoration of gas service to customers affected by Hurricane Sandy as well as other storm recovery activities.

Statutory authority: Public Service Law, sections 4, 65 and 66

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

Specific reasons underlying the finding of necessity: Approval of the temporary waiver of 16 NYCRR Section 261.53 should be adopted on an emergency basis pursuant to SAPA § 202(6). Requiring compliance with 16 NYCRR Section 261.53 while gas utilities work to restore gas service to customers in the aftermath of Hurricane Sandy could cause delays in restoring gas service that would threaten the public health, safety and general welfare. As a result, compliance with the advance notice and comment requirements of SAPA § 202(1) would be contrary to the public interest.

Subject: Temporary waiver of the notification requirement contained in 16 NYCRR Section 261.53.

Purpose: To provide gas utilities with a temporary waiver of 16 NYCRR Section 261.53.

Text of emergency/proposed rule: On November 2, 2012, the Public Service Commission issued an Order granting a temporary waiver of the notification requirement contained in 16 NYCRR Section 261.53, on an emergency basis. That regulation required utilities to notify local Department of Social Services (DSS) offices when the disconnection of gas service to results in a customer being unable to use heating facilities. As a result of Hurricane Sandy, gas utilities have a large number of customers who currently do not have gas service and need to have such service restored. In the process of restoring service to these customers, utility employees may discover hazardous conditions within buildings which prevent them from restoring gas service. Compliance with the notification requirement of 16 NYCRR Section 261.53 under these circumstances could result in delays to utility restoration efforts and hamper local DSS offices contemporaneous storm recovery efforts.

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 February 2, 2013.

Text of rule may be obtained from: Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223-1350, (518) 486-2655, email: Deborah.Swatling@dps.ny.gov

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, NY 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 amended rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(12-G-0500EP1)

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

Waiver of Certain Requirements of 16 NYCRR Section 255.604 Concerning "Operator Qualification"

I.D. No. PSC-47-12-00006-EP

Filing Date: 2012-11-02

Effective Date: 2012-11-02

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 providing a waiver of certain requirements of 16 NYCRR § 255.604 concerning operator qualification during the pendency of work related to storm restoration of service efforts by the State's gas utilities as a result of outages caused by Hurricane Sandy.

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

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

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 grant the waiver on an emergency basis could result in the hampering of efforts to timely restore gas utility service resulting from damage caused by Hurricane Sandy. The hampering of such restoration efforts would adversely impact the public safety, 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 an immediate waiver of certain requirements of 16 NYCRR § 255.604 is necessary for the preservation of the public health, safety and general welfare.

Subject: Waiver of certain requirements of 16 NYCRR section 255.604 concerning "operator qualification."

Purpose: The waiver will allow utilities flexibility in personnel and contractor services to facilitate the restoration of gas service.

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 waiving on a temporary basis, subject to the terms and conditions set forth in the order, the requirements of 16 NYCRR § 255.604 regarding to "Operator Qualification" during the pendency of restoration efforts by the State's gas utilities resulting from storm damage caused by Hurricane Sandy.

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 February 2, 2013.

Text of rule may be obtained from: Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223-1350, (518) 486-2655, email: Deborah.Swatling@dps.ny.gov

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, NY 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 amended rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(12-G-0504EP1)

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

Renewable Portfolio Standard Structure and Funding Allocation to Further Support On-Site Anaerobic Digester Generation Development

I.D. No. PSC-47-12-00008-P

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

Proposed Action: The Commission is considering a petition by the New York State Energy Development Authority requesting changes to the Re-

newable Portfolio Standard as it relates to on-site anaerobic digester generation.

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

Subject: Renewable Portfolio Standard structure and funding allocation to further support on-site anaerobic digester generation development.

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, the request of the New York State Energy Research and Development Authority (NYSERDA) to change the Renewable Portfolio Standard (RPS) as it relates to on-site anaerobic digester generation. In particular, the Commission is considering NYSERDA's "Petition For Modification of RPS CST ADG Program" dated October 19, 2012.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact: Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223-1350, (518) 486-2659, email: Deborah.Swatling@dps.ny.gov

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, NY 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-0188SP35)

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

Issuance of Securities

I.D. No. PSC-47-12-00009-P

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

Proposed Action: The Commission is considering whether to approve disapprove, or modify a petition filed by New York American Water Company, Inc. to issue up to approximately \$40 million of long-term debt.

Statutory authority: Public Service Law, section 89-f

Subject: Issuance of Securities.

Purpose: To allow or disallow New York American Water Company to issue long-term debt.

Substance of proposed rule: The Public Service Commission is considering whether to approve, deny or modify, in whole or in part, a petition by New York American Water Company, Inc. f/k/a Long Island Water Corporation seeking authorization to issue up to approximately \$40 million of long term debt to refinance existing long-term debt and finance new construction projects. The Commission shall consider all other related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact: Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223-1350, (518) 486-2659, email: Deborah.Swatling@dps.ny.gov

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

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

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

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

(12-W-0493SP1)

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

Whether to Permit the Use of the Romet AdEC Electronic Corrector for Use in Commercial and Industrial Gas Meter Applications

I.D. No. PSC-47-12-00010-P

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

Proposed Action: The PSC is considering whether to approve, deny or modify, in whole or in part, a petition filed by National Fuel Gas Distribution Corporation for approval to use the Romet Limited AdEC (Advanced Electronic Corrector) made by Romet LTD., Mississauga, Canada.

Statutory authority: Public Service Law, section 67(1)

Subject: Whether to permit the use of the Romet AdEC electronic corrector for use in commercial and industrial gas meter applications.

Purpose: To permit gas utilities in New York State to use the Romet AdEC corrector.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny, or modify, in whole or part, the petition filed by National Fuel Gas Distribution Corporation, to use the Romet Limited AdEC Corrector in commercial natural gas meter applications. The Commission may apply its decision here 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.ny.gov/f96dir.htm>. For questions, contact: Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223-1350, (518) 486-2659, email: Deborah.Swatling@dps.ny.gov

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

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

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

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

(12-G-0495SP1)

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

Customer Charges

I.D. No. PSC-47-12-00011-P

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

Proposed Action: The Commission is considering a tariff filing by Hudson Valley Water Companies, Inc. (HVWC) proposing revisions to the Company's rules and regulations contained in P.S.C. No. 2 — Water.

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

Subject: Customer charges.

Purpose: To make changes to the rates, charges, rules and regulations in HVWC's tariff to become effective March 1, 2013.

Substance of proposed rule: The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by Hudson Valley Water Companies Inc. proposing revisions to the Company's rules and regulations contained in P.S.C. No. 2 — Water. The purpose of this filing is to allow the Company to charge for (1) work the customer requests to be done, and (2) customers that make a payment at the time of the discontinuance of service will be charged the restoration of service charge. The proposed filing has an effective date of March 1, 2013. The Commission may resolve related matters and may take this action for other utilities.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact: Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223-1350, (518) 486-2659, email: deborah.swatling@dps.ny.gov

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

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

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

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

(12-W-0505SP1)

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

Approval of the Transfer of Ownership of WPS from Integrys to Lakeside

I.D. No. PSC-47-12-00012-P

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

Proposed Action: The Commission is considering the approval of transfer of ownership of WPS Beaver Falls Generation LLC and WPS Syracuse Generation LLC (together, WPS) from Integrys Energy Services, Inc. (Integrys) to Lakeside New York LLC (Lakeside).

Statutory authority: Public Service Law, sections 70 and 83

Subject: Approval of the transfer of ownership of WPS from Integrys to Lakeside.

Purpose: To consider the approval of the transfer of ownership of WPS from Integrys to Lakeside.

Substance of proposed rule: The Public Service Commission is considering a petition filed on October 24, 2012 requesting approval of the transfer of ownership of WPS Beaver Falls Generation LLC (WPS Beaver Falls) and WPS Syracuse Generation LLC (WPS Syracuse) from Integrys Energy Services, Inc. to Lakeside New York LLC. WPS Beaver Falls owns and operates an approximately 95 MW electric generation facility in Beaver Falls, New York, which also includes steam plant used to serve two customers, and WPS Syracuse owns and operates an approximately 109 MW electric generation facility in Solway, New York. The Commission may adopt, reject or modify, in whole or in part, the relief proposed and may resolve related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact: Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223-1350, (518) 486-2659, email: deborahswatling@dps.ny.gov

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

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

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

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

(12-M-0491SP1)

Workers' Compensation Board

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

Medical Treatment Guidelines

I.D. No. WCB-47-12-00013-P

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

Proposed Action: Amendment of Part 324 of Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 117, 141, 13, 13-a, 13-b, 13-k, 13-l and 13-m

Subject: Medical Treatment Guidelines.

Purpose: Requires use of the Medical Treatment Guidelines for covered injuries and creates processes for their use.

Substance of proposed rule (Full text is posted at the following State website: wcb.ny.gov): The proposed amendments to Part 324 of 12 NYCRR adopt Medical Treatment Guidelines (MTG) for Carpal Tunnel Syndrome (CTS).

In addition, the Guidelines for the neck, back, shoulder and knee have been amended to permit 10 chiropractic, physical therapy or occupational therapy visits each year following a determination that the claimant has reached maximum medical improvement (MMI) and has chronic pain. No variance is allowed from the maximum of 10 annual visits.

Section 324.2(d)(2) has been amended to remove anterior acromioplasty and chondroplasty from the list of procedures that require prior authorization by the payer.

Section 324.3 has also been amended to prohibit the repeated submission of variance requests by a treating medical provider for substantially similar treatment when an earlier variance request has not yet been denied or without additional information when the earlier substantially similar request has been previously denied.

Paragraph (3) of subdivision (a) of Section 324.3 has been amended to specifically state that a variance must be submitted within two business days of the preparation of the request.

Paragraph (5) of subdivision (a) has been added to provide that no variance is required for ongoing maintenance care.

Section 324.3 has been amended to remove the requirement that the parties attempt to informally resolve disputes for eight days and to direct that requests for review of a denial of a variance request will be directed to medical arbitration unless the claimant or payer requests review by a Workers' Compensation Law Judge.

In addition, Section 324.3 has been amended to give the Chair discretion to direct the resolution of variance denials based on the claimant's failure to appear for an independent medical examination.

The Board proposes further changes to Part 324 of 12 NYCRR by modification of the definition of MMI to conform it to the definition developed by the Advisory Committee and incorporated in the Board's 2012 Guidelines for the Determination of Permanent Impairment and Loss of Wage Earning Capacity.

At subdivision (c) of section 324.1, the proposed amendment adds a definition of "Denial, deny or denials" to include instances when the carrier or Special Fund partially grants or approves only a portion of a variance or request for optional prior approval.

Throughout the regulation the language has been modified from use of words like "form" and "file" to terms such as "format prescribed by the Chair" and "submit."

Text of proposed rule and any required statements and analyses may be obtained from: Heather MacMaster, NYS Workers' Compensation Board, 328 State Street, Schenectady, New York 12305-2318, (518) 486-9564, email: regulations@wcb.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.

Summary of Regulatory Impact Statement

1. Statutory Authority:

Workers' Compensation Law (WCL) § 117 (1), WCL § 141, WCL § 13, WCL § 13-b and WCL § 13-a (5).

2. Legislative Objectives:

The purpose of the 12 NYCRR Part 324 (the Medical Treatment Guidelines or MTG) was to create medical guidelines for the treatment of injured workers using the most effective modern diagnostic and treatment techniques.

3. Needs and Benefits:

The Guidelines determine the standard of treatment and care for workers' compensation claimants. Carriers are only required to pay for medical care that is consistent with the Guidelines or that has been approved through a variance process. The Guidelines establish criteria for appropriate timing and use of diagnostic testing and medical treatments, control utilization of treatment, and thereby seek to reduce costs. Several years after the development of the initial MTGs, the Advisory Committee began to develop Guidelines for carpal tunnel syndrome (CTS). The Superintendent transmitted the recommended CTS MTG to the Chair in fall 2011. The Chair promptly posted the MTG and sought public comments. The comments were reviewed and changes made where appropriate.

In addition, the Guidelines for the neck, back, shoulder and knee have been amended to permit 10 chiropractic, physical therapy or occupational

therapy visits each year following a determination that the claimant has reached maximum medical improvement (MMI) and has chronic pain.

Section 324.2(d)(2) has been amended to remove anterior acromioplasty and chondroplasty from the list of procedures that require prior authorization by the payer.

Section 324.3 has also been amended to prohibit the repeated submission of variance requests by a treating medical provider for substantially similar treatment when an earlier variance request has not yet been denied or without additional information when the earlier substantially similar request has been previously denied.

Paragraph (3) of subdivision (a) of Section 324.3 has been amended to specifically state that a variance must be submitted within two business days of the preparation of the request.

Section 324.3 has been amended to remove the eight day requirement for informal resolutions and to direct that requests for review of a denial of a variance request will be directed to medical arbitration unless the claimant or payer requests review by a Workers' Compensation Law Judge.

In addition, Section 324.3 has been amended to give the Chair discretion to direct the resolution of variance denials based on the claimant's failure to appear for an independent medical examination.

The Board proposes further changes to Part 324 of 12 NYCRR by modification of the definition of MMI to conform it to the definition developed by the Advisory Committee and incorporated in the Board's 2012 Guidelines for the Determination of Permanent Impairment and Loss of Wage Earning Capacity.

At subdivision (c) of section 324.1, the proposed amendment adds a definition of "Denial, deny or denials" to include instances when the carrier or Special Fund partially grants or approves only a portion of a variance or request for optional prior approval.

Throughout the regulation the language has been modified from use of words like "form" and "file" to terms such as "format prescribed by the Chair" and "submit."

4. Costs:

The proposed amendments are intended to reduce costs to all parties and the Board, through further streamlining of the process to reduce delays in resolution of disputes and add clarity and guidance in the treatment of injured workers. As with the original Guidelines adopted in 2010, the Board will offer support for this implementation through training. The Guidelines will be available on the Board's website and anyone will be able to download and print them free of charge. If an individual or entity requests a hardcopy of one or more of the guidelines, the cost will be \$10.00 per guideline or \$50.00 for all five. This charge is to cover the Board's cost in making the copies. The charge for one or more of the Guidelines on a compact disc is \$5.00.

5. Local Government Mandates:

The rule only imposes a mandate on local governments that are self-insured or that own and/or operate a hospital. The mandates on local governments are the same as those imposed on private self-insured employers, insurance carriers, the State Insurance Fund, third party administrators, medical professionals, private hospitals. Self-insured local governments and those that own and/or operate a hospital will need to comply with the requirements in the rule the same as a private self-insured employer or insurance carrier or private hospital. It is expected that the rule will generate reduced medical costs and therefore lower workers' compensation costs for all employers, including local governments.

The rule requires that all claimants with injuries, illnesses or occupational diseases to the neck, back, shoulder, and/or knee, and those diagnosed with carpal tunnel syndrome be treated in accordance with the Guidelines adopted and amended by the regulation.

6. Paperwork Requirements:

The proposed amendments should significantly reduce the number of variances requested and thus reduce the paperwork associated with those requests. The only additional paperwork requirements are the need to adhere to the Guidelines and to request a variance for treatment that deviates from the Guidelines' recommendations. The forms used to request a variance are already in use, but will be modified slightly.

7. Duplication:

The proposed regulation does not duplicate or conflict with any state or federal requirements.

8. Alternatives:

Carpal Tunnel Syndrome Guideline. The Advisory Committee to the Superintendent developed and proposed these CTS Guidelines based on the Colorado and Washington state guidelines. The Board could have rejected the proposed guidelines and chosen another state or commercially available guidelines for the treatment of CTS. It did not do so because the Board values the inclusive and collaborative process by which the proposed guidelines were developed and because the Board did not receive any comments that called into question the validity of the proposed guidelines.

Maintenance Care. The Board could have waited to incorporate new

maintenance care guidelines as part of the chronic pain guidelines that are currently in development by the MAC. The Board chose to move forward at this time because there was widespread agreement on the need to allow for limited maintenance care and more than three quarters of existing variance requests involve such treatment. The Board saw no reason to wait when a solution could be adopted at this time.

Amendments to Part 324. One alternative to amending Part 324 of 12 NYCRR that the Board considered was to take no action. However, that alternative was not compelling because of the various issues that have been present since adoption of the original regulation. While the Board has attempted to correct the issues through communication with stakeholders and internal process, it was ultimately determined that the existing regulations required amendment.

Under the current regulation, there are disputes regarding the timeliness of the filing of variance requests that occur when a variance is prepared and signed by the treating medical provider during the examination and treatment of a claimant, but the variance request is not submitted until later due to routine medical office practice. After consultation with stakeholders it was determined that the most important objective with respect to timeliness was to ensure that the Board and the carrier or Special Fund are provided with the variance request at the same time. It was determined that a slight delay between the preparation and submission of the variance request did not compromise the quality of the variance or the ability to evaluate the variance. Treating medical providers have communicated that the two business days proposed by the Board in this amendment is ample time to accommodate the minor routine delays between the preparation of the variance and the submission.

Under the current regulation, the system has been burdened by treating medical providers that repeatedly submit variance requests for medical care, when a prior substantially similar, or identical, request has been denied or is still under review. These duplicate variance requests strain the Board's resources, the resources of carriers and Special Funds, produce delays in the resolution of all requests, and diminish the ability to carefully consider each variance request. The Board carefully considered this issue and has developed an approach in the proposed regulation that will create an expedited process for the denial of resubmitted variances while ensuring that claimants retain the ability to request a variance from the Guidelines when medically necessary.

Finally, the Board has proposed changes to the regulation that will offer flexibility should the Board create an easy, accessible means for processing of the requests for variances and optional prior approvals electronically via a web portal or some other electronic means. The Board considered not changing the regulation at the present time. However if the Board is able to offer an easily accessible, transparent web portal that will further reduce delays and eliminate disputes concerning timely filings, then no further amendment of this regulation would be necessary before the Board could implement such a change. Furthermore, the recommended changes will not impact the current process.

9. Federal Standards:

No federal standards are applicable to this proposed regulation.

10. Compliance Schedule:

Participants will be able to comply with the proposed regulation when they take effect on February 1, 2013. The Board will conduct extensive outreach and education to providers, insurance companies, attorneys, Board staff, and others, between now and the effective date to facilitate incorporation of changes and to familiarize all stakeholders with the substantive content of the new and revised Guidelines. The participants will also have time to incorporate the carpal tunnel syndrome Guideline and the changes in the regulations into their policies, procedures and practices. Stakeholders will be given additional time beyond February 1, 2013, to incorporate revised forms into their systems.

Regulatory Flexibility Analysis

1. Effect of rule:

Small businesses and local governments whose only involvement with the workers' compensation system is that they are employers and are required to have coverage will not be affected directly by this rule. Small businesses cannot be individually self-insured but must purchase workers' compensation coverage from the State Insurance Fund or a private insurance carrier authorized to write workers' compensation insurance in New York or join a group self-insured trust. It is the entity providing coverage for the small employer that must comply with all of the provisions of this rulemaking, not the covered employer. The impact on the State Insurance Fund and all private insurance carriers is not covered in this document as they are not small businesses. Group self-insured trusts, third party administrators hired by private insurance carriers and group self-insured trusts, independent medical examination (IME) entities, and attorneys may be small businesses who will be impacted by this regulation. All health practitioners authorized by the Chair to treat or conduct independent medical examinations of claimants will have to comply with parts of this rule. Finally, local governments that own and/or operate a hospital will be affected by this rule.

The approximately 2,500 political subdivisions that are self-insured for workers' compensation coverage in New York State will have to comply with the provisions of this proposal. Those local governments who are not self-insured and do not own and/or operate a hospital will not be affected by this rule.

2. Compliance requirements:

The proposed rule modifies existing compliance requirements on the small businesses and local governments described above.

The proposed amendments should significantly reduce the number of variances requested and thus reduce the reporting and recordkeeping associated with those requests. Adoption of the carpal tunnel syndrome Guidelines will require all medical providers to adhere to those Guidelines and to request a variance to deviate from the Guidelines' recommendations. The forms used to request a variance are already in use, but will be modified slightly. It is not anticipated that the proposed amendments will require any additional staffing or resources by rural employers.

3. Professional services:

Small businesses and local governments affected by the rule will not need any new professional services to comply with this rule.

4. Compliance costs:

The proposed amendments are intended to improve medical care, reduce administrative costs to all parties including rural participants, and reduce delays in resolution of disputes, and reduce medical costs in workers' compensation. As with the original Guidelines adopted in 2010, the Board will offer support for this implementation through training. The Guidelines will be available on the Board's website and anyone will be able to download and print them free of charge. If an individual or entity requests a hardcopy of one or more of the guidelines, the cost will be \$10.00 per guideline or \$50.00 for all five. This charge is to cover the Board's cost in making the copies. The charge for one or more of the Guidelines on a compact disc is \$5.00.

5. Economic and technological feasibility:

It is economically and technologically feasible for small businesses and local governments to comply with the proposed amendments. The proposed amendments rely on existing technology and services already provided to affected payers. The proposed amendments permit the Board to adapt technologies but always allows for use of regular mail when the technology is not available to a participant.

6. Minimizing adverse impact:

As stated above, the implementation of the proposed amendments is expected to save money for all participants in the workers' compensation system by prescribing Guidelines for the treatment of CTS, by permitting a fixed number of treatments for maintenance care to relieve chronic pain and eliminating the variance requests associated to such treatment, and by further streamlining the process to eliminate delays and disputes.

7. Small business and local government participation:

The Board solicited comments from all stakeholders to the proposed carpal tunnel syndrome Guidelines by Subject Number dated October 4, 2011. The Board's Subject Numbers are emailed to over 3000 subscribers statewide. The Board does not track how many of these subscribers are small businesses or local governments. In addition, the Board posts all Subject Numbers on its website. The Subject Number, "Chair Seeks Comments on Draft Carpal Tunnel Syndrome Treatment Guidelines," invited public comment from all participants.

The proposed amendments are expected to reduce costs and consume fewer resources for all participants in the workers' compensation system including small businesses and local governments.

While medical professionals and affected payers who are small businesses will be required to incorporate the Guidelines into their policies, practices, and procedures, the Board will assist in this process by providing training and support to stakeholders. There will be no charge for the training.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

The amendments to Part 324 of 12 NYCRR (Guidelines or MTG) will apply to all insurance carriers, the State Insurance Fund, self-insured employers, self-insured local governments, local governments that own and/or operate hospitals, attorneys, medical providers, group self-insured trusts, third party administrators and claimants across the state. These individuals and entities exist in all rural areas of the state.

2. Reporting, recordkeeping and other compliance requirements:

The proposed amendments should significantly reduce the number of variances requested and thus reduce the reporting and recordkeeping associated with those requests. Adoption of the carpal tunnel syndrome Guidelines will require all medical providers to adhere to those Guidelines and request a variance to perform treatment that deviates from the Guidelines' recommendations. The forms used to request a variance are already in use. It is not anticipated that the proposed amendments will require any additional staffing or resources by rural employers.

3. Costs:

The proposed amendments are intended to reduce administrative costs to all parties including rural participants, reduce delays in resolution of disputes, and add clarity and guidance in the treatment of injured workers. As with the original Guidelines adopted in 2010, the Board will offer support for this implementation through training. The Guidelines will be available on the Board's website and anyone will be able to download and print them free of charge. If an individual or entity requests a hardcopy of one or more of the guidelines, the cost will be \$10.00 per guideline or \$50.00 for all five. This charge is to cover the Board's cost in making the copies. The charge for one or more of the Guidelines on a compact disc is \$5.00.

4. Minimizing adverse impact:

As stated above, the implementation of Guidelines is expected to reduce costs and consume fewer resources for all participants in the workers' compensation system including rural participants.

While medical professionals and affected payers will be required to incorporate the Guidelines into their policies, practices, and procedures, the Board will assist in this process by providing training to stakeholders and Board employees. There will be no charge for the training.

5. Rural area participation:

The Board shared a summary of the regulations with representatives from the Medical Society of New York, the New York State Chiropractic Association, the New York Physical Therapy Association, the New York State Society of Orthopedic Surgeons, as well as attorneys representing injured workers, and requested comments. Each of these groups has constituents throughout the state including rural areas. In addition, the Board either met with or had conference calls with representatives from most of these entities. Changes were made to the Guidelines/regulations in response to the comments.

Job Impact Statement

The proposed rule will not have an adverse impact on jobs. The proposed rule amends Part 324 of 12 NYCRR, known as the Medical Treatment Guidelines, and establishes the necessary processes to support the use of such guidelines.

The rule does not eliminate any existing process, procedure, or program. While the amendment to the Medical Treatment Guidelines adopted in 2010 should reduce medical disputes, including the need for prior approval for special services two procedures and for treatment consistent with the carpal tunnel syndrome Guidelined, such reductions will not result in an adverse impact on jobs.