RULE MAKING ACTIVITIES

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

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

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

Office of Alcoholism and Substance Abuse Services

NOTICE OF ADOPTION

General Facility Requirements

I.D. No. ASA-33-12-00001-A
Filing No. 1000
Filing Date: 2012-10-03
Effective Date: 2012-10-24

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

Action taken: Repeal of Part 814; and addition of new Part 814 to Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 19.07(c), 19.09(b), 19.40, 32.07(a) and 32.02

Subject: General Facility Requirements.

Purpose: Updates to reflect standards that are current enforced as well as new provisions required by changes in other regulations.

Text or summary was published in the August 15, 2012 issue of the Register, I.D. No. ASA-33-12-00001-P.

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

Text of rule and any required statements and analyses may be obtained from: Sara Osborne, Senior Attorney, NYS OASAS, 1450 Western Ave., Albany, NY 12203, (518) 485-2317, email: Sara.Osborne@oasas.ny.gov

Assessment of Public Comment

The agency received no public comment.

State Board of Elections

NOTICE OF ADOPTION

Disclosure of Independent Expenditures

I.D. No. SBE-08-12-00020-A
Filing No. 1003
Filing Date: 2012-10-09
Effective Date: 2012-10-24

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

Action taken: Amendment of section 6200.10 of Title 9 NYCRR.

Statutory authority: Election Law, section 3-102; L. 2011, ch. 399 (Unconsolidated Law)

Subject: Disclosure of Independent Expenditures.

Purpose: Set requirements relative to disclosure of Independent Expenditures.

Text or summary was published in the February 22, 2012 issue of the Register, I.D. No. SBE-08-12-00020-P.

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

Text of rule and any required statements and analyses may be obtained from: William McCann, New York State Board of Elections, 40 North Pearl Street, Albany, NY 12207, (518) 474-2063, email: william.mccann@elections.ny.gov

Assessment of Public Comment

4 Public Comments were received - Citizens Union; The League of Women Voters of NYS; Common Cause/NY; and The Brennan Center for Justice.

The Legislature has charged the New York State Board of Elections (''Board of Elections"/ ''Board'') with regulating independent expenditures to the ''fullest extent of the law'' in elections for New York State and municipal offices. In response to the proposed definition of ''express advocacy'' in the Board's draft regulation of independent expenditures, Citizens Union, Common Cause New York, and the League of Women Voters have commented that the Board should regulate certain independent expenditures that subsidize pure issue advocacy - viz., ''communications that discuss an organization's views on issues endorsed by a political candidate or party without expressly advocating the election of that candidate or party.'' Matter of Klepper v. Christian Coalition of New York, Inc. (''Klepper''), 259 A.D.2d 926, 927 (3d Dep't 1999). To this end, it was suggested that the regulation require disclosure of ''Electioneering Communications.'' Electioneering Communications are certain communications that contain a clearly identified candidate by references such as name, caricature, or photo, made during a specific window period prior to a primary or general election, that are not express advocacy. The Brennan Center for Justice has commented that the draft regulation appropriately does not govern issue advocacy as proposed by the other three entities who responded. The proposal of Citizens Union, Common Cause New York, and the League of Women Voters that the Board regulate independent expenditures that subsidize pure issue advocacy would constitute impermissible regulation beyond the fullest extent of the law in New York, whose definition of a ''political committee'' in Election Law § 14-100(1) has been construed to authorize only regulation of communications that expressly advocate in favor of or against a clearly identified candidate for public office.

The Brennan Center for Justice recognizes this circumstance, and notes that the Board's independent expenditure regulations must apply to express advocacy at its fullest extent. However, the Brennan Center for Justice also states that the Regulation does not pertain to the full range of communications that constitute ''express advocacy.'' In response, the Board considered leaving its proposed definition of express advocacy as is, broadening its definition by eliminating examples of words that signal express advocacy, or specifying that express advocacy includes its ''functional equivalents.''

Klepper interpreted New York's definition of a political committee to encompass entities engaged in ''express advocacy,'' not entities engaged solely in ''issue advocacy,'' as the United States Supreme Court has distinguished those terms in Buckley v. Valeo (''Buckley''), 424 U.S. 1 (1976). Pursuant to that interpretation, the Board determined that New York's regulations concerning independent expenditures should require disclosure only with respect to express advocacy, not issue advocacy. To mandate disclosure of issue advocacy, as the Brennan Center has correctly asserted in its comment, would surpass the ''fullest extent of the law'' in New York -- i.e., that only express advocacy is subject to disclosure. To the extent that they argue otherwise, the comments offered by Citizens Union, Common Cause New York, and the League of Women Voters are beyond the scope of Law in New York State.

In order to regulate to the ''fullest extent of the law'' -- as the Legislature has required the Board of Elections to do -- New York's proposed regulations concerning independent expenditures must require disclosure with respect to the full range of activities that encompass ''express advocacy.''

The proposed regulation defines ''express advocacy'' as ''a communication that contains express words such as vote, oppose, support, elect, defeat, or reject, which call for the election or defeat of a candidate.'' The Brennan Center contends that this definition -- which derives from a Buckley footnote that sets forth certain ''magic words'' that denote express advocacy -- does not cover the whole spectrum of express advocacy, in that it does not include so-called ''functional equivalents of express advocacy'' -- i.e., communications that ''could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates.'' 11 C.F.R. § 100.22(b).

This definition of functional equivalents of express advocacy - also known as the ''appeal to vote'' test - was originally formulated by the Court in Federal Election Commission v. Furgatch, 807 F.2d 857, 862-63 (9th Cir. 1987), as a means to describe express advocacy that did not consist of the ''magic words'' identified by Buckley. In 1995, at the conclusion of an eight-year-long process to define communications prohibited by Section 441b of the Federal Election Campaign Act of 1971 (''FECA'') (which then forbade independent expenditures by corporations), the Federal Election Commission (''FEC'') followed Furgatch by promulgating an express advocacy definition that included functional equivalents. If the FEC defined express advocacy to include functional equivalents, the Brennan Center argues, so should the New York State Board of Elections.

The FEC's issuance of its express advocacy definition, however, was an act of statutory construction of FECA § 441b - not of New York's political committee definition in Election Law § 14-100(1). In 1999, Klepper declared that this definition did not include entities engaged purely in issue advocacy, but was silent whether express advocacy in New York included functional equivalents, or solely communications consisting of the ''magic words'' set forth in Buckley.

The Supreme Court's decisions in McConnell v. Federal Election Commission, 540 U.S. 93 (2003), Federal Election Commission v. Wisconsin Right to Life, Inc., 551 U.S. 449 (2007), and Citizens United v. Federal Election Commission, ___ U.S. ___, 130 S.Ct. 876 (2010) - all rendered after Klepper - do not resolve this question. In each case, the Court confirmed that required disclosure and reporting of functional equivalents of express advocacy would not violate the First Amendment to the United States Constitution. The Court did not say, however, whether functional equivalents constitute a subset of express advocacy. Although Klepper counseled that ''political committees'' subject to regulation include all entities that engage in express advocacy, Klepper did not answer whether express advocacy includes its functional equivalents.

What is clear is that the Board's independent expenditure regulations must regulate the entire range of express advocacy, consistent with Klepper's construction of New York's political committee definition.

The Board reviewed all of the materials submitted. An extensive review and discussion was undertaken concerning the application of the functional equivalents standard to the Klepper standard, and whether these could be read consistently with one another. On the one hand, ''functional equivalents of express advocacy'' are communications that ''could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates.'' 11 C.F.R. § 100.22(b). Klepper identified pure issue advocacy as ''communications that discuss an organization's views on issues endorsed by a political candidate or party without expressly advocating the election of that candidate or party.'' Klepper, 259 A.D.2d 926, 927 (3d Dep't 1999). In both cases, clearly identified candidates are present in the communications. Under the functional equivalents standard, items that would not be required to be disclosed under Klepper because they would be deemed issue advocacy, would be required to be disclosed. A segment of the Board determined that functional equivalents was beyond the scope of New York Law, that the definition of Express Advocacy as proposed was the appropriate standard, and that any change to the standard would require an act of the New York State Legislature. The other segment of the Board determined that functional equivalents should be included, that New York Law supported that standard, and the regulation should be modified. It was finally determined that the Regulation would stand as written and the Board voted to adopt the Regulations.

Department of Environmental Conservation

EMERGENCY RULE MAKING

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

I.D. No. ENV-31-12-00001-E
Filing No. 999
Filing Date: 2012-10-03
Effective Date: 2012-10-03

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

Action taken: Addition of sections 44.1(r) and 44.7 to Title 6 NYCRR.

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

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

Specific reasons underlying the finding of necessity: These regulations are necessary for New York to remain in compliance with the Fishery Management Plan (FMP) for American lobster as adopted by the Atlantic States Marine Fisheries Commission (ASMFC), to avoid potential Federal sanctions for lack of compliance with such plan, and to begin rebuilding the southern New England lobster stock. Each member state of ASMFC is expected to promulgate regulations that comply with FMPs adopted by ASMFC. These regulations are needed to properly manage the State's fisheries. Failure by a state to adopt, in a timely manner, necessary regulations may result in a determination of non-compliance by ASMFC and the imposition of Federal sanctions on the particular fishery in that state. A closure of the New York's lobster fishery could result in significant adverse impacts to the State's economy. During 2010, New York's 360 resident commercial lobster license holders harvested almost 800,000 pounds of lobsters for a value of approximately $3.4 million. In addition, there were 1,095 non-commercial lobster license holders who utilized the State's lobster resource. New York State must adopt regulations that are in compliance with the FMP which are intended to start rebuilding the depleted southern New England lobster stock.

The promulgation of this regulation on an emergency basis is necessary because the normal rule making process would not adopt these regulations in the time frame necessary to remain in compliance with the Atlantic States Marine Fisheries Commission (ASMFC) Lobster FMP. The Department of Environmental Conservation (DEC) submitted a Notice of Emergency Adoption and Proposed Rule Making on July 11, 2012 and the original rule became effective that day; it will expire on October 8, 2012. The public comment period will expire on September 17, 2012. In order for the proposed rule to be adopted before the emergency rule expires, the Notice of Adoption must be filed with the Department of State by September 18, 2012. In effect, the Notice of Adoption must be filed the day after the public comment period ends. This is not a reasonable amount of time to draft the adoption rule making package and route it through the department for review and approval. This rule making is necessary to maintain the current rule in effect until the Notice of Adoption can be reviewed, approved, published in the State Register and adopted.

These rules are necessary to remain in compliance with the Atlantic States Marine Fisheries Commission (ASMFC) American Lobster Fishery Management Plan (FMP). If New York allows the current regulations to lapse, the State may be found out of compliance with the lobster FMP and may result in Federal sanctions and a moratorium on lobster harvest in New York. It is in the best interests of New York State's lobster fishing industry to remain in compliance with ASMFC lobster requirements to promulgate this rule as an emergency adoption.

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 of emergency rule: Section 44.1 of 6 NYCRR is amended read as follows:

Existing subdivisions 44.1(a) through 40.1(q) remain the same.

New subdivision 44.1(r) of 6 NYCRR is adopted to read as follows:

(r) "V-notched lobster" is defined as any female lobster that bears a notch or indentation in the base of the flipper that is at least as deep as 1/8 inch, with or without setal hairs. V-notched lobster also means any female lobster which is mutilated in a manner which could hide, obscure, or obliterate such a mark.

Existing sections 44.2 through 44.6 remain unchanged.

Existing section 44.7 of 6 NYCRR is repealed.

New section 44.7 is adopted to read as follows:

44.7 Mandatory V-Notching

(a) All legal size egg-bearing female lobsters captured in LMA 4 must be V-notched and immediately released back in the water. V-notches must be to the right of the center flipper as viewed from the rear of the female lobster when the underside of the lobster is down. The V-notch should be made by means of a sharp bladed instrument, at least one quarter inch in depth and not greater than one half inch in depth and tapering to a sharp point.

(b) Permittees who designate more than one LMA in their lobster permit application shall abide by the V-notching rules of the most restrictive of the designated LMAs, regardless of where they are fishing. Any person who possesses more than one commercial lobster permit shall abide by the V-notching rules of the most restrictive of the LMAs designated on all of their permits, regardless of where they are fishing. Any permitee who fails to designate an LMA on their application shall abide by the most restrictive of the LMAs 1, 2, 3, 4, 5, 6, and Outer Cape Cod (OCC) V-notching rules. The department shall provide license holders written notice of the current V-notching rules of LMAs 1, 2, 3, 4, 5, 6 and OCC annually.

(c) The landing or possession of any V-notched female lobster is prohibited. This prohibition applies to all persons other than a final purchaser or consumer.

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. ENV-31-12-00001-EP, Issue of August 1, 2012. The emergency rule will expire December 1, 2012.

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.

Regulatory Impact Statement

1. Statutory authority:

Environmental Conservation Law (ECL) sections 3-0301, 13-0105 and 13-0329 authorize the Department of Environmental Conservation (department) to establish by regulation V-notch regulations for Lobster Conservation Management Areas 1, 2, 3, 4, 5, and Outer Cape Cod (OCC) for American lobsters.

2. Legislative objectives:

It is the objective of the above-cited legislation that the department manages marine fisheries to optimize resource use for commercial and recreational harvesters consistent with marine fisheries conservation and management policies, and interstate fishery management plans.

3. Needs and benefits:

The objective of Addendum XVII to ASMFC American Lobster Fishery Management Plan (FMP) is to reduce harvest of lobster in Southern New England (SNE) by 10 percent to initiate stock rebuilding. Lobster Conservation Management Teams (LCMT) met and determined implementation measures. These measures include that all legal size egg-bearing female lobsters captured in LMA 2, 4 and 5 must be V-notched and immediately released back in the water. New York permit holders harvest lobsters in all three areas, but LMA 4 is the only one which contains New York waters. The Addendum's implementation date is 2013, but due to concerns about not meeting the reduction by the 2014 compliance date, the V-notch implementation date was moved forward to 2012.

DEC filed a Notice of Emergency Adoption and Proposed Rule Making on July 11, 2012 and the original rule became effective. It will expire October 8, 2012. Since the public comment period expires on September 17, 2012 and the Notice of Adoption must be filed by September 18, 2012, there is not enough time to get the permanent adoption rule making package reviewed and approved before the original rule expires. Failure by New York to maintain the current V-notch rules in effect could result in a lapse in the previously adopted rule, a determination of non-compliance by ASMFC and the Secretary of Commerce and the imposition of a lobster fishery closure - a complete ban on fishing for lobster in New York.

Pursuant to section 13-0371 of the ECL, New York State is a party to the Atlantic States Marine Fisheries Compact which established the Atlantic States Marine Fisheries Commission (ASMFC). ASMFC facilitates the cooperative management of marine, shell and anadromous fish species among the fifteen member states. The principal mechanism for implementation of cooperative management of migratory fish is ASMFC's Interstate Fishery Management Plans for individual species or groups of fish. The Fisheries Management Plans (FMPs) are designed to promote the long-term health of these species, preserve resources, and protect the interests of both commercial and recreational fishers.

Under the provisions of the Atlantic Coastal Fisheries Cooperative Management Act (ACFCMA), ASMFC determines if states have implemented provisions of FMPs with which they are required to comply. If ASMFC determines that a state is non-compliant with an FMP, it so notifies the U.S. Secretary of Commerce. If the Secretary concurs in the non-compliance determination, the Secretary promulgates and enforces a complete prohibition on all fishing for the subject species in the waters of the non-compliant state until the state comes into compliance with the FMP.

Environmental Conservation Law section 13-0329(16), authorizes the department to adopt regulations for the management of lobster in LMAs 1, 2, 3, 4, 5 and Outer Cape Cod (OCC), provided that such regulations must be consistent with the fishery management plans for lobster adopted by ASMFC.

Addendum XVII to the Fishery Management Plan (FMP) for American Lobster requires New York to implement mandatory V-notch program for LMAs 2, 4 and 5.

Failure by New York to adopt these amendments could result in a determination of non-compliance by ASMFC and the Secretary of Commerce and the imposition of a lobster fishery closure - a complete ban on fishing for lobster in New York. The promulgation of this regulation on an emergency basis is necessary in order for the department to meet compliance deadlines and avoid closure of the lobster fishery and the economic hardship that would be associated with such closure. During 2010, New York's 360 resident commercial lobster license holders harvested almost 800,000 pounds of lobsters for a value of approximately $3.4 million. In addition, there were 1,095 non-commercial lobster license holders.

4. Costs:

(a) Cost to State government:

There are no new costs to State government resulting from this action.

(b) Cost to local government:

There will be no costs to local governments.

(c) Cost to private regulated parties:

This rule will impose costs to commercial lobster permit holders who indicate on their permit that they fish in LMA 2, 4 or 5. The objective of Addendum XVII is to decrease harvest by 10 percent. We estimate the rule would cost New York's lobster industry as a whole approximately $45,000 annually using 2010 lobster harvest data.

(d) Costs to the regulating agency for implementation and continued administration of the rule:

The department will incur limited costs associated with both the implementation and administration of these rules, including the costs relating to notifying permit holders of the new rules and enforcement.

5. Local government mandates:

The rule does not impose any mandates on local government.

6. Paperwork:

None.

7. Duplication:

The amendment does not duplicate any State or Federal requirement.

8. Alternatives:

(a) Alternative management measures.

Addendum XVII to the Atlantic States Marine Fisheries Commission (ASMFC) American lobster Fishery Management Plan adopted a 10 percent reduction in harvest to help rebuild the depleted Southern New England lobster stock. The Addendum recommended size limits and seasonal and area closures as management measures. Lobster Conservation Management Teams (LCMT) 2, 4, and 5 proposed conservation equivalency V-notch programs which were approved by the ASMFC Lobster Board. Alternative measures would need to be proposed by the Area LCMT and approved by the ASMFC Lobster Management Board.

(b) No Action.

The ASMFC American Lobster FMP requires a 10 percent reduction in harvest, which will be implemented all or in part by mandatory V-notching for LMAs 2, 4 and 5. Implementation measures were determined by the LCMTs, which are composed of lobster industry representatives. If the department does not adopt these rules, delayed implementation measures may be imposed or the state could be judged out of compliance with the ASMFC American Lobster FMP. In either event the commercial and recreational lobster fisheries would be closed for some duration of time. This would cause significant hardship on resource users. The estimated dollar value of New York's commercial lobster harvest was approximately $3.4 million in 2011, the most recent year with an estimate of the value of the lobster fishery.

9. Federal standards:

The amendments to Part 44 are in compliance with the ASMFC fishery management plan for American lobster.

10. Compliance schedule:

The emergency regulations will take effect immediately upon filing with the Department of State. Regulated parties will be notified of the changes to the regulations by appropriate news releases and via the department's website.

Regulatory Flexibility Analysis

1. Effect of rule:

The amendment of 6 NYCRR Part 44 implements a mandatory V-notch program for lobster harvesters in Lobster Conservation Management Areas (LMA) in which they are required by the Atlantic States Marine Fisheries Commission (ASMFC). It is currently required in LMA 2, 4, and 5. These rules will affect both commercial and non-commercial lobster license holders. These regulations do not apply directly to local governments, and will not have any direct effects on local governments.

The objective of Addendum XVII to ASMFC American Lobster Fishery Management Plan (FMP) is to reduce harvest of lobster in Southern New England (SNE) by 10 percent to initiate stock rebuilding. Lobster Conservation Management Teams (LCMT) met and determined implementation measures. These measures include that all legal size egg-bearing female lobsters captured in LMA 2, 4 and 5 must be V-notched and immediately released back in the water. New York permit holders harvest lobsters in all three areas, but LMA 4 is the only one which contains New York waters. The Addendum's implementation date is 2013, but due to concerns about not meeting the reduction by the 2014 compliance date, the V-notch implementation date was moved forward to 2012. This rule was originally adopted by Emergency Adoption and Proposed Rule Making on July 11, 2012 and will expire October 8, 2012. This rule cannot be adopted through the first emergency since the public comment period will expire on September 17, 2012 and the Notice of Adoption must be filed by September 18, 2012. This is not enough time to get the package processed. Failure by New York to adopt this measure could result in a determination of non-compliance by ASMFC and the Secretary of Commerce and the imposition of a lobster fishery closure - a complete ban on fishing for lobster in New York.

In 2010, there were 360 licensed resident commercial lobster fishers in New York; most are self-employed. The objective of Addendum XVII is to decrease harvest by 10 percent. We estimate the impacts of the rule will cost New York's LMA 2, 4, and 5 lobster harvesters $45,000 annually using 2010 lobster harvest data. The regulatory changes also apply to non-commercial harvesters. There were 1,095 non-commercial lobster permit holders in 2010. In 2010, approximately 30 percent of the non-commercial permit holders fished in areas that would be impacted by the rule.

In the long-term, the maintenance of sustainable fisheries will have a positive effect on small businesses in the fisheries in question. Any short-term losses in participation, harvest and sales will be offset by the restoration of fishery stocks and an increase in yield from well-managed resources. Protection of the lobster resource is essential to the survival of the commercial and non-commercial fisheries. These regulations are designed to protect stocks while allowing appropriate harvest, to prevent over-harvest, and to continue to rebuild or maintain the stocks for future utilization.

2. Compliance requirements:

None.

3. Professional services:

None.

4. Compliance costs:

There are no initial capital costs that will be incurred by a regulated business or industry to comply with the proposed rule.

5. Economic and technological feasibility:

The proposed regulations do not require any expenditures on the part of affected businesses in order to comply with the changes. The changes required by this action have been determined to be economically feasible for the affected parties.

There is no additional technology required for small businesses, and this action does not apply to local governments. Therefore, there are no economic or technological impacts for any such bodies.

6. Minimizing adverse impact:

The promulgation of this regulation is necessary in order for the department to remain in compliance with the ASMFC lobster FMP. The regulations are intended to protect the lobster resource and avoid the adverse impacts that would be associated with closure of the fishery for non-compliance with the FMP.

Ultimately, the maintenance of long-term sustainable fisheries will have a positive effect on employment for the fisheries in question, as well as wholesale and retail outlets and other support industries. Failure to comply with an FMP and take required actions to protect a marine fishery could hinder the rebuilding of the SNE lobster stock and have an adverse impact on the commercial and recreational fisheries for that species, as well as the supporting industries for those fisheries. These regulations are being adopted in order to initiate stock rebuilding while allowing for some harvest.

7. Small business and local government participation:

ASMFC had public hearings on Addendum XVII where all resident commercial lobster license holders were invited. In addition, the LMA 4 Lobster Conservation Management Team met to decide on implementation measures for this Addendum.

There was no special effort to contact local governments because the proposed rule does not affect them.

8. Cure period or other opportunity for ameliorative action:

Pursuant to SAPA 202-b (1-a)(b), no such cure period is included in the rule because of the potential adverse impact on the resource. Cure periods for the illegal taking of fish or wildlife are neither desirable nor recommended. Immediate compliance is required to ensure the general welfare of the public and the resource is protected.

Rural Area Flexibility Analysis

The Department of Environmental Conservation has determined that this rule will not impose an adverse impact on rural areas. There are no rural areas within the marine and coastal district. The lobster fisheries directly affected by the rule are entirely located within the marine and coastal district, and are not located adjacent to any rural areas of the State. Further, the rule does not impose any reporting, record-keeping, or other compliance requirements on public or private entities in rural areas. Since no rural areas will be affected by the amendments of 6 NYCRR Part 44, a Rural Area Flexibility Analysis is not required.

Job Impact Statement

1. Nature of impact:

The amendment of 6 NYCRR Part 44 will implement the V-notch management measures of Addendum XVII to the Atlantic States Marine Fisheries Commission (ASMFC) American Lobster Fishery Management Plan (FMP). The objective of this Addendum is to reduce the harvest of lobster in Southern New England (SNE) by 10 percent to initiate stock rebuilding. This rule specifically addresses mandatory V-notch programs for lobster harvesters in Lobster Conservation Management Areas (LMA) in which they are required by the Atlantic States Marine Fisheries Commission (ASMFC). It is currently required in LMA 2, 4, and 5. New York permit holders harvest lobsters in all three areas, but LMA 4 is the only one which contains New York waters. The mandatory V-notch program requires lobster permit holders to cut a notch in the tail fin of any legal size female egg-bearing lobster and return it to the water. V-notching lobsters protects them from harvest for approximately two years. Failure by New York to adopt this measure could result in a determination of non-compliance by ASMFC and the Secretary of Commerce and the imposition of a lobster fishery closure - a complete ban on fishing for lobster in New York. These rules will affect both commercial and non-commercial permit holders.

2. Categories and numbers affected:

In 2010, there were 360 licensed resident commercial lobster fishers in New York, most are self-employed. The objective of Addendum XVII is to decrease harvest by 10 percent. We estimate the rule would cost New York's LMA 2, 4, and 5 lobster harvesters $45,000 annually using 2010 lobster harvest data. The regulatory changes also apply to non-commercial harvesters. There were 1,095 non-commercial lobster permit holders in 2010. In 2010, approximately 30 percent of the non-commercial permit holders fished in areas that would be impacted by the rule.

3. Regions of adverse impact:

This rule making will impact lobster permit holders fishing in the Marine District of New York in LMAs 2, 4 and 5 which are located in the near shore Atlantic Ocean from Cape Cod through Cape Hatteras.

4. Minimizing adverse impact:

This rule making will decrease the potential for closure of the lobster fishery in New York. If the fishery were to close, it would reduce harvest by 100 percent rather than the 10 percent reduction of the Addendum. During 2010, New York's 360 resident commercial lobster license holders harvested almost 800,000 pounds of lobsters for a value of approximately $3.4 million. In addition, there were 1,095 non-commercial lobster license holders.

Thus, the restrictions are in fact an effort to minimize the potential for job loss due to a closure of the fishery. In the long-term, the maintenance of sustainable fisheries will have a positive effect on lobster fishers. Any short-term losses in participation, harvest and sales will be offset by rebuilding of fishery stocks. Protection of the lobster resource is important to the survival of the lobster fishers and the businesses that support in these fisheries.

Assessment of Public Comment

The agency received no public comment since publication of the last assessment of public comment.

Department of Financial Services

EMERGENCY RULE MAKING

Business Conduct of Mortgage Loan Servicers

I.D. No. DFS-43-12-00003-E

Filing No. 1002

Filing Date: 2012-10-05

Effective Date: 2012-10-07

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

Action taken: Addition of Part 419 to Title 3 NYCRR.

Statutory authority: Banking Law, art. 12-D

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

Specific reasons underlying the finding of necessity: The legislature required the registration of mortgage loan servicers as part of the Mortgage Lending Reform Law of 2008 (Ch. 472, Laws of 2008, hereinafter, the "Mortgage Lending Reform Law") to help address the existing foreclosure crisis in the state. By registering servicers and requiring that servicers engage in the business of mortgage loan servicing in compliance with rules and regulations adopted by the Superintendent, the legislature intended to help ensure that servicers conduct their business in a manner acceptable to the Department. However, since the passage of the Mortgage Lending Reform Law, foreclosures continue to pose a significant threat to New York homeowners. The Department continues to receive complaints from homeowners and housing advocates that mortgage loan servicers' response to delinquencies and their efforts at loss mitigation are inadequate. These rules are intended to provide clear guidance to mortgage loan servicers as to the procedures and standards they should follow with respect to loan delinquencies. The rules impose a duty of fair dealing on loan servicers in their communications, transactions and other dealings with borrowers. In addition, the rule sets standards with respect to the handling of loan delinquencies and loss mitigation. The rule further requires specific reporting on the status of delinquent loans with the Department so that it has the information necessary to assess loan servicers' performance.

In addition to addressing the pressing issue of mortgage loan delinquencies and loss mitigation, the rule addresses other areas of significant concern to homeowners, including the handling of borrower complaints and inquiries, the payment of taxes and insurance, crediting of payments and handling of late payments, payoff balances and servicer fees. The rule also sets forth prohibited practices such as engaging in deceptive practices or placing homeowners' insurance on property when the servicers has reason to know that the homeowner has an effective policy for such insurance.

Subject: Business conduct of mortgage loan servicers.

Purpose: To implement the purpose and provisions of the Mortgage Lending Reform Law of 2008 with respect to mortgage loan servicers.

Substance of emergency rule: Section 419.1 contains definitions of terms that are used in Part 419 and not otherwise defined in Part 418, including ''Servicer'', ''Qualified Written Request'' and ''Loan Modification''.

Section 419.2 establishes a duty of fair dealing for Servicers in connection with their transactions with borrowers, which includes a duty to pursue loss mitigation with the borrower as set forth in Section 419.11.

Section 419.3 requires compliance with other State and Federal laws relating to mortgage loan servicing, including Banking Law Article 12-D, RESPA, and the Truth-in-Lending Act.

Section 419.4 describes the requirements and procedures for handling to consumer complaints and inquiries.

Section 419.5 describes the requirements for a servicer making payments of taxes or insurance premiums for borrowers.

Section 419.6 describes requirements for crediting payments from borrowers and handling late payments.

Section 419.7 describes the requirements of an annual account statement which must be provided to borrowers in plain language showing the unpaid principal balance at the end of the preceding 12-month period, the interest paid during that period and the amounts deposited into and disbursed from escrow. The section also describes the Servicer's obligations with respect to providing a payment history when requested by the borrower or borrower's representative.

Section 419.8 requires a late payment notice be sent to a borrower no later than 17 days after the payment remains unpaid.

Section 419.9 describes the required provision of a payoff statement that contains a clear, understandable and accurate statement of the total amount that is required to pay off the mortgage loan as of a specified date.

Section 419.10 sets forth the requirements relating to fees permitted to be collected by Servicers and also requires Servicers to maintain and update at least semi-annually a schedule of standard or common fees on their website.

Section 419.11 sets forth the Servicer's obligations with respect to handling of loan delinquencies and loss mitigation, including an obligation to make reasonable and good faith efforts to pursue appropriate loss mitigation options, including loan modifications. This Section includes requirements relating to procedures and protocols for handling loss mitigation, providing borrowers with information regarding the Servicer's loss mitigation process, decision-making and available counseling programs and resources.

Section 419.12 describes the quarterly reports that the Superintendent may require Servicers to submit to the Superintendent, including information relating to the aggregate number of mortgages serviced by the Servicer, the number of mortgages in default, information relating to loss mitigation activities, and information relating to mortgage modifications.

Section 419.13 describes the books and records that Servicers are required to maintain as well as other reports the Superintendent may require Servicers to file in order to determine whether the Servicer is complying with applicable laws and regulations. These include books and records regarding loan payments received, communications with borrowers, financial reports and audited financial statements.

Section 419.14 sets forth the activities prohibited by the regulation, including engaging in misrepresentations or material omissions and placing insurance on a mortgage property without written notice when the Servicer has reason to know the homeowner has an effective policy in place.

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 2, 2013.

Text of rule and any required statements and analyses may be obtained from: Sam L. Abram, NYS Department of Financial Services, 1 State Street, New York, NY 10004, (212) 709-1658, email: sam.abram@dfs.gov

Regulatory Impact Statement

1. Statutory Authority.

Article 12-D of the Banking Law, as amended by the Legislature in the Mortgage Lending Reform Law of 2008 (Ch. 472, Laws of 2008, hereinafter, the ''Mortgage Lending Reform Law''), creates a framework for the regulation of mortgage loan servicers. Mortgage loan servicers are individuals or entities which engage in the business of servicing mortgage loans for residential real property located in New York. That legislation also authorizes the adoption of regulations implementing its provisions. (See, e.g., Banking Law Sections 590(2)(b-1) and 595-b.)

Subsection (1) of Section 590 of the Banking Law was amended by the Mortgage Lending Reform Law to add the definitions of ''mortgage loan servicer'' and ''servicing mortgage loans''. (Section 590(1)(h) and Section 590(1)(i).)

A new paragraph (b-1) was added to Subdivision (2) of Section 590 of the Banking Law. This new paragraph prohibits a person or entity from engaging in the business of servicing mortgage loans without first being registered with the Superintendent. The registration requirements do not apply to an ''exempt organization,'' licensed mortgage banker or registered mortgage broker.

This new paragraph also authorizes the Superintendent to refuse to register an MLS on the same grounds as he or she may refuse to register a mortgage broker under Banking Law Section 592-a(2).

Subsection (3) of Section 590 was amended by the Subprime Law to clarify the power of the banking board to promulgate rules and regulations and to extend the rulemaking authority regarding regulations for the protection of consumers and regulations to define improper or fraudulent business practices to cover mortgage loan servicers, as well as mortgage bankers, mortgage brokers and exempt organizations. The functions and powers of the banking board have since been transferred to the Superintendent of Financial Services, pursuant to Part A of Chapter 62 of the Laws of 2011, Section 89.

New Paragraph (d) was added to Subsection (5) of Section 590 by the Mortgage Lending Reform Law and requires mortgage loan servicers to engage in the servicing business in conformity with the Banking Law, such rules and regulations as may be promulgated by the Banking Board or prescribed by the Superintendent, and all applicable federal laws, rules and regulations.

New Subsection (1) of Section 595-b was added by the Mortgage Lending Reform Law and requires the Superintendent to promulgate regulations and policies governing the grounds to impose a fine or penalty with respect to the activities of a mortgage loan servicer. Also, the Mortgage Lending Reform Law amends the penalty provision of Subdivision (1) of Section 598 to apply to mortgage loan servicers as well as to other entities.

New Subdivision (2) of Section 595-b was added by the Mortgage Lending Reform Law and authorizes the Superintendent to prescribe regulations relating to disclosure to borrowers of interest rate resets, requirements for providing payoff statements, and governing the timing of crediting of payments made by the borrower.

Section 596 was amended by the Mortgage Lending Reform Law to extend the Superintendent's examination authority over licensees and registrants to cover mortgage loan servicers. The provisions of Banking Law Section 36(10) making examination reports confidential are also extended to cover mortgage loan servicers.

Similarly, the books and records requirements in Section 597 covering licensees, registrants and exempt organizations were amended by the Mortgage Lending Reform Law to cover servicers and a provision was added authorizing the Superintendent to require that servicers file annual reports or other regular or special reports.

The power of the Superintendent to require regulated entities to appear and explain apparent violations of law and regulations was extended by the Mortgage Lending Reform Law to cover mortgage loan servicers (Subdivision (1) of Section 39), as was the power to order the discontinuance of unauthorized or unsafe practices (Subdivision (2) of Section 39) and to order that accounts be kept in a prescribed manner (Subdivision (5) of Section 39).

Finally, mortgage loan servicers were added to the list of entities subject to the Superintendent's power to impose monetary penalties for violations of a law, regulation or order. (Paragraph (a) of Subdivision (1) of Section 44).

The fee amounts for mortgage loan servicer registration and branch applications are established in accordance with Banking Law Section 18-a.

2. Legislative Objectives.

The Mortgage Lending Reform Law was intended to address various problems related to residential mortgage loans in this State. The law reflects the view of the Legislature that consumers would be better protected by the supervision of mortgage loan servicing. Even though mortgage loan servicers perform a central function in the mortgage industry, there had previously been no general regulation of servicers by the state or the Federal government.

The Mortgage Lending Reform Law requires that entities be registered with the Superintendent in order to engage in the business of servicing mortgage loans in this state. The new law further requires mortgage loan servicers to engage in the business of servicing mortgage loans in conformity with the rules and regulations promulgated by the Banking Board and the Superintendent.

The mortgage servicing statute has two main components: (i) the first component addresses the registration requirement for persons engaged in the business of servicing mortgage loans; and (ii) the second authorizes the Superintendent to promulgate appropriate rules and regulations for the regulation of servicers in this state.

Part 418 of the Superintendent's Regulations, initially adopted on an emergency basis on July 1 2009, addresses the first component of the mortgage servicing statute by setting standards and procedures for applications for registration as a mortgage loan servicer, for approving and denying applications to be registered as a mortgage loan servicer, for approving changes of control, for suspending, terminating or revoking the registration of a mortgage loan servicer as well as setting financial responsibility standards for mortgage loan servicers.

Part 419 addresses the business practices of mortgage loan servicers in connection with their servicing of residential mortgage loans. This part addresses the obligations of mortgage loan servicers in their communications, transactions and general dealings with borrowers, including the handling of consumer complaints and inquiries, handling of escrow payments, crediting of payments, charging of fees, loss mitigation procedures and provision of payment histories and payoff statements. This part also imposes certain recordkeeping and reporting requirements in order to enable the Superintendent to monitor services' conduct and prohibits certain practices such as engaging in deceptive business practices.

Collectively, the provisions of Part 418 and 419 implement the intent of the Legislature to register and supervise mortgage loan servicers.

3. Needs and Benefits.

The Mortgage Lending Reform Law adopted a multifaceted approach to the lack of supervision of the mortgage loan industry, particularly with respect to servicing and foreclosure. It addressed a variety of areas in the residential mortgage loan industry, including: i. loan originations; ii. loan foreclosures; and iii. the conduct of business by residential mortgage loans servicers.

Until July 1, 2009, when the mortgage loan servicer registration provisions first became effective, the Department regulated the brokering and making of mortgage loans, but not the servicing of these mortgage loans. Servicing is vital part of the residential mortgage loan industry; it involves the collection of mortgage payments from borrowers and remittance of the same to owners of mortgage loans; to governmental agencies for taxes; and to insurance companies for insurance premiums. Mortgage servicers also act as agents for owners of mortgages in negotiations relating to loss mitigation when a mortgage becomes delinquent. As ''middlemen,'' moreover, servicers also play an important role when a property is foreclosed upon. For example, the servicer may typically act on behalf of the owner of the loan in the foreclosure proceeding.

Further, unlike in the case of a mortgage broker or a mortgage lender, borrowers cannot ''shop around'' for loan servicers, and generally have no input in deciding what company services their loans. The absence of the ability to select a servicer obviously raises concerns over the character and viability of these entities given the central part of they play in the mortgage industry. There also is evidence that some servicers may have provided poor customer service. Specific examples of these activities include: pyramiding late fees; misapplying escrow payments; imposing illegal prepayment penalties; not providing timely and clear information to borrowers; erroneously force-placing insurance when borrowers already have insurance; and failing to engage in prompt and appropriate loss mitigation efforts.

More than 2,000,000 loans on residential one-to-four family properties are being serviced in New York. Of these over 9% were seriously delinquent as of the first quarter of 2012. Despite various initiatives adopted at the state level and the creation of federal programs such as Making Home Affordable to encourage loan modifications and help at risk homeowners, the number of loans modified, have not kept pace with the number of foreclosures. Foreclosures impose costs not only on borrowers and lenders but also on neighboring homeowners, cities and towns. They drive down home prices, diminish tax revenues and have adverse social consequences and costs.

As noted above, Part 418, initially adopted on an emergency basis on July 1 2009, relates to the first component of the mortgage servicing statute - the registration of mortgage loan servicers. It was intended to ensure that only those persons and entities with adequate financial support and sound character and general fitness will be permitted to register as mortgage loan servicers. It also provided for the suspension, revocation and termination of licensees involved in wrongdoing and establishes minimum financial standards for mortgage loan servicers.

Part 419 addresses the business practices of mortgage loan servicers and establishes certain consumer protections for homeowners whose residential mortgage loans are being serviced. These regulations provide standards and procedures for servicers to follow in their course of dealings with borrowers, including the handling of borrower complaints and inquiries, payment of taxes and insurance premiums, crediting of borrower payments, provision of annual statements of the borrower's account, authorized fees, late charges and handling of loan delinquencies and loss mitigation. Part 419 also identifies practices that are prohibited and imposes certain reporting and record-keeping requirements to enable the Superintendent to determine the servicer's compliance with applicable laws, its financial condition and the status of its servicing portfolio.

Since the adoption of Part 418, 67 entities have been approved for registration or have pending applications and nearly 400 entities have indicated that they are a mortgage banker, broker, bank or other organization exempt from the registration requirements.

All Exempt Organizations, mortgage bankers and mortgage brokers that perform mortgage loan servicing with respect to New York mortgages must notify the Superintendent that they do so, and are required to comply with the conduct of business and consumer protection rules applicable to mortgage loan servicers.

These regulations will improve accountability and the quality of service in the mortgage loan industry and will help promote alternatives to foreclosure in the state.

4. Costs.

The requirements of Part 419 do not impose any direct costs on mortgage loan servicers. Although mortgage loan servicers may incur some additional costs as a result of complying with Part 419, the overwhelming majority of mortgage loan servicers are banks, operating subsidiaries or affiliates of banks, large independent servicers or other financial services entities that service millions, and even billions, of dollars in loans and have the experience, resources and systems to comply with these requirements. Moreover, any additional costs are likely to be mitigated by the fact that many of the requirements of Part 419, including those relating to the handling of residential mortgage delinquencies and loss mitigation (419.11) and quarterly reporting (419.12), are consistent with or substantially similar to standards found in other federal or state laws, federal mortgage modification programs or servicers own protocols.

For example, Fannie Mae and Freddie Mac, which own or insure approximately 90% of the nation's securitized mortgage loans, have similar guidelines governing various aspects of mortgage servicing, including handling of loan delinquencies. In addition, over 100 mortgage loan servicers participate in the federal Making Home Affordable (MHA) program which requires adherence to standards for handling of loan delinquencies and loss mitigation similar to those contained in these regulations. Those servicers not participating in MHA have, for the most part, adopted programs which parallel many components of MHA.

Reporting on loan delinquencies and loss mitigation has likewise become increasingly common. The OCC publish quarterly reports on credit performance, loss mitigation efforts and foreclosures based on data provided by national banks and thrifts. And, states such as Maryland and North Carolina have adopted similar reporting requirements to those contained in section 419.12.

Many of the other requirements of Part 419 such as those related to handling of taxes, insurance and escrow payments, collection of late fees and charges, crediting of payments derive from federal or state laws and reflect best industry practices. The periodic reporting and bookkeeping and record keeping requirements are also standard among financial services businesses, including mortgage bankers and brokers (see, for example section 410 of the Superintendent's Regulations).

The ability by the Department to regulate mortgage loan servicers is expected to reduce costs associated with responding to consumers' complaints, decrease unnecessary expenses borne by mortgagors, and should assist in decreasing the number of foreclosures in this state.

The regulations will not result in any fiscal implications to the State. The Department is funded by the regulated financial services industry. Fees charged to the industry will be adjusted periodically to cover Department expenses incurred in carrying out this regulatory responsibility.

5. Local Government Mandates.

None.

6. Paperwork.

Part 419 requires mortgage loan servicers to keep books and records related to its servicing for a period of three years and to produce quarterly reports and financial statements as well as annual and other reports requested by the Superintendent. It is anticipated that the quarterly reporting relating to mortgage loan servicing will be done electronically and would therefore be virtually paperless. The other recordkeeping and reporting requirements are consistent with standards generally required of mortgage bankers and brokers and other regulated financial services entities.

7. Duplication.

The regulation does not duplicate, overlap or conflict with any other regulations. The various federal laws that touch upon aspects of mortgage loan servicing are noted in Section 9 ''Federal Standards'' below.

8. Alternatives.

The Mortgage Lending Reform Law required the registration of mortgage loan servicers and empowered the Superintendent to prescribe rules and regulations to guide the business of mortgage servicing. The purpose of the regulation is to carry out this statutory mandate to register mortgage loan servicers and regulate the manner in which they conduct business. The Department circulated a proposed draft of Part 419 and received comments from and met with industry and consumer groups. The current Part 419 reflects the input received.

The alternative to these regulations is to do nothing or to wait for the newly created federal bureau of consumer protection to promulgate national rules, which could take years, may not happen at all or may not address all the practices covered by the rule. Thus, neither of those alternatives would effectuate the intent of the legislature to address the current foreclosure crisis, help at-risk homeowners vis-à-vis their loan servicers and ensure that mortgage loan servicers engage in fair and appropriate servicing practices.

9. Federal Standards.

Currently, mortgage loan servicers are not required to be registered by any federal agencies, and there are no comprehensive federal rules governing mortgage loan servicing. Federal laws such as the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 et seq. and regulations adopted thereunder, 24 C.F.R. Part 3500, and the Truth-in-Lending Act, 15 U.S.C. section 1600 et seq. and Regulation Z adopted thereunder, 12 C.F.R. section 226 et seq., govern some aspects of mortgage loan servicing, and there have been some recent amendments to those laws and regulations regarding mortgage loan servicing. For example, Regulation Z, 12 C.F.R. section 226.36(c), was recently amended to address the crediting of payments, imposition of late charges and the provision of payoff statements. In addition, the recently enacted Dodd-Frank Wall Street Reform and Protection Act of 2010 (Dodd-Frank Act) establishes requirements for the handling of escrow accounts, obtaining force-placed insurance, responding to borrower requests and providing information related to the owner of the loan.

Additionally, the newly created Bureau of Consumer Financial Protection established by the Dodd-Frank Act may soon propose additional regulations for mortgage loan servicers.

10. Compliance Schedule.

Similar emergency regulations first became effective on October 1, 2010.

Regulatory Flexibility Analysis

1. Effect of the Rule:

The rule will not have any impact on local governments. The Mortgage Lending Reform Law of 2008 (Ch. 472, Laws of 2008, hereinafter, the ''Mortgage Lending Reform Law'') requires all mortgage loan servicers, whether registered or exempt from registration under the law, to service mortgage loans in accordance with the rules and regulations promulgated by the Banking Board or Superintendent. The functions and powers of the Banking Board have since been transferred to the Superintendent of Financial Services, pursuant to Part A of Chapter 62 of the Laws of 2011, Section 89. Of the 67 entities which have been approved for registration or have pending applications and the nearly 400 entities which have indicated that they are exempt from the registration requirements, it is estimated that very few are small businesses.

2. Compliance Requirements:

The provisions of the Mortgage Lending Reform Law relating to mortgage loan servicers has two main components: it requires the registration by the Department of servicers who are not a bank, mortgage banker, mortgage broker or other exempt organizations (the ''MLS Registration Regulations'') , and it authorizes the Department to promulgate rules and regulations that are necessary and appropriate for the protection of consumers, to define improper or fraudulent business practices, or otherwise appropriate for the effective administration of the provisions of the Mortgage Lending Reform Law relating to mortgage loan servicers (the ''Mortgage Loan Servicer Business Conduct Regulations'').

The provisions of the Mortgage Lending Reform Law requiring registration of mortgage loan servicers which are not mortgage bankers, mortgage brokers or exempt organizations became effective on July 1, 2009. Part 418 of the Superintendent's Regulations, initially adopted on an emergency basis on July 1 2009, sets for the standards and procedures for applications for registration as a mortgage loan servicer, for approving and denying applications to be registered as a mortgage loan servicer, for approving changes of control, for suspending, terminating or revoking the registration of a mortgage loan servicer as well as the financial responsibility standards for mortgage loan servicers.

Part 419 implements the provisions of the Mortgage Lending Reform Law by setting the standards by which mortgage loan servicers conduct the business of mortgage loan servicing. The rule sets the standards for handling complaints, payments of taxes and insurance, crediting of borrower payments, late payments, account statements, delinquencies and loss mitigation, fees and recordkeeping.

3. Professional Services:

None.

4. Compliance Costs:

The requirements of Part 419 do not impose any direct costs on mortgage loan servicers. Although mortgage loan servicers may incur some additional costs as a result of complying with Part 419, the overwhelming majority of mortgage loan servicers are banks, operating subsidiaries or affiliates of banks, large independent servicers or other financial services entities that service millions, and even billions, of dollars in loans and have the experience, resources and systems to comply with these requirements. Moreover, any additional costs are likely to be mitigated by the fact that many of the requirements of Part 419, including those relating to the handling of residential mortgage delinquencies and loss mitigation (419.11) and quarterly reporting (419.12), are consistent with or substantially similar to standards found in other federal or state laws, federal mortgage modification programs or servicers own protocols.

For example, Fannie Mae and Freddie Mac, which own or insure approximately 90% of the nation's securitized mortgage loans, have similar guidelines governing various aspects of mortgage servicing, including handling of loan delinquencies. In addition, over 100 mortgage loan servicers participate in the federal Making Home Affordable (MHA) program which requires adherence to standards for handling of loan delinquencies and loss mitigation similar to those contained in these regulations. Those servicers not participating in MHA have, for the most part, adopted programs which parallel many components of MHA.

Reporting on loan delinquencies and loss mitigation has likewise become increasingly common. The OCC publishes quarterly reports on credit performance, loss mitigation efforts and foreclosures based on data provided by national banks and thrifts. And, states such as Maryland and North Carolina have adopted similar reporting requirements to those contained in section 419.12.

Many of the other requirements of Part 419 such as those related to handling of taxes, insurance and escrow payments, collection of late fees and charges, crediting of payments derive from federal or state laws and reflect best industry practices. The periodic reporting and bookkeeping and record keeping requirements are also standard among financial services businesses, including mortgage bankers and brokers (see, for example section 410 of the Superintendent's Regulations).

Compliance with the rule should improve the servicing of residential mortgage loans in New York, including the handling of mortgage delinquencies, help prevent unnecessary foreclosures and reduce consumer complaints regarding the servicing of residential mortgage loans.

5. Economic and Technological Feasibility:

For the reasons noted in Section 4 above, the rule should impose no adverse economic or technological burden on mortgage loan servicers that are small businesses.

6. Minimizing Adverse Impacts:

As noted in Section 1 above, most servicers are not small businesses. Many of the requirements contained in the rule derive from federal or state laws, existing servicer guidelines utilized by Fannie Mae and Freddie Mac and best industry practices.

Moreover, the ability by the Department to regulate mortgage loan servicers is expected to reduce costs associated with responding to consumers' complaints, decrease unnecessary expenses borne by mortgagors, help borrowers at risk of foreclosure and decrease the number of foreclosures in this state.

7. Small Business and Local Government Participation:

The Department distributed a draft of proposed Part 419 to industry representatives, received industry comments on the proposed rule and met with industry representatives in person. The Department likewise distributed a draft of proposed Part 419 to consumer groups, received their comments on the proposed rule and met with consumer representatives to discuss the proposed rule in person. The rule reflects the input received from both industry and consumer groups.

Rural Area Flexibility Analysis

Types and Estimated Numbers. Since the adoption of the Mortgage Lending Reform Law of 2008 (Ch. 472, Laws of 2008, hereinafter, the ''Mortgage Lending Reform Law''), which required mortgage loan servicers to be registered with the Department unless exempted under the law, 67 entities have pending applications or have been approved for registration and nearly 400 entities have indicated that they are a mortgage banker, broker, bank or other organization exempt from the registration requirements. Only one of the non-exempt entities applying for registration is located in New York and operating in a rural area. Of the exempt organizations, all of which are required to comply with the conduct of business contained in Part 419, approximately 400 are located in New York, including several in rural areas. However, the overwhelming majority of exempt organizations, regardless of where located, are banks or credit unions that are already regulated and are thus familiar with complying with the types of requirements contained in this regulation.

Compliance Requirements. The provisions of the Mortgage Lending Reform Law relating to mortgage loan servicers has two main components: it requires the registration by the Department of servicers that are not a bank, mortgage banker, mortgage broker or other exempt organization (the ''MLS Registration Regulations'') , and it authorizes the Department to promulgate rules and regulations that are necessary and appropriate for the protection of consumers, to define improper or fraudulent business practices, or otherwise appropriate for the effective administration of the provisions of the Mortgage Lending Reform Law relating to mortgage loan servicers (the ''MLS Business Conduct Regulations'').

The provisions of the Mortgage Lending Reform Law of 2008 requiring registration of mortgage loan servicers which are not mortgage bankers, mortgage brokers or exempt organizations became effective on July 1, 2009. Part 418 of the Superintendent's Regulations, initially adopted on an emergency basis on July 1, 2010, sets forth the standards and procedures for applications for registration as a mortgage loan servicer, for approving and denying applications to be registered as a mortgage loan servicer, for approving changes of control, for suspending, terminating or revoking the registration of a mortgage loan servicer as well as the financial responsibility standards for mortgage loan servicers.

Part 419 implements the provisions of the Mortgage Lending Reform Law of 2008 by setting the standards by which mortgage loan servicers conduct the business of mortgage loan servicing. The rule sets the standards for handling complaints, payments of taxes and insurance, crediting borrower payments, late payments, account statements, delinquencies and loss mitigation and fees. This part also imposes certain recordkeeping and reporting requirements in order to enable the Superintendent to monitor services' conduct and prohibits certain practices such as engaging in deceptive business practices.

Costs. The requirements of Part 419 do not impose any direct costs on mortgage loan servicers. The periodic reporting requirements of Part 419 are consistent with those imposed on other regulated entities. In addition, many of the other requirements of Part 419, such as those related to the handling of loan delinquencies, taxes, insurance and escrow payments, collection of late fees and charges and crediting of payments, derive from federal or state laws, current federal loan modification programs, servicing guidelines utilized by Fannie Mae and Freddie Mac or servicers' own protocols. Although mortgage loan servicers may incur some additional costs as a result of complying with Part 419, the overwhelming majority of mortgage loan servicers are banks, credit unions, operating subsidiaries or affiliates of banks, large independent servicers or other financial services entities that service millions, and even billions, of dollars in loans and have the experience, resources and systems to comply with these requirements. Of the 67 entities that have been approved for registration or that have pending applications, only one is located in a rural area of New York State. Of the few exempt organizations located in rural areas of New York, virtually all are banks or credit unions. Moreover, compliance with the rule should improve the servicing of residential mortgage loans in New York, including the handling of mortgage delinquencies, help prevent unnecessary foreclosures and reduce consumer complaints regarding the servicing of residential mortgage loans.

Minimizing Adverse Impacts. As noted in the ''Costs'' section above, while mortgage loan servicers may incur some higher costs as a result of complying with the rules, the Department does not believe that the rule will impose any meaningful adverse economic impact upon private or public entities in rural areas.

In addition, it should be noted that Part 418, which establishes the application and financial requirements for mortgage loan servicers, authorizes the Superintendent to reduce or waive the otherwise applicable financial responsibility requirements in the case of mortgage loans servicers that service not more than 12 mortgage loans or more than $5,000,000 in aggregate mortgage loans in New York and which do not collect tax or insurance payments. The Superintendent is also authorized to reduce or waive the financial responsibility requirements in other cases for good cause. The Department believes that this will ameliorate any burden on mortgage loan servicers operating in rural areas.

Rural Area Participation. The Department issued a draft of Part 419 in December 2009 and held meetings with and received comments from industry and consumer groups following the release of the draft rule. The Department also maintains continuous contact with large segments of the servicing industry though its regulation of mortgage bankers and brokers and its work in the area of foreclosure prevention. The Department likewise maintains close contact with a variety of consumer groups through its community outreach programs and foreclosure mitigation programs. The Department has utilized this knowledge base in drafting the regulation.

Job Impact Statement

Article 12-D of the Banking Law, as amended by the Mortgage Lending Reform Law (Ch. 472, Laws of 2008), requires persons and entities which engage in the business of servicing mortgage loans after July 1, 2009 to be registered with the Superintendent. Part 418 of the Superintendent's Regulations, initially adopted on an emergency basis on July 1, 2009, sets forth the application, exemption and approval procedures for registration as a mortgage loan servicer, as well as financial responsibility requirements for applicants, registrants and exempted persons.

Part 419 addresses the business practices of mortgage loan servicers in connection with their servicing of residential mortgage loans. Thus, this part addresses the obligations of mortgage loan servicers in their communications, transactions and general dealings with borrowers, including the handling of consumer complaints and inquiries, handling of escrow payments, crediting of payments, charging of fees, loss mitigation procedures and provision of payment histories and payoff statements. This part also imposes certain recordkeeping and reporting requirements in order to enable the Superintendent to monitor services' conduct and prohibits certain practices such as engaging in deceptive business practices.

Compliance with Part 419 is not expected to have a significant adverse effect on jobs or employment activities within the mortgage loan servicing industry. The vast majority of mortgage loan servicers are sophisticated financial entities that service millions, if not billions, of dollars in loans and have the experience, resources and systems to comply with the requirements of the rule. Moreover, many of the requirements of the rule reflect derive from federal or state laws and reflect existing best industry practices.

Department of Health

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Medicaid Eligibility

I.D. No. HLT-43-12-00008-P

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

Proposed Action: This is a consensus rule making to amend section 360-2.4 of Title 18 NYCRR.

Statutory authority: Public Health Law, sections 201 and 206; and Social Services Law, section 363-a

Subject: Medicaid Eligibility.

Purpose: Time frames for issuance of Medicaid Eligibility determinations.

Text of proposed rule: Pursuant to the authority vested in the Commissioner of Health by sections 201 and 206 of the Public Health Law and section 363-a of the Social Services Law, subdivision (a) of section 360-2.4 of Title 18 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended, to be effective upon publication of a Notice of Adoption in the New York State Register to read as follows:

(a) Time frames.

(1) Except as provided in paragraphs (2) [,] *and* (3) [and (4)] of this subdivision, the social services district must determine an applicant's eligibility for MA within 45 days of the date of the MA application.

(2) If an applicant's MA eligibility is dependent on disability status, the social services district will determine MA eligibility within 90 days of application. If a decision is not reached within 90 days, the applicant must be sent a statement explaining why.

(3) [If an applicant for ADC or HR is determined ineligible for such benefits, the social services district will make a separate determination of MA eligibility within 30 days of the date the application for ADC or HR was denied. If timely action was not taken on the ADC or HR application, the district will determine eligibility within 30 days of the date when action should have been taken.

(4)] The district will determine eligibility within 30 days of the date of the MA application if an applicant is:

(i) a pregnant woman or an infant younger than one year of age whose household income does not exceed [185] *200* percent of the applicable Federal poverty level; *or*

(ii) a child at least one year of age but younger than [six] *nineteen* years of age whose household income does not exceed 133 percent of the applicable Federal poverty level [; or

(iii) a child born after September 30, 1983 who is at least six years of age but younger than 19 years of age whose income does not exceed 100 percent of the applicable Federal poverty level].

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

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

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

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

Consensus Rule Making Determination

Statutory Authority:

The authority to promulgate this regulation can be found in sections 201 and 206 of the Public Health Law (PHL) and section 363-a of the Social Services Law (SSL).

Section 201 of the PHL grants the department the authority to adopt regulations as may be necessary to implement the State Plan for Medical Assistance as required by Title X of the federal Social Security act.

Section 206 of the PHL grants the commissioner the power enforce the provisions of the medical assistance program, or its successor, pursuant to titles eleven-A and eleven-B of the SSL.

Section 363-a of the SSL requires the department to promulgate such regulations as may be necessary to implement title eleven of the SSL.

Basis:

The proposed regulation would remove the language in subdivision (a) of section 360-2.4 providing for an additional 30 days to issue a Medicaid decision after an applicant, who applied for cash public assistance and Medicaid at the same time, is determined ineligible for public assistance. The current regulation is worded to conform to the terms of a 1981 litigation settlement that is no longer relevant because of the subsequent delinking of Medicaid from the cash public assistance programs by the Welfare Reform Act of 1997. Therefore, these regulatory provisions are no longer applicable to any person applying for Medicaid.

The proposed regulation would also update references to Federal poverty level percentages in section 360-2.4(a), relating to the requirement to determine Medicaid eligibility within 30 days of application for pregnant women and children under age 19 whose eligibility is determined by comparing household income to specified poverty level percentages. Due to subsequent statutory enactments, the applicable Federal poverty level percentages have changed, and there are no longer different percentages for children under the age of 6 and those who are age 6 through 18. The proposed regulation would conform the Federal poverty level percentages referenced in section 360-2.4(a) to the nondiscretionary provisions of these subsequent statutory changes.

Job Impact Statement

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

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Certified Home Health Agency (CHHA) and Licensed Home Care Services Agency (LHCSA) Requirements

I.D. No. HLT-43-12-00009-P

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

Proposed Action: Amendment of Parts 763 and 766 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 3612(5) and (6)

Subject: Certified Home Health Agency (CHHA) and Licensed Home Care Services Agency (LHCSA) Requirements.

Purpose: To expand access to palliative care and eliminate physician from the LHCSA quality improvement committee.

Text of proposed rule: Subdivision (b) of section 763.3 is amended as follows:

(b) An agency shall provide *at least one of the services identified in paragraph (1) of subdivision (a) of this section* [nursing, physical therapy, speech-language pathology or occupational therapy] directly, while any [additional service] *other services* may be provided directly or by contract arrangement. For purposes of this Part, the direct provision of services includes the provision by employees compensated by the agency or individuals under contract with the agency, but does not include the provision of services through contract arrangements with other agencies or facilities.

Subdivisions (c) and (e) of section 763.6 are amended as follows:

(c) The plan of care shall cover all pertinent diagnoses, including mental status, types of services and equipment required, frequency of visits, prognosis, *need for palliative care,* rehabilitation potential, functional limitations, activities permitted, nutritional requirements, medications and treatments, any safety measures to protect against injury, instructions for timely discharge or referral, and any other appropriate items.

* * *

(e) The plan of care shall be reviewed as frequently as required by changing patient conditions but at least every [62] *60* days.

Paragraph (3) of subdivision (a) of section 763.7 is amended as follows:
(3) medical orders and nursing diagnoses to include all diagnoses, medications, treatments, [and prognosis] *prognoses, and need for palliative care*. Such orders shall be:
(i) signed by the authorized practitioner within 30 days after admission to the agency, or prior to billing, whichever is sooner;
(ii) signed by the authorized practitioner within 30 days after issuance of any change in medical orders or prior to billing, whichever is sooner, to include all written and oral changes and changes made by telephone by such practitioner; and
(iii) renewed by the authorized practitioner as frequently as indicated by the patient's condition but at least every [62] *60* days;
Subdivision (b) of section 766.3 is amended as follows:
(b) a plan of care is established for each patient based on a professional assessment of the patient's needs and includes pertinent diagnosis, prognosis, *need for palliative care,* mental status, frequency of each service to be provided, medications, treatments, diet regimens, functional limitations and rehabilitation potential;
Subdivision (d) of section 766.4 is amended as follows:
(d) Medical orders shall reference all diagnoses, medications, treatments, prognoses, *need for palliative care*, and other pertinent patient information relevant to the agency plan of care; and
(1) shall be authenticated by an authorized practitioner within thirty (30) days after admission to the agency; and
(2) when changes in the patient's medical orders are indicated, orders, including telephone orders, shall be authenticated by the authorized practitioner within 30 days.
Subdivision (l) of section 766.9 is amended as follows:
(l) appoint a quality improvement committee to establish and oversee standards of care. The quality improvement committee shall consist of a consumer and appropriate health professional persons [including a physician if professional health care services are provided]. The committee shall meet at least four times a year to:
(1) review policies pertaining to the delivery of the health care services provided by the agency and recommend changes in such policies to the governing authority for adoption;
(2) conduct a clinical record review of the safety, adequacy, type and quality of services provided which includes:
(i) random selection of records of patients currently receiving services and patients discharged from the agency within the past three months; and
(ii) all cases with identified patient complaints as specified in subdivision (j) of this section;
(3) prepare and submit a written summary of review findings to the governing authority for necessary action; and
(4) assist the agency in maintaining liaison with other health care providers in the community.

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

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
Statutory Authority:
Public Health Law ("PHL") § 3612(5) authorizes the Public Health and Health Planning Council to adopt and amend rules and regulations to effectuate the provisions and purposes of PHL Article 36 with respect to certified home health agencies. Section 3612(6) requires the Commissioner of Health to adopt, and amend as needed, rules and regulations to effectuate the purposes of Article 36 regarding quality of care and services.
Legislative Objectives:
PHL Article 36 was intended to promote the quality of home care services provided to residents of New York State and to assure adequate availability as a viable alternative to institutional care.
Needs and Benefits:
On February 24, 2011 Governor Cuomo accepted a report from the Medicaid Redesign Team (MRT) designed to meet the Medicaid savings targets contained in the Executive Budget for 2011-12. The report included 79 recommendations to redesign and restructure the Medicaid program to be more efficient and achieve better outcomes for patients. Included among the recommendations accepted were MRT proposal numbers 109 and 147.
MRT Proposal 109 sought to expand access to palliative care services. In furtherance of that objective, the proposed amendments to the regulations add a requirement that the plans of care and medical orders required for patients of certified home health agencies (CHHAs) and licensed home care services agencies (LHCSAs) address the patient's need for palliative care.
MRT Proposal 147 aimed to reduce regulatory burdens on providers. Accordingly, the proposed changes to the regulations eliminate the need for a physician to serve on the quality improvement (QI) committee of LHCSAs.
Finally, the proposed changes reflect minor amendments made to align these regulations with federal requirements and to correct errors. First, the amendments eliminate the requirement that CHHAs provide more than one qualifying service directly to coincide with the federal standards as defined in 42 CFR § 484.14(a). The current regulation appears to require CHHAs to provide more than one service directly, which the Department of Health does not require, and this has led to confusion among interested agencies.
Second, the amendments change the maximum period of time that may lapse before a comprehensive assessment is reviewed from 62 days to 60 days, as this was an error in the regulations as originally drafted. Federal regulations, at 42 CFR § 484.55(d)(1), require review at least every 60 days.
Costs:
The only new requirement imposed on agencies by these regulations is the requirement that the plan of care address palliative care, which is not anticipated to result in any appreciable burden to agencies and should not add additional costs to current operations. All other amendments are cost neutral or will decrease costs.
Local Government Mandates:
There are no mandates in this rule specific to local government. There are 28 existing county-based LHCSAs and approximately 29 county based CHHAs, and these entities will be required to comply with the same requirements as other licensed agencies.
Paperwork:
Providers are not expected to have increased paperwork as a result of these amendments.
Duplication:
The proposed regulatory changes are not duplicative of other requirements.
Alternatives:
The MRT proposals are specific in their mandates. The Department has made only those changes required to implement the MRT proposals.
Federal Standards:
There are no federal health care standards for LHCSAs. This provider type is a New York State construct. Federal regulations governing CHHAs are at 42 CFR Part 484.
Compliance Schedule:
Compliance is expected upon notice of adoption in the State Register.

Regulatory Flexibility Analysis
Effect of Rule:
Licensed home care services agencies (LHCSAs) and certified home health agencies (CHHAs), including those operated by county health departments, provide public health services in the home as required by Public Health Law. There are approximately 28 county-based LHCSAs and approximately 29 county-based CHHAs. Additionally, based on agency reports, the Department estimates that 860 LHCSAs and 168 CHHAs have less than 100 employees, and would be categorized as small businesses.
Compliance Requirements:
There is one new requirement imposed on home care agencies as a result of these amendments, which is to include the need for palliative care in each patient's plan of care and medical orders.
Professional Services:
No additional professional staff will be required because of these amendments. The requirement that agencies address the need for palliative care will be handled as a part of procedures already undertaken by agencies.
Compliance Costs:
It is not anticipated that there will be any increase in costs incurred by agencies as a result of these amendments. The amendments either remove existing obligations or add a minimal requirement that may be assumed with no increase in cost as part of current operations.
Economic and Technological Feasibility:
These rules can be implemented with no clear economic or technological impact. The only requirement imposed by these regulations is an unappreciable addition to current operations, and no additional technology will be required to comply.
Minimizing Adverse Impact:
The MRT proposals are specific in their mandates. The Department has made only those changes required to implement the MRT proposals.
Small Business and Local Government Participation:

The Department will meet the requirements of SAPA Section 202-b(6) in part by publishing a notice of proposed rulemaking in the State register with a comment period. All agencies and associations that represent such agencies were able to participate in the MRT process.

Rural Area Flexibility Analysis

Types and Estimated Numbers of Rural Areas:

All counties in New York State have rural areas with the exception of 7 downstate counties. Approximately 80% of LHCSAs and 86% of CHHAs are licensed to serve counties with rural areas.

Reporting, Recordkeeping and Other Compliance Requirements and Professional Services:

There is one new requirement imposed on home care agencies as a result of these amendments, which is to include the need for palliative care in each patient's plan of care and medical orders. This requirement adds only a minimal recordkeeping burden on agencies, as plans of care and medical orders are already required for every patient serviced by a LHCSA or CHHA. No new professional staff is required to comply.

Costs:

It is not anticipated that there will be any increase in costs incurred by agencies as a result of these amendments. The amendments either remove existing obligations or add a minimal requirement that may be assumed with no increase in cost as part of current operations.

Minimizing Adverse Impact:

The MRT proposals were specific in their mandates. The Department has made only those changes required to implement the MRT proposals.

Rural Area Participation:

There is no impact specifically to rural areas as a result of these amendments, and the impact to all agencies is minimal.

Job Impact Statement

Nature of Impact:

The Department has determined that the proposed rules will not have a substantial adverse impact on jobs and employment opportunities.

Categories and Numbers Affected:

None.

Regions of Adverse Impact:

None.

Minimizing Adverse Impact:

Not applicable.

Self Employment Opportunities:

Not applicable.

Department of Labor

NOTICE OF EXPIRATION

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

Public Employees Occupational Safety and Health Standards

I.D. No.	Proposed	Expiration Date
LAB-40-11-00007-P	October 5, 2011	October 4, 2012

Office for People with Developmental Disabilities

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Financial Reporting for Providers of OPWDD Services

I.D. No. PDD-43-12-00007-P

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

Proposed Action: Amendment of Subpart 635-4 and sections 679.6, 686.13 and 690.7 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 13.09(b) and 43.02

Subject: Financial Reporting for Providers of OPWDD Services.

Purpose: To expand the applicability of reporting requirements and to revise the sanctions for failure to report.

Public hearing(s) will be held at: 10:30 a.m., December 10, 2012 at Office for People with Developmental Disabilities, Counsel's Office Conference Rm., 3rd Fl., 44 Holland Ave., Albany, NY; and 10:30 a.m., December 12, 2012 at Office for People with Developmental Disabilities, Counsel's Office Conference Rm., 3rd Fl., 44 Holland Ave., Albany, NY.

Interpreter Service: Interpreter services will be made available to hearing impaired persons, at no charge, upon written request to the agency contact designated in this notice.

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

Substance of proposed rule (Full text is posted at the following State website: www.opwdd.ny.gov): The proposed regulations amend current OPWDD regulations concerning financial reporting, record keeping and audit requirements.

Current OPWDD regulations in 14 NYCRR Subpart 635-4 apply to facilities certified as Individualized Residential Alternatives, Community Residences, Day Treatment Facilities and ICF/DDs. The proposed amendments expand the applicability of this Subpart to include Medicaid Service Coordination, clinic treatment facilities ("Article 16 Clinics") and all Home and Community Based Waiver Services. All of the requirements in Subpart 635-4 will apply to the additional services except that the requirement for submission of budget information will apply only to providers which are applying for an operating certificate.

The existing regulations provide for two 30 day extensions of the cost report filing deadlines. The proposed regulations allow only one 30 day extension.

For providers which fail to file their cost reports by the reporting deadline, current regulations allow for the imposition of a 5 percent reduction in the operating portion of the rates, fees or prices. In lieu of this, OPWDD is proposing, for the period of time during which a provider's cost report is outstanding, that providers shall be subject to a reduction in reimbursement in an amount equal to 2 percent. For a provider subject to this sanction, the 2 percent reduction shall apply to reimbursements for the following: ICF/DD services (Intermediate Care Facilities for Persons with Developmental Disabilities), Medicaid service coordination, day treatment services, clinic services, and the following HCBS waiver services: residential habilitation services (community residential habilitation in a community residence, residential habilitation in an IRA, and residential habilitation in family care), community habilitation services, day habilitation services, prevocational services, supported employment services, respite services, plan of care support services, and family education and training services. This penalty will not be restored once a provider's cost report is received. Providers will also be subject to this sanction if they fail to meet deadlines for revised cost reports or other requested information.

As is the case with the current regulations, a penalty applies if a provider does not submit a cost report by the due date and also if OPWDD determines that a cost report must be revised and the provider does not submit a revised cost report within 30 days. The proposed regulations will require OPWDD to give the provider written notice that it missed the cost report deadline or that it must submit a revised cost report. The OPWDD notice will give the provider a final opportunity to submit the cost report (15 days for an initial cost report and 30 days for a revised cost report) or explain that it cannot submit the cost report in that time period because of unforeseeable factors beyond its control. If the provider submits the cost report or shows that there were unforeseeable factors beyond its control that prevented it from submitting on time, it will avoid the penalty. However, the penalty will be imposed if the provider submits an explanation of the unforeseeable factors and OPWDD sets a new deadline for the cost report, but the provider misses this new deadline.

The proposed regulations change the procedures in cases where it is the provider that discovers that a cost report is incomplete, inaccurate or incorrect, and where the provider makes this discovery before receiving its new base period rate, fee or price. The proposed regulations will eliminate the requirement that the provider first give OPWDD notice and then follow up with a revised cost report within 30 days. Instead, the proposed regulation will simply require the provider to submit a revised cost report. Also, the proposed regulation will eliminate the penalty in this situation, but keep the provision that allows, rather than requires, that OPWDD revise the rate, fee or price based on the revised cost data, and then only if and when OPWDD receives the revised cost report.

The proposed amendments would apply the provisions in section 635-4.6 to HCBS Waiver services and MSC. Section 635-4.6 states that provider records, reports and information are subject to audit for six years and contains procedures for review of audit findings. However, the law already subjects providers of these services to audit and record retention requirements.

The proposed amendments make several clarifications to requirements for the records that providers must keep. First the amendments clarify that service-specific records of expenditures and revenues must be kept at the program or site level. Second, the amendments state that providers must maintain underlying records which formed the basis for or which support the cost, budget and other reports and data submitted to OPWDD. Third, the amendments clarify that reports and records that were not used to establish a rate, price or fee must be kept until the later of six years from the due date or date of submission, and that reports and records that were used to establish a rate, price or fee must be kept for six years after the rate, price or fee was set.

The proposed regulations change current regulations in sections 679.6, 686.13 and 690.7, concerning clinic treatment facilities ("Article 16 clinics"), residential habilitation services and day treatment services respectively, to conform to the new language in Subpart 635-4 and/or to refer to Subpart 635-4.

The proposed regulations also make non-substantive changes to existing language to enhance clarity and comprehension.

Text of proposed rule and any required statements and analyses may be obtained from: Barbara Brundage, Director, Regulatory Affairs Unit, Office for People With Developmental Disabilities (OPWDD), 44 Holland Avenue, Albany, New York 12229, (518) 474-1830, email: barbara.brundage@opwdd.ny.gov

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

Public comment will be received until: Five days after the last scheduled public hearing.

Additional matter required by statute: Pursuant to the requirements of the State Environmental Quality Review Act, OMRDD, as lead agency, has determined that the action described herein will have no effect on the environment, and an E.I.S. is not needed.

Regulatory Impact Statement

1. Statutory Authority:

a. OPWDD has the statutory authority to adopt rules and regulations necessary and proper to implement any matter under its jurisdiction as stated in the New York State Mental Hygiene Law Section 13.09(b).

b. OPWDD has the statutory authority to adopt rules and regulations relating to reports and audits relating to facility utilization and costs of providing services, as stated in section 43.02(c) of the Mental Hygiene Law.

2. Legislative Objectives: These proposed amendments further the legislative objectives embodied in sections 13.09(b) and 43.02 of the Mental Hygiene Law. The proposed amendments concern the applicability of financial reporting, record keeping and audit requirements and the consequences for providers which fail to meet filing deadlines for annual consolidated fiscal reports (cost reports).

3. Needs and Benefits: The regulations governing financial reporting, record keeping and audit requirements were promulgated in 1998. Since then, OPWDD has developed new services and existing services have been substantially changed. These 1998 regulations cover only a subset of services which are provided under the auspices of OPWDD today. The amendments propose to expand the applicability of the reporting and audit requirements in 14 NYCRR Subpart 635-4 to cover Medicaid Service Coordination (MSC), Home and Community Based Services Waiver services (HCBS Waiver services), and clinic treatment facilities ("Article 16 clinics") provided under the auspices of OPWDD. Providers delivering the additional services specified in the proposed regulation have been submitting cost reports pursuant to other regulatory requirements and/or OPWDD directives so this expansion of the applicability in regulation does not represent a change for providers.

The second change limits the number of cost report filing deadline extensions available to providers from two thirty-day extensions to one thirty-day extension. This brings regulations in line with actual OPWDD practices and consequently providers should realize a seamless implementation.

The third change concerns sanctions for providers which fail to honor the reporting deadlines. Current regulations address the possibility of a 5 percent penalty levied against the operating portion of existing rates, prices and/or fees. The penalty has not been imposed and as a result, late filers do exist with varying degrees of delinquency. Not only does this disrupt the efficient flow of rate setting operations, but providers need to examine the financial results of their operations at least on an annual basis to measure, assess, and react to the factors influencing their financial health and to forge budgets and define their fiscal direction. OPWDD wants to assure that the compilation and submission of financial data occurs on a timely basis. This objective is shared by the Centers for Medicare and Medicaid Services which has questioned OPWDD's failure to employ the existing sanction. These amendments propose to continue the permanent penalty but modify it from the current 5 percent reduction in rates, prices and/or fees to a 2 percent reduction in reimbursements, and to make the penalty required rather than discretionary. The 2 percent reduction in reimbursements will be applied to all reimbursements made during the time period the cost report is outstanding, regardless of service dates. One advantage in supplanting the old sanction with the new is that imposing a reduction in reimbursement provision does not require that prices, rates, and/or fees be recalculated and reissued.

As is the case with the current regulations, a penalty applies if a provider does not submit a cost report by the due date and also if OPWDD determines that a cost report must be revised and the provider does not submit a revised cost report within 30 days. The proposed regulations will require OPWDD to give the provider written notice that it missed the cost report deadline or that it must submit a revised cost report. The OPWDD notice will give the provider a final opportunity to submit the cost report or explain that it cannot submit it because of unforeseeable factors beyond its control. If the provider submits the cost report or shows that there were unforeseeable factors beyond its control that prevented it from submitting on time, it will avoid the penalty. However, the penalty will be imposed if the provider submits an explanation of the unforeseeable factors and OPWDD sets a new deadline for the cost report, but the provider misses this new deadline.

The proposed regulations change the procedures in cases where it is the provider that discovers that a cost report is incomplete, inaccurate or incorrect, and where the provider makes this discovery before receiving its new base period rate, fee or price. The proposed regulations will eliminate the requirement that the provider first give OPWDD notice and then follow up with a revised cost report within 30 days. Instead, the proposed regulation will simply require the provider to submit a revised cost report. Also, the proposed regulation will eliminate the penalty in this situation, but keep the provision that allows, rather than requires, that OPWDD revise the rate, fee or price based on the revised cost data, and then only if and when OPWDD receives the revised cost report.

The proposed amendments would apply the provisions in section 635-4.6 to HCBS Waiver services and MSC. Section 635-4.6 states that provider records, reports and information are subject to audit for six years and contains procedures for review of audit findings. However, the law already subjects providers receiving Medicaid or Non-Medicaid State funding for MSC and HCBS waiver services to audit and record retention requirements, so this change will not affect providers.

Sections 679.6, 686.13 and 690.7, which address financial reporting for specific services, are changed to conform with the amendments to Subpart 635-4.

The proposed amendments make several clarifications to requirements for the records that providers must keep. First the amendments clarify that service-specific records of expenditures and revenues must be kept at the program or site level. Second, the amendments state that providers must maintain underlying records which formed the basis for or which support the cost, budget and other reports and data submitted to OPWDD. Third, the amendments clarify that reports and records that were not used to establish a rate, price or fee must be kept until the later of six years from the due date or date of submission, and that reports and records that were used to establish a rate, price or fee must be kept for six years after the rate, price or fee was set.

The proposed amendments also make minor and non-substantive changes to the current regulations for the purpose of clarification and simplification.

4. Costs:

a. Costs to the agency and to the State and its local governments: Local governments should incur no costs as a result of these amendments. OPWDD may incur a small cost in staff time needed to review providers' explanations of failure to submit cost reports on time. OPWDD expects that providers will only submit these explanations in rare cases. Conversely, the amendments pertaining to penalty modification may result in savings for the State. In the event that providers are not in compliance with the requirements to submit cost reports and/or other information in a timely fashion even though they were able to do so, OPWDD will impose a penalty which consists of a reduction in reimbursement to the agency. In that event, the State will realize savings equal to its share of the amount of the reduction in reimbursement. Nearly all reimbursement to agencies is provided through Medicaid and the State share is generally half of the amount. However, OPWDD cannot quantify the savings since it cannot quantify the amount of penalties which may be imposed. As noted, OPWDD expects that providers will be motivated by the penalty and will consequently submit cost reports and required information on time and thereby avoid the imposition of any penalty.

There is a local share of Medicaid for a few services delivered in the OPWDD system, and reduction of reimbursement may result in a small savings in the local share of those services. However, Chapter 58 of the Laws of 2005 places a cap on the local share of Medicaid costs and local governments are already paying for Medicaid at the capped level. Any reduction in reimbursement would have to reduce a local government's share below the cap in order to affect its costs. Since OPWDD cannot predict whether there will be penalties, and how much they will be, and since local governments' share of Medicaid is capped, OPWDD cannot estimate the savings, if any, to local governments as a result of these amendments.

b. Costs to private regulated parties: There are no initial capital investment costs. There may be minimal additional costs associated with implementation and continued compliance with the rule. While the proposed regulations expand the requirement to submit cost reports to additional types of services, providers of these services have already been submitting cost reports pursuant to other regulatory requirements and/or OPWDD directive. The expansion of the audit provisions to HCBS Waiver services and MSC will not result in costs to the providers because they have always been subject to audit. Similarly, the clarifications of the records that must be maintained should not result in any costs to providers. Providers should already be keeping records by program or site in order to accurately report costs, and the changes for retention periods only restate existing requirements in easier to understand terms. The requirement that underlying records must be kept should not result in additional costs to providers. Providers already create these records to prepare reports, so the only additional cost is the minimal cost of keeping the records. However, as noted above, the amendments related to the penalty modification could result in a reduction in reimbursement to providers who fail to submit their cost reports or other required information on time. As noted above, OPWDD expects that these amendments will sufficiently motivate all providers to minimize or eliminate non-compliance and therefore it expects that the penalties that will be imposed will be negligible. However, in the event that providers are out of compliance with reporting requirements, the provider may experience a permanent loss of 2% of the reimbursement received during the time that the provider is out of compliance.

5. Local Government Mandates: There are no new requirements imposed by the rule on any county, city, town, village; or school, fire, or other special district.

6. Paperwork: The only additional paperwork required by the proposed amendments is the explanation of the provider's failure to submit a cost report or additional data on time. This is not required of all providers, only of those that fail to meet a reporting deadline, and even then only if the provider was prevented from filing on time by unforeseeable factors outside its control. As noted, providers of the additional types of services have already been submitting cost reports per other regulatory requirements and/or OPWDD directive.

7. Duplication: The proposed amendments do not duplicate any existing State or Federal requirements that are applicable to services for persons with developmental disabilities.

8. Alternatives: OPWDD has long considered these measures to effectuate better compliance with reporting requirements. It has looked at alternatives utilized by other agencies. They include tougher penalties and withholding with monthly escalations in the withholding percentage with significantly high caps. In contrast, OPWDD has selected a more conservative and modest approach with less foreboding consequences for providers.

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

10. Compliance Schedule: OPWDD expects to finalize the proposed amendments as soon as possible consistent with the timeframes established by the State Administrative Procedure Act. OPWDD will be mailing a notice of the proposed amendments to providers approximately three months in advance of the effective date. There are no additional compliance activities associated with these amendments since the providers of the services specified in the proposed regulations have been submitting cost reports pursuant to other regulatory requirements and/or OPWDD directive and there are minimal additional requirements pertaining to records that must be kept.

Regulatory Flexibility Analysis

1. Effect on small business: OPWDD has determined, through a review of the certified cost reports, that most OPWDD-funded services are provided by non-profit agencies which employ more than 100 people overall. However, some smaller agencies which employ fewer than 100 employees overall would be classified as small businesses. Currently, there are approximately 700 agencies providing services which are certified, authorized or funded by OPWDD. OPWDD is unable to estimate the portion of these providers that may be considered to be small businesses.

The proposed amendments have been reviewed by OPWDD in light of their impact on small businesses. These amendments concern the applicability of financial reporting, record keeping and audit requirements and the consequences for providers which fail to meet annual consolidated fiscal reports (cost reports) filing deadlines and fail to submit other information in a timely fashion.

2. Compliance requirements: The proposed amendments do not impose any new requirements with which providers are expected to comply. Providers have already been submitting cost reports for these services pursuant to other regulatory requirements and/or OPWDD directive and have always been subject to audit, so there are no additional compliance activities imposed by the proposed regulations. These amendments will have no effect on local governments.

3. Professional services: Providers have to engage the services of public accountants to certify cost reports. There are no additional professional services required for small business providers as a result of these amendments, since these amendments only expand the requirement to submit cost report to include services for which providers already submit cost reports pursuant to other regulations or OPWDD policy. The amendments will not add to the professional service needs of local governments.

4. Compliance costs: The proposed regulations expand the requirement to submit cost reports to additional types of services; however providers of these services have already been submitting cost reports pursuant to other regulatory requirements and/or OPWDD directive. The expansion of the audit provisions to HCBS Waiver services and MSC will not affect providers because they have always been subject to audit. However, the penalty modification could result in a reduction in reimbursement to providers who fail to submit their cost reports or other required information on time. OPWDD expects that these amendments will sufficiently motivate all providers to minimize or eliminate non-compliance and therefore it expects that the cost of penalties that will be imposed will be negligible. However, in the event that providers are out of compliance with reporting requirements, the provider may experience a permanent loss of 2% of reimbursements received during the time that the provider is out of compliance.

The proposed amendments change some requirements for the records that providers must keep. First the amendments clarify that service-specific records of expenditures and revenues must be kept at the program or site level. Second, the amendments state that providers must maintain underlying records which formed the basis for or which support the cost, budget and other reports and data submitted to OPWDD. Third, the amendments clarify that reports and records that were not used to establish a rate, price or fee must be kept until the later of six years from the due date of date of submission, and that reports and records that were used to establish a rate, price or fee must be kept for six years after the rate, price or fee was set. These clarifications should not result in any costs to providers. The requirement that records be kept at the level of each site or program should not cause providers to incur any costs because they already have to keep records at this level of detail in order to report costs correctly on the cost report. The changes for retention periods only restate existing requirements in easier to understand terms. The requirement that underlying records must be kept should not result in additional costs to providers. Providers already create these records to prepare reports, so the only additional cost is the minimal cost of keeping the records.

5. Economic and technological feasibility: The proposed amendments do not impose the use of any new technological processes on regulated parties.

6. Minimizing adverse economic impact: The proposed amendments may result in an adverse economic impact for providers who fail to comply with existing requirements for the submission of cost reports and other information. Current regulations allow OPWDD to impose a 5 percent penalty levied against the operating portion of existing rates, prices and/or fees. These amendments propose to continue the permanent penalty but modify it from the current 5 percent reduction in rates, prices and/or fees to a 2 percent reduction in reimbursements. The 2 percent reduction in reimbursements will be applied to all reimbursements made during the time period the cost report is outstanding, regardless of service dates. This amount will not be restored to providers once the cost report is received by OPWDD, which may result in an adverse economic impact to providers. OPWDD expects that these amendments will sufficiently motivate all providers to minimize or eliminate non-compliance and therefore the amount of penalties that will be imposed will be negligible.

OPWDD has reviewed and considered the approaches for minimizing adverse economic impact as suggested in section 202-b(1) of the State Administrative Procedure Act. OPWDD did not consider the exemption of small businesses from the imposition of penalties, or giving small businesses more time to submit cost reports since OPWDD considers compliance with the pertinent requirements to be crucial for the health, safety, and welfare of the individuals served by small providers. The timely submission of cost reports is imperative so that OPWDD can properly monitor the fiscal health of providers in order to be aware of situations where providers may be unable to continue to provide essential services. In addition OPWDD needs to monitor the expenditure of funds to determine whether sufficient funds are expended for the direct care of individuals receiving services as opposed to administrative costs. Consequently, it is essential that OPWDD have timely access to information contained in the cost reports to provide the oversight necessary for the protection of the individuals it serves.

However, the proposed regulations contain a procedure that will ensure that a provider can avoid the penalty if it could not meet a cost report deadline for reasons it could not foresee or avoid. The regulations will require that the provider be notified in writing that it missed the cost report deadline or that it must submit a revised report, and that the provider be given an opportunity to submit the report within a certain time period (15 days for an original report and 30 days for a revised report) and thus avoid the penalty. If the provider cannot meet the deadline because of circumstances that it could not foresee and that were beyond its control, the provider can explain these circumstances to OPWDD. If OPWDD agrees that the provider could not have met the deadline for unforeseeable circumstances beyond its control, OPWDD will set a new due date for the cost report and the provider will not be subject to the penalty as long as it submits the report by the new due date.

7. Small business participation: The proposed regulations were discussed with representatives of providers, including the New York State Association of Community and Residential Agencies (NYSACRA), on March 26, 2012. Some of the members of NYSACRA have fewer than 100 employees. OPWDD will be mailing these proposed amendments to all providers, including providers that are small businesses, three months in advance of the effective date.

8. The proposed amendments will modify penalties for both violating the requirement to submit an original cost report and the requirement to submit a revised cost report upon notice from OPWDD. The proposed amendments also include a cure period. Before the penalty can be imposed on a provider that fails to file an original cost report, OPWDD must give the provider written notice that it missed the filing deadline and an additional 15 days to come into compliance by filing the report. A provider can also avoid the penalty by submitting a written statement which identifies unforeseeable factors beyond its control that prevent it from complying within the 15 day deadline. Similarly, before the penalty can be imposed on a provider for not filing a revised cost report, OPWDD must give the provider written notice that it has to file a revised report and 30 days to do so. A provider can avoid the penalty by filing the revised report within the 30 day period or by submitting a written statement which identifies unforeseeable factors beyond its control that prevent it from complying within the 30 day deadline.

Rural Area Flexibility Analysis

1. Description of the types and estimation of the number of rural areas in which the rule will apply: OPWDD services are provided in every county in New York State. 44 counties have a population less than 200,000: Allegany, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Ontario, Orleans, Oswego, Otsego, Putnam, Rensselaer, St. Lawrence, Saratoga, Schenectady, Schoharie, Schuyler, Seneca, Steuben, Sullivan, Tioga, Tompkins, Ulster, Warren, Washington, Wayne, Wyoming and Yates. 9 counties with certain townships have a population density of 150 persons or less per square mile: Albany, Broome, Dutchess, Erie, Monroe, Niagara, Oneida, Onondaga and Orange.

The proposed amendments have been reviewed by OPWDD in light of their impact on entities in rural areas. These amendments concern the applicability of financial reporting, record keeping and audit requirements and the consequences for providers which fail to meet annual consolidated fiscal reports (cost reports) filing deadlines and fail to submit other information in a timely fashion. The geographic location of any given program (urban or rural) will not be a contributing factor to any additional costs to providers.

2. Compliance requirements: The proposed amendments do not impose any new requirements with which providers are expected to comply. Providers have already been submitting cost reports for these services pursuant to other regulatory requirements and/or OPWDD directive and have always been subject to audit, so there are no additional compliance activities imposed by the proposed regulations. These amendments will have no effect on local governments.

3. Professional services: Providers have to engage the services of public accountants to certify cost reports. There are no additional professional services required for providers in rural areas as a result of these amendments, since these amendments only expand the requirement to submit cost report to include services for which providers already submit cost reports pursuant to other regulations or OPWDD policy. The amendments will not add to the professional service needs of local governments.

4. Compliance costs: The proposed regulations expand the requirement to submit cost reports to additional types of services; however providers of these services have already been submitting cost reports pursuant to other regulatory requirements and/or OPWDD directive. The expansion of the audit provisions to HCBS Waiver services and MSC will not affect providers because they have always been subject to audit. However, the penalty modification could result in a reduction in reimbursement to providers who fail to submit their cost reports or other required information on time. OPWDD expects that these amendments will sufficiently motivate all providers to minimize or eliminate non-compliance and therefore it expects that the cost of penalties that will be imposed will be negligible. However, in the event that providers are out of compliance with reporting requirements, the provider may experience a permanent loss of 2% of reimbursements received during the time that the provider is out of compliance.

The proposed amendments change some requirements for the records that providers must keep. First the amendments clarify that service-specific records of expenditures and revenues must be kept at the program or site level. Second, the amendments state that providers must maintain underlying records which formed the basis for or which support the cost, budget and other reports and data submitted to OPWDD. Third, the amendments clarify that reports and records that were not used to establish a rate, price or fee must be kept until the later of six years from the due date or date of submission, and that reports and records that were used to establish a rate, price or fee must be kept for six years after the rate, price or fee was set. These clarifications should not result in any costs to providers. The requirement that records be kept at the level of each site or program should not cause providers to incur any costs because they already have to keep records at this level of detail in order to report costs correctly on the cost report. The requirement that underlying records must be kept should not result in additional costs to providers. Providers already create these records to prepare reports, so the only additional cost is the minimal cost of keeping the records.

5. Minimizing adverse impact: The proposed amendments may result in an adverse economic impact for providers who fail to comply with existing requirements for the submission of cost reports and other information. Current regulations allow OPWDD to impose a 5 percent penalty levied against the operating portion of existing rates, prices and/or fees. These amendments propose to continue the permanent penalty but modify it from the current 5 percent reduction in rates, prices and/or fees to a 2 percent reduction in reimbursements. The 2 percent reduction in reimbursements will be applied to all reimbursements made during the time period the cost report is outstanding, regardless of service dates. This amount will not be restored to providers once the cost report is received by OPWDD, which may result in an adverse economic impact to providers. OPWDD expects that these amendments will sufficiently motivate all providers to minimize or eliminate non-compliance and therefore the amount of penalties that will be imposed will be negligible.

OPWDD has reviewed and considered the approaches for minimizing adverse economic impact as suggested in section 202-bb(2)(b) of the State Administrative Procedure Act. OPWDD did not consider the exemption of providers in rural areas from the imposition of penalties, or giving providers in rural areas more time to submit cost reports since OPWDD considers compliance with the pertinent requirements to be crucial for the health, safety, and welfare of the individuals served by providers in rural areas. The timely submission of cost reports is imperative so that OPWDD can properly monitor the fiscal health of providers in order to be aware of situations where providers may be unable to continue to provide essential services. In addition OPWDD needs to monitor the expenditure of funds to determine whether sufficient funds are expended for the direct care of individuals receiving services as opposed to administrative costs. Consequently, it is essential that OPWDD have timely access to information contained in the cost reports to provide the oversight necessary for the protection of the individuals it serves.

However, the proposed regulations contain a procedure that will ensure that a provider can avoid the penalty if it could not meet a cost report deadline for reasons it could not foresee or avoid. The regulations will require that the provider be notified in writing that it missed the cost report deadline or that it must submit a revised report, and that the provider be given an opportunity to submit the report within a certain time period (15 days for an original report and 30 days for a revised report) and thus avoid the penalty. If the provider cannot meet the deadline because of circumstances that it could not foresee and that were beyond its control, the provider can explain these circumstances to OPWDD. If OPWDD agrees that the provider could not have met the deadline for unforeseeable circumstances beyond its control, OPWDD will set a new due date for the cost report and the provider will not be subject to the penalty as long as it submits the report by the new due date.

6. Participation of public and private interests in rural areas: On March 26, 2012, the proposed regulations were discussed with representatives of providers such as NYSARC, the NYS Association of Community and Residential Agencies, NYS Catholic Conference, and CP Association of NYS, which represent providers throughout New York State including those in rural areas. OPWDD will also be mailing these proposed amendments to all providers, including providers in rural areas, three months in advance of the effective date.

Job Impact Statement

A Job Impact Statement for these amendments is not being submitted because it is apparent from the nature and purposes of the amendments that they will not have a substantial adverse impact on jobs and/or employment opportunities.

The proposal amends current regulations concerning financial reporting, record keeping and auditing to expand the applicability to include additional types of services. There are no additional compliance activities imposed by the proposed regulations since providers have already been submitting cost reports for these services pursuant to OPWDD directive and have always been subject to audit. No adverse effect on jobs or employment opportunities will result from this aspect of the regulations.

The change limiting the number of cost report filing extensions from two to one should not have a significant adverse impact on jobs and employment opportunities because current OPWDD practice is to only grant one extension, and because the regulation will give a provider notice and an opportunity to come into compliance.

The changes regarding penalties should not have a significant adverse effect on jobs or employment opportunities for several reasons. First, there will be a cure period. Before the penalty can be imposed, OPWDD will give the provider written notice and additional time to come into compliance. The provider can avoid the penalty by submitting the report during this cure period or by submitting a written statement which explains unforeseeable factors beyond its control that prevent it from filing the cost report by the deadline. Second, OPWDD expects that these amendments will sufficiently motivate providers to submit cost reports on time, so that there will be negligible penalties imposed.

The proposed change regarding cases where the provider discovers a cost report is incomplete, inaccurate or incorrect before receiving its new base period rate, fee or price cannot have an adverse effect on jobs or employment opportunities because the change would remove these penalties.

The change applying section 635-4.6 to HCBS Waiver Servicies and MSC would not affect jobs or employment because the law already subjects providers of these services to audit and record retention requirements.

The clarifications regarding the retention and audit of financial records could not have an adverse effect on jobs or employment opportunities because any provider not already complying with these requirements will only have to change how it keeps its records, and keep records for a longer time.

Public Service Commission

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Water Rates and Charges

I.D. No. PSC-43-12-00004-P

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

Proposed Action: The Commission is considering a tariff filing by Rolling Meadows Water Corporation, requesting approval to increase its annual revenues by approximately $87,307 or 19.48%, in P.S.C. No. 4 — Water, to become effective February 1, 2013.

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

Subject: Water rates and charges.

Purpose: To approve an increase in annual revenues by approximately $87,307 or 19.48%.

Substance of proposed rule: The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by Rolling Meadows Water Corporation, requesting approval to increase its annual revenues by approximately $87,307 or 19.48% to P.S.C. No. 4 — Water. The proposed filing has an effective date of February 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: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223-1350, (518) 486-2655, email: leann.ayer@dps.ny.gov

Data, views or arguments may be submitted to: Jaclyn A. Brilling, 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-0445SP1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Grant Authority for Additional Expenditures in New York State Electric and Gas Corporation Emergency Economic Program

I.D. No. PSC-43-12-00005-P

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

Proposed Action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition by New York State Electric and Gas Corporation requesting authorization for additional expenditures in its Emergency Economic Programs.

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

Subject: Grant authority for additional expenditures in New York State Electric and Gas Corporation Emergency Economic Programs.

Purpose: Provide emergency economic program assistance for qualified applicants that exceed the previously approved $7 million program.

Substance of proposed rule: The Public Service is reviewing the petition of New York State Electric and Gas Corporation (NYSEG) for the authorization to spend up to an additional $1 million on its Emergency Economic Development Programs in order to provide assistance to all qualifying customers in its service area recovering from the effects of Hurricane Irene and Tropical Storm Lee. The Commission may adopt permanently, reject or modify the previsions of the order.

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

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

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

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

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

(11-E-0559SP2)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Annual Reconciliation of Gas Expenses and Gas Cost Recoveries

I.D. No. PSC-43-12-00006-P

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

Proposed Action: The PSC is considering whether to approve, modify, or reject, in whole or in part, the filings made by various local gas distribution companies (LDCs) and municipalities regarding their Annual Reconciliation of Gas Expenses and Gas Cost Recoveries.

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

Subject: Annual Reconciliation of Gas Expenses and Gas Cost Recoveries.

Purpose: The filings of various LDCs and municipalities regarding their Annual Reconciliation of Gas Expenses and Gas Cost Recoveries.

Substance of proposed rule: The Commission is considering whether to approve, modify, or reject, in whole or in part, the filings made by various local gas distribution companies (LDCs) and municipalities regarding their Annual Reconciliation of Gas Expenses and Gas Cost Recoveries. The Commission 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: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann.ayer@dps.ny.gov

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

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

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

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

(12-G-0437SP1)

Department of State

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Real Estate Advertising

I.D. No. DOS-43-12-00001-P

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

Proposed Action: Amendment of section 175.25 of Title 19 NYCRR.

Statutory authority: Real Property Law, section 442-k(1)

Subject: Real estate advertising.

Purpose: To provide guidance and protection pertaining to advertising by real estate licensees.

Text of proposed rule: Existing 19 NYCRR Section 175.25, Advertising is repealed.

A new Section 175.25, Advertising is added as follows:

175.25 Advertising

(a) Definitions

1. ''Advertising'' and ''advertisement'' mean promotion and solicitation related to licensed real estate activity, including but not limited to, advertising via mail telephone, websites, e-mail, electronic bulletin boards, business cards, signs, billboards, and flyers. ''Advertising'' and ''advertisement'' shall not include commentary made by a duly licensed real estate salesperson, real estate associate broker or real estate broker that is not related to promoting licensed real estate activity.

2. ''Team'' means two or more persons, one of whom must be an associate real estate broker or real estate salesperson, associated with the same real estate brokerage who hold themselves out or operate as a team.

3. ''Real estate brokerage'' means a real estate company represented by a real estate broker.

4. ''Logo'' means a graphic mark used to identify a real estate broker, associate broker, salesperson or team, but not a photograph of a real estate broker, associate broker, salesperson or team contained in an advertisement.

5. ''Property'' means real property or shares of stock in a cooperative corporation.

(b) Placement of advertisements

1. Only a real estate broker is permitted to place or cause to be published advertisements related to the sale or lease of property. Advertisements placed or caused to be published by an associate real estate broker, a real estate salesperson or a team for the sale or lease of property listed with or represented by a real estate broker are not permitted except where the property is listed with or represented by the real estate broker with whom the associate real estate broker, real estate salesperson or team placing the ad is associated and said real estate broker approved placement of the advertisement.

2. Authorization

a. No property shall be advertised unless the real estate broker has obtained authorization for such advertisement from the owner of the property or as hereinafter provided.

b. Real estate brokers shall not advertise property that is subject to an exclusive listing held by another real estate broker without the written permission of the listing broker.

c. Proprietary information. Photographs of property that are posted on a real estate broker's website shall not be used or reproduced without written permission from the copyright holder of such photographs.

(c) Content of advertisements

1. Name of real estate broker. Advertisements shall indicate that the advertiser is a real estate broker and provide the name of the real estate broker or real estate brokerage and either: (i) the full address of the real estate broker or real estate brokerage or, (ii) the telephone number of the real estate broker or brokerage.

2. Name of associated licensees. The advertisement may include the names of one or more associate real estate brokers or real estate salespersons associated with the real estate broker or brokerage placing the advertisement. Where an advertisement includes the name of an associate broker, real estate salesperson or a team, the name of the real estate broker and/or real estate brokerage must also be printed in the advertisement.

3. Nicknames. Real estate brokers, associate real estate brokers, and real estate salespersons shall advertise using the name under which said real estate broker, associate real estate broker or real estate salesperson is licensed with the Department of State. A nickname may be used in an advertisement provided that the full-licensed name is listed clearly and conspicuously.

4. License type. Except as provided in subsection (d) of this section, advertisements shall correctly and accurately state the type of license held by the real estate broker, associate real estate broker or real estate salesperson named in the advertisement. Licensees may abbreviate the type of license held, provided that such abbreviation is not misleading. The use of the titles, ''sales associate'', ''licensed sales agent'' or simply ''broker'' is prohibited. Real estate brokers, associate real estate brokers or real estate salespersons who have additional titles or designations are permitted to advertise such titles or designations.

5. Contact information. An associate real estate broker, real estate salesperson or team may provide additional contact information, such as a post office box, in an advertisement.

6. Home offices. A residence may be used as an office provided that it is properly licensed by the Department of State.

7. Telephone numbers. Notwithstanding subdivision (c)(1) of this section, a real estate broker, associate broker, real estate salesperson or team may provide telephone numbers other than that of the brokerage in an advertisement, provided that the advertisement clearly identifies the type of such other telephone number as desk, home, cell phone, or otherwise.

8. Logos. A real estate team, associate real estate broker or real estate salesperson may use a logo different from that of the real estate broker or real estate brokerage with whom they are associated, provided that the name or logo of the real estate broker or real estate brokerage is also printed in the advertisement.

9. Property description. Advertisements shall include an honest and accurate description of the property to be sold or leased. All advertisements that state the advertised property is in the vicinity of a geographical area or territorial subdivision shall include as part of such advertisement the name of the geographical area or territorial subdivision in which such property is actually located. Use by real estate brokers, associate real estate brokers and real estate salespersons of a name to describe an area that would be misleading to the public is prohibited.

10. Guaranteed Profits. Advertisements shall not guarantee future profits from any real estate activity.

(d) Additional requirements and exceptions

1. Classified Advertisements. Classified and multi-property advertisements may omit the license type of any associate real estate broker or real estate salesperson named in the advertisement.

2. Business Cards. Notwithstanding subdivision (c) of this section, business cards must contain the business address of the licensee and the name of the real estate broker or real estate brokerage with whom the associate real estate broker or real estate salesperson is associated. All business cards must also contain the office telephone number for the associate real estate broker, real estate salesperson or team.

3. Web-based advertising

a. Websites created and maintained by associate real estate brokers, real estate salespersons and teams are permitted, provided that said associate real estate brokers, real estate salespersons and teams are duly authorized by their supervising real estate broker to create and maintain such websites and such websites remain subject to the supervision of the real estate broker with whom the licensees are associated while the website is live. Such websites shall be directly linked to the website of the broker with whom the licensees are associated unless the broker does not have a website.

b. Every page of such a website shall include the information required by these rules and regulations.

4. E-mail. An initial e-mail from a real estate broker, associate real *estate broker, real estate salesperson or team to a client or potential client shall provide the information required by these rules and regulations. Such information may be omitted from subsequent e-mail communications to the same recipient.*

5. For-Sale Signs. Notwithstanding subdivision (c)(1) of this section, unless otherwise prohibited by local law, any property listed through a real estate broker must be advertised as such, and any signage placed upon such property soliciting the sale or lease of the property must identify the representative broker or brokerage and include the office telephone number of the brokerage.

6. Advertisements referencing property not listed with broker. Any advertisement that references or includes information about a property that is not listed with the advertising broker or was not sold by the advertising broker shall prominently display the following disclaimer: "This advertisement does not suggest that the broker has a listing or has done a transaction in this property or properties." Such advertisement: (i) shall not, absent consent provided pursuant to subdivision (b)(2)(b) of this section, suggest, directly or indirectly that the advertising broker was involved in the transaction and (ii) shall not refer to property currently listed with another broker.

(e) Teams

1. Team name. Team names shall either: (i) include the full licensed name of the real estate brokers, associate brokers or real estate salespersons who are part of said team, or (ii) if the names are not included, the team name must be immediately followed by "at/of [full name of the broker/brokerage]." Team names may use the term "team." The use of any other terms besides "team," such as "associate," "realty" or "group" is prohibited. The use of the name of a non-licensed individual in a team name is prohibited. For twelve months after the adoption of this regulation, teams that have changed their name to comply with this provision shall be entitled to state in advertisements under their new name that they were 'formerly known as' their prior team name.

2. Unlicensed team members. If any unlicensed individuals are named in advertising for a team, the advertisement must clearly and conspicuously state which individuals are real estate licensees and which ones are not.

Text of proposed rule and any required statements and analyses may be obtained from: Whitney Clark, NYS Department of State, Office of Counsel, 1 Commerce Plaza, 99 Washington Avenue, Albany, NY 12231, (518) 473-2728, email: whitney.clark@dos.ny.gov

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

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

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

Regulatory Impact Statement

1. Statutory authority:

Real Property Law (RPL) Article 12-A prescribes requirements for individuals and business entities to act as a real estate salesperson and/or real estate broker (hereinafter referred to collectively as "real estate licensees"). RPL § 441-c(1)(a), among other provisions, permits the Department of State to impose sanctions against real estate licensees for dishonest or misleading advertising.

RPL § 442-k(1) authorizes the New York State Board of Real Estate to promulgate regulations to administer and effectuate the purposes of Article 12-A of the Real Property Law ("Article 12-A"). To fulfill this purpose, the Department of State, in conjunction with the New York State Board of Real Estate, has issued rules and regulations which are found at Part 175 of Title 19 NYCRR and is proposing this rule.

2. Legislative objectives:

Article 12-A, requires the Department of State to license and regulate real estate licensees. One of the purposes of Article 12-A is to ensure that real estate licensees deal honestly and fairly with members of the public. This proposed rule advances this legislative intent by providing guidance to real estate licensees on proper advertising practices so as to ensure that said advertisements are not false or misleading.

3. Needs and benefits:

The proposed rule making will protect consumers, provide guidance to real estate licensees and meet the legislative intent of Article 12-A.

The Department of State investigates and prosecutes alleged violations of Article 12-A by real estate licensees, including those involving misleading and false advertising. Agency hearing determinations provide guidance on what constitutes "dishonest and misleading advertising." Many years ago, the Department of State prepared and circulated informal advertising guidelines that incorporated many of the principals found in these agency hearing determinations. With the passage of time and changes in technology, these guidelines have become dated and no longer accurately reflect current advertising trends.

As a service to real estate licensees, Department of State staff routinely speak at meetings of local boards and trade associations and provide informal opinions to real estate licensees by telephone and letter. Up to 50% of the questions asked of Department of State staff by real estate licensees pertain to issues of advertising. The number of questions received by the Department on this issue and the number of real estate advertising issues encountered in administrative hearings, make it evident that the industry is in need of guidance on proper advertising practices, particularly with regard to internet advertising and marketing by "real estate teams."

A real estate team is a group of real estate licensees working for a single real estate broker. Real Property Law section 441(1)(d) requires a real estate broker to supervise real estate licensees associated with him or her. Increasingly, real estate teams are placing misleading advertisements that make it appear as though they are a separate real estate company and not under the guidance and supervision of their representative broker.

With new technology and the evolving forms of advertising by real estate licensees, concerns have arisen over contemporary advertising related issues. In October 2006, the Council of the City of New York released a study into deceptive advertising practices by real estate licensees and recommended that the NYC Department of Consumer Affairs take immediate action to monitor the online advertising practices of New York City real estate licensees.

The proposed rule incorporates agency hearing determinations and provides a framework for real estate licensees on how to advertise in a way that complies with Article 12-A. This will benefit consumers by ensuring that they are not misled by false and/or misleading advertisements. It will also benefit real estate licensees by providing them with guidance on how to advertise in a manner that is compliant with statutory limitations.

4. Costs:

a. Costs to regulated parties:

The proposed rule making will not impose costs on those real estate licensees who choose to place advertisements unless the text of any existing advertisement has to be changed to comply with the proposed regulations. Advertising costs vary based on method and location.

Print advertising rates range from approximately $8.00 to $289 for a column inch of black and white advertising space. The cost of advertising in the classified section of a newspaper varies based on the frequency of the advertisement and whether the advertisement is placed in the daily or Sunday newspaper. These advertising rates range from approximately $9.00 to $21.00. The estimated cost of a radio ad is $50 for a 30 second radio spot. Internet advertising rates vary from free to $500 per month based on the website, size and type of the advertisement placed. Other websites charge a fee based on the number of real estate advertisements placed. Craigslist.org, a website that is commonly used by real estate licensees, charges a fee of $10 per real estate ad in New York City and allows free posting on backpage.com. Billboard advertising rates vary from approximately $400 to $12,750 per month.

b. Costs to the Department of State:

The rule does not impose any costs to the Department of State. Rather, the proposed rule making will likely decrease the enforcement-related costs incurred by the agency. Many of the advertising-related complaints which the Department of State receives are the result of inadvertent, unintentional errors by real estate licensees. The proposed rule making will provide guidance to the industry and reduce the number of advertising-based complaints. This will save costs associated with the staff time needed to investigate and pursue these complaints.

5. Local government mandates:

The rule does not impose any program, service, duty or responsibility upon any county, city, town, village, school district or other special district.

6. Paperwork:

The rule does not impose any new paperwork requirements insofar as advertisements are not among those records which real estate licensees are required to retain for a period of three years. (See 19 NYCRR section 175.23).

7. Duplication:

This rule does not duplicate, overlap or conflict with any other state or federal requirement.

8. Alternatives:

Initially, the Department of State considered merely updating the informal advertising guidelines. After consulting with the New York State Board of Real Estate, however, it was determined that enforceable regulations were required in order to adequately protect the public from dishonest and misleading advertising practices.

In preparing the proposed rule making, the Department of State reviewed advertising laws and regulations from other states. In addition, the Department of State worked closely with the two largest real estate trade associations (NYSAR and REBNY) in reviewing and drafting the proposed rule making. Various proposals were reviewed and considered, including the following.

It was proposed that membership in real estate teams be limited so as to require an associate broker to be a named member of any real estate team. After consideration, however, it was determined that this proposal could foster the false impression that a team is a separate real estate office and not under the guidance and supervision of the representative broker.

The Department of State also considered requiring real estate teams to immediately comply with all of the regulations upon adoption. In consultation with the New York State Real Estate Board and regulated parties, however, it was determined that some real estate licensees have developed a client base and business reputation under a particular team name that will be prohibited by the proposed regulations. To permit these licensees to acquaint the public with the new team name, it was decided that real estate teams may, for a one-year period following the adoption of the rule, continue to place advertisements indicating that they were 'formerly known' as the old team name.

Another alternative considered was to require certain content in all advertisements, such as the license category of the real estate licensee and the address of his or her broker. After consultation with the board and trade associations, however, it was determined that this content was not necessary in all advertisements and that for certain types, such as classified advertisements, an abbreviated form of advertising should be allowed so as to minimize advertising costs.

9. Federal standards:

There are no federal standards regulating the registration of real estate licensees. Consequently, this rule does not exceed any existing federal standard.

10. Compliance schedule:

The Department of State intends the proposed rule making to be effective ninety (90) days after adoption to afford time to notify licensees that the rule has been adopted and provide them with adequate time to bring existing advertisements into compliance. Given the extensive outreach to the regulated public and efforts to include the two largest trade groups (NYSAR and REBNY) in the rule development, licensees will have had adequate notice of the proposed regulation. As such, the Department of State is not providing for a cure period prior to enforcement of these regulations.

Regulatory Flexibility Analysis

1. Effect of rule:

The rule will apply to real estate brokers and salespeople ("real estate licensees") who are licensed pursuant to Article 12-A of the Real Property Law. The Department of State (the "Department") currently licenses 108,896 real estate licensees, many of whom work for small businesses.

The rule does not apply to local governments.

2. Compliance requirements:

The proposed rule making does not impose any reporting or recordkeeping requirements on real estate licensees. All real estate licensees, however, will be required to comply with the proposed rule making in the event that it is adopted as regulation. Real estate licensees are not required to advertise their services. If they do so, however, the content of said advertisements will need to conform with the requirements and limitations of the proposed rule making.

3. Professional services:

Real estate licensees will not need to rely on professional services to comply with the requirements of the proposed rule, which merely limits and prescribes the content of advertisements. To place advertisements, however, real estate licensees will need to contact and work with the source of the advertisement, be it a newspaper, billboard, internet provider or other source, to arrange for the placement of the advertisement.

4. Compliance costs:

The proposed rule making may, but will not necessarily, impose costs on those real estate licensees who place advertisements that contain the information required by the proposed regulations. Advertising costs vary based on method and location.

Print advertising rates range from approximately $8.00 to $289 for a column inch of black and white advertising space. The cost of advertising in the classified section of a newspaper varies based on the frequency of the advertisement and whether the advertisement is placed in the daily or Sunday newspaper. These advertising rates range from approximately $9.00 to $21.00. The estimated cost of a radio ad is $50 for a 30 second radio spot. Internet advertising rates vary from free to $500 per month based on the website, size and type of the advertisement placed. Other websites charge based on the number of real estate advertisements. Craigslist.org, a website that is commonly used by real estate licensees, charges a fee of $10 per real estate ad in New York City and allows free posting on backpage.com. Billboard advertising rates vary from approximately $400 to $12,750 per month.

5. Economic and technological feasibility:

The Department has determined that it will be economically and technologically feasible for small businesses to comply with the proposed rule. The limitations and requirements of the content of advertisements that would be imposed by the proposed rule making will not increase the costs of advertising. The costs of placing advertisements that are compliant with the proposed regulations are the same as placing advertisements that do not comply with the rule. As such, it will be economically feasible for small businesses to comply with the proposed rule.

It will also be technologically feasible for small businesses to comply with the proposed rule. The proposed rule making better defines 'false and dishonest advertising' by offering simple and easy to follow guidance on the content of advertisements. Real estate licensees, including those working for small businesses, will not have to rely on special technology to conform the content of their advertisements to the requirements of the proposed rule making.

6. Minimizing adverse economic impact:

The Department of State has not identified any adverse economic impact of this rule. The rule does not impose any additional reporting or recordkeeping requirements on real estate licensees and does not require licensees to take any affirmative acts to comply with the rule other than conforming the content of any advertisements which they choose to place with the requirements of the proposed rule making.

While communicating with the regulated public about the proposed rule, the Department of State was informed that requiring real estate teams to change their names immediately upon adoption of the rule could negatively impact these teams. It was explained that real estate teams may have developed a business reputation under an old team name that will need to be changed so as to comply with the proposed rule making. So as to minimize any adverse economic impact on these licensees, the Department of State is allowing a one-year grace period, during which time real estate teams may indicate in their advertisements that they were 'formerly known as' the old team name.

7. Small business participation:

Prior to proposing the rule, the Department of State discussed the proposal at several public meetings of the New York State Board of Real Estate, the minutes of which were posted on the Department's website. The Department of State also worked closely with the two largest trade associations of real estate licensees (NYSAR and REBNY) in drafting the proposed rule making. These trade associations represent real estate licensees throughout the State, including those who work for small businesses. The Department of State will continue its outreach after the rule is formally proposed as a Notice of Proposed Rule Making in the State Register. The publication of the rule in the State Register will provide additional notice to small businesses. Additional comments will be received and entertained by the Department.

8. Cure period:

The Department of State is not providing for a cure period prior to enforcement of these regulations. The proposed rule making will be effective ninety (90) days after adoption, which the Department of State deems sufficient time to notify licensees that the rule has been adopted and to provide licensees with adequate time to bring existing advertisements into compliance. Prior to proposing this rule, the Department conducted extensive outreach to regulated parties including involving the two largest trade groups (NYSAR and REBNY) in the rule development. As such, licensees will have adequate notice of the proposed regulation.

Rural Area Flexibility Analysis

1. Effect of the rule:

The rule will apply to real estate brokers and salespeople ("real estate licensees") who are licensed pursuant to Article 12-A of the Real Property Law. The Department of State (the "Department") currently licenses 108,896 real estate licensees, many of whom live and work in rural areas.

2. Compliance requirements:

The proposed rule making does not impose any reporting or recordkeeping requirements on real estate licensees. All real estate licensees, however, will be required to comply with the proposed rule making in the event that it is adopted as regulation. Real estate licensees are not required to advertise their services. If they do so, however, the content of said advertisements will need to conform with the requirements and limitations of the proposed rule making.

3. Professional services:

Real estate licensees will not need to rely on professional services to comply with the requirements of the proposed rule, which limits and prescribes the content of advertisements. To place advertisements, however, real estate licensees will need to contact and work with the source of the advertisement, be it a newspaper, billboard, website or other source, to arrange for the placement of the advertisement.

4. Compliance costs:

The proposed rule making will impose costs on those real estate licensees who choose to place advertisements only to the extent that the text of any existing advertisements has to be changed in order to comply with the proposed regulations. Advertising costs vary based on method and location, with costs in rural areas generally being lower than in urban locations.

Print advertising rates range from approximately $8.00 to $289 for a column inch of black and white advertising space. The cost of advertising in the classified section of a newspaper varies based on the frequency of the advertisement and whether the advertisement is placed in the daily or Sunday newspaper. These advertising rates range from approximately $9.00 to $21.00. The estimated cost of a radio ad is $50 for a 30 second radio spot. Internet advertising rates vary from free to $500 per month based on the website, size and type of the advertisement placed. Other websites charge based on the number of real estate advertisements. Craigslist.org, a website that is commonly used by real estate licensees, charges a fee of $10 per real estate ad in New York City and allows free posting on backpage.com. Billboard advertising rates vary from approximately $400 to $12,750 per month.

5. Minimizing adverse economic impacts:

The Department of State did not identify any adverse economic impacts of the proposed rule to residents of rural areas. The rule does not impose any additional reporting or recordkeeping requirements on real estate licensees and does not require licensees to take any affirmative acts to comply with the rule other than possibly having to conform the content of any advertisements, which they choose to place, to the requirements of the proposed rule making.

While communicating with the regulated public about the proposed rule, the Department of State was informed that requiring real estate teams to change their names immediately upon adoption of the rule could negatively impact teams with established names. It was explained that real estate teams may have developed a business reputation under a team name that may need to be changed so as to comply with the proposed rule making. So as to minimize any adverse economic impact on any such licensees, the Department of State is allowing a one-year grace period, during which time real estate teams may indicate in their advertisements that they were 'formerly known as' the old team name.

6. Rural area participation:

Prior to proposing the rule, the Department of State discussed the proposal at several public meetings of the New York State Board of Real Estate. These meetings were web-cast live, over the Internet, and a tape and minutes of the meetings were posted on the Department's website so as to be available to residents of all areas of the State. The Department of State also worked closely with the two largest trade associations of real estate licensees (NYSAR and REBNY) in drafting the proposed rule making. These trade associations represent real estate licensees throughout the State, including those who live and work in rural areas. The Department of State will also continue its outreach after the rule is formally proposed as a Notice of Proposed Rule Making in the State Register. The publication of the rule in the State Register will provide additional notice to residents of rural areas. Additional comments will be received and entertained by the Department.

Job Impact Statement

The Department of State has determined that the rule will have no impact on jobs and employment opportunities for real estate salespersons and brokers ("real estate licensees"). As such, a job impact statement is not required.

The purpose of the proposed rule making is to update existing advertising regulations to more accurately reflect current advertising trends and to incorporate agency findings of what constitutes false and misleading advertising pursuant to section 441-c of the Real Property Law. The rule places limitations on real estate advertising but does not impose any requirements or prohibitions that would impact the availability of jobs for real estate licensees. By better defining "false and misleading advertising," the proposed rule making merely provides guidance to real estate licensees and protects consumers from false and misleading advertising.

Urban Development Corporation

EMERGENCY RULE MAKING

Bonding Guarantee Assistance Program

I.D. No. UDC-43-12-00002-E

Filing No. 1001

Filing Date: 2012-10-05

Effective Date: 2012-10-05

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

Action taken: Addition of Part 4253 to Title 21 NYCRR.

Statutory authority: Urban Development Corporation Act, section 5(4); L. 1994, ch. 169, section 16-f; and L. 1968, ch. 174

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

Specific reasons underlying the finding of necessity: The current economic crisis, including high unemployment and the immediate lack of capital for job generating small business, are the reasons for the emergency adoption of this Rule which is required for the immediate implementation of the Bonding Guarantee Assistance Program. The Program will provide surety companies the additional financial backing needed in order to induce such companies to issue payment and performance bonds for contractors that are small businesses, certified minority-owned enterprises or women-owned business enterprises, in order for such contractors to meet payment and performance bonding requirements for construction projects, including but not limited to, government sponsored, transportation related construction projects and to provide technical assistance in completing bonding applications for such contractors seeking surety bonding in preparation for bidding on construction projects, including transportation related projects. This assistance will sustain and increase employment generated by these businesses.

Subject: Bonding Guarantee Assistance Program.

Purpose: Provide the basis for administration of the Bonding Guarantee Assistance Program.

Substance of emergency rule: The Bonding Guarantee Assistance Program (the ''Program'') was created pursuant to Chapter 169 of the Laws of 1994 (the ''Enabling Legislation''). The general purpose of the Program is to improve the economy of New York by providing small businesses greater access to surety bonds required to participate in the construction industry.

The Enabling Legislation creates Section 16-f of the New York State Urban Development Corporation Act (the ''UDC Act'') which governs the Program. The Enabling Legislation requires the New York State Urban Development Corporation d/b/a Empire State Development (the ''Corporation'') to promulgate rules and regulations for the Program (the ''Rules'') in accordance with the provisions of the State Administrative Procedure Act. The Rules set forth the framework for the eligibility, evaluation criteria, application and project process and administrative procedures of the Program.

1. Program Assistance:

(a) Provide eligible surety companies the additional financial backing needed in order to induce such companies to issue bid, payment and performance bonds for eligible contractors that are small businesses, as defined in the Rule, and certified, pursuant to article fifteen-A of the Executive Law, eligible minority-owned business enterprises or eligible women-owned business enterprises, in order for such contractors to meet bid, payment and performance bonding requirements for construction projects, including but not limited to, government sponsored, transportation related construction projects; and

(b) Provide technical assistance in completing bonding applications for such contractors seeking surety bonding in preparation for bidding on construction projects, including transportation related projects. The Corporation may refer such businesses to various business service providers or the Department of Economic Development for technical assistance as such businesses may need.

(c) Program assistance is limited to the financial backing necessary to secure bid bonds, performance bonds, and payment bonds issued in connection with contract bids or awards. Such Program assistance shall be in such form as the Corporation may determine, and may include irrevocable standby letters of credits issued to a surety company by a financial institution for the account of the Corporation in connection with the surety company providing such bonds on behalf of a Program eligible contractor with respect to a contract. The amount of such Program assistance provided to a surety company with respect to each contract shall generally not be greater than the amount necessary to induce such surety company to issue the bonds required for the contract, and in no event shall exceed fifty percent of the face value of bonds to be issued by the surety company for such contract. Generally, a surety company may not receive Program assistance for more than two contracts for the same contractor at the same time.

2. Program Administration:

(a) In order for a Surety Company to participate in the Program, the surety company shall enter into a Program participation agreement with the Corporation in such form as the Corporation may prescribe.

(b) The Corporation shall conduct the oversight and management of the Program, and the Corporation may engage an agent for administration and implementation of the Program.

(c) The Corporation may contract with one or more financial institutions in order that such financial institution will provide to surety companies, as additional financial backing Program assistance, letters of credit or other guarantees for the account of the Corporation.

(d) The Corporation or the agent shall evaluate applications for Program assistance and make determinations as to business creditworthiness and whether to provide the requested additional financial backing Program assistance.

(e) The Corporation or the agent shall prepare annual reports for the Program.

3. Fees:

A participating Surety company may charge application fees, commitment fees, bonding premiums and other reasonable fees and expenses pursuant to a schedule of fees and expenses adopted by the surety company and approved in writing by the Corporation. The Corporation may require a contractor participating in the Program to pay the Corporation for its out-of-pocket costs in connection with the Program assistance for the contractor, including, without limiting the foregoing, the costs with respect to letter of credit and other guarantees to be provided to a surety company in connection with bonds for such contractor's contract.

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires January 2, 2013.

Text of rule and any required statements and analyses may be obtained from: Antovk Pidedjian, Sr. Counsel, New York Urban Development Corporation, 633 Third Avenue, 37th Floor, New York, NY 10017, (212) 803-3792, email: apidedjian@esd.ny.gov

Regulatory Impact Statement

1. Statutory Authority: Section 9-c of the New York State Urban Development Corporation Act Chapter 174 of the Laws of 1968 (Uncon. Laws section 6259-c), as amended (the ''Act''), provides, in part, that the Corporation shall, assisted by the Commissioner of Economic Development and in consultation with the Department of Economic Development, promulgate rules and regulations in accordance with the State Administrative Procedure Act.

Section 16-f of the Act provides for the creation of the Bonding Guarantee Assistance Program (the ''Program'') and authorizes the New York State Urban Development Corporation d/b/a Empire State Development (the ''Corporation''), within available appropriations, to provide small businesses and minority and women-owned business enterprises the additional financial backing needed in order to induce surety companies to issue payment and performance bonds necessary for such contractors to meet payment and performance bonding requirements for construction projects, including but not limited to, government sponsored, transportation related construction projects and to provide technical assistance in completing bonding applications for such contractors seeking surety bonding in preparation for bidding on construction projects, including transportation related projects.

2. Legislative Objectives: Section 16-f of the Act (Uncon. Laws section 6266-f, added by Chapter 169 of the Laws of 1994) sets forth the Legislative objective of authorizing the Corporation, within available appropriations, to provide the assistance described above. The adoption of 21 NYCRR Part 4253 will further these goals by setting forth the types of available assistance, evaluation criteria, the application process and related matters for the Program.

3. Needs and Benefits: The State has allocated $10,405,173.00 of Federal funds for this program. The Bond Guarantee Assistance Program will provide assistance to New York's eligible small businesses, minority-owned business enterprises and women-owned business enterprises, in order to provide the collateral support necessary to secure surety bonds. These businesses have been determined to be a major source of employment throughout New York State. These businesses have historically had difficulties obtaining financing or refinancing in order to remain competitive and grow their operations, and the current economic difficulties have exacerbated this problem. Providing assistance to these businesses should sustain and potentially increase the employment provided by such businesses, especially during this period of historically high unemployment and underemployment. The rule defines eligible and ineligible businesses and eligible uses of the assistance and other criteria to be applied to qualify small businesses for the collateral support.

4. Costs: The Program is funded by a State appropriation in the amount of $10,405,173.00 dollars. Pursuant to the rule, the amount of such assistance provided to a surety company with respect to each contract shall not be greater than the amount necessary to induce such surety company to issue the bonds required for the contract, and in no event shall exceed fifty percent of the face value of bonds to be issued by the surety company for such contract. The costs to a participating surety company would depend on the extent to which they participate in the Program and their effectiveness and efficiency providing assistance.

5. Paperwork / Reporting: There are no additional reporting or paperwork requirements as a result of this rule for Program participants except those required by the statute creating the Program such as an annual report on the organization's lending activity and providing information in connection with an audit by the Corporation with respect to the organization's use of Program funds. Standard applications and documents used for most other assistance by the Corporation will be employed in keeping with the Corporation's overall effort to facilitate the application process for all of the Corporation's clients.

6. Local Government Mandates: The Program imposes no mandates - program, service, duty, or responsibility - upon any city, county, town, village, school district or other special district.

7. Duplication: The regulations do not duplicate any existing state or federal rule.

8. Alternatives: While surety companies already provide business credit through surety bonding, access to such credit remains difficult to obtain for contractors that are small businesses and/or certified minority-owned enterprises or women-owned business enterprises. The State has established the Program in order to enhance the access of such businesses to such credit, and the proposed rule provides the regulatory basis for inducing surety companies to provide credit for contractors that are small businesses and/or certified minority-owned enterprises or women-owned business enterprises.

9. Federal Standards: There are no minimum federal standards related to this regulation. The regulation is not inconsistent with any federal standards or requirements.

10. Compliance Schedule: The regulation shall take effect immediately upon adoption.

Regulatory Flexibility Analysis

a) Effects of Rule: In the rule: ''Small business'' is defined as a business that is resident and authorized to do business in the State, independently owned and operated, not dominant in its field, and employs one hundred or fewer persons on a full time basis; ''Women owned Business Enterprise'' is defined as a business enterprise, including a sole proprietorship, partnership or corporation that is: (i) at least fifty-one percent owned by one or more United States citizens or permanent resident aliens who are women; (ii) an enterprise in which the ownership interest of such women is real, substantial and continuing; (iii) an enterprise in which such women ownership has and exercises the authority to control independently the day-to-day business decisions of the enterprise; (iv)) an enterprise authorized to do business in State and independently owned and operated; (v) an enterprise owned by an individual or individuals, whose ownership, control and operation are relied upon for certification, with a personal net worth that does not exceed three million five hundred thousand dollars, as adjusted annually on the first of January for inflation according to the consumer price index of the previous year; and (vi) an enterprise that is a Small Business, unless the term Women-Owned Business Enterprise is otherwise defined in section 310 of the Executive Law, in which case the definition shall be as set forth for such term in such section; ''Minority-Owned Business Enterprise'' is defined as a business enterprise, including a sole proprietorship, partnership or corporation that is: (i) at least fifty-one percent owned by one or more Minority Group Members; (ii) an enterprise in which such minority ownership is real, substantial and continuing; (iii) an enterprise in which such minority ownership has and exercises the authority to control independently the day-to-day business decisions of the enterprise; (iv) an enterprise authorized to do business in this state and independently owned and operated; (v) an enterprise owned by an individual or individuals, whose ownership, control and operation are relied upon for certification, with a personal net worth that does not exceed three million five hundred thousand dollars, as adjusted annually on the first of January for inflation according to the consumer price index of the previous year; and (vi) an enterprise that is a Small Business, unless the term Minority-Owned Business Enterprise is otherwise defined in section 310 of the Executive Law, in which case the definition shall be as set forth for such term in such section; and ''Surety Company'' is defined as a surety company that has a certificate of solvency from, and its rates approved by, the New York State Department of Financial Services and/ or appears in the most current edition of the U.S. Department of Treasury Circular 570 as eligible to issue bonds in connection with procurement contracts for the United States of America. The rule will facilitate the statutory Program's purpose of having New York State Urban Development Corporation d/b/a Empire State Development (the ''Corporation'') provide assistance to surety companies in order to provide financial backing to eligible small businesses, certified minority-owned business enterprises or certified women-owned business enterprises to secure bid bonds, performance bonds and payment bonds issued in connection with contract bids or awards. The amount of such assistance provided to small businesses and minority and women-owned small businesses with respect to each contract shall not be greater than the amount necessary to induce such surety company to issue the bonds required for the contract, and in no event shall exceed fifty percent of the face value of bonds to be issued by the surety company for such contract.

1. Compliance Requirements: There are no compliance requirements for local governments in these regulations. Small businesses must comply with the compliance requirements applicable to all participating surety companies regardless of size. This is a voluntary program. Companies not wishing to undertake the compliance obligations need not participate.

2. Professional Services: Applicants do not need to obtain professional services to comply with these regulations.

3. Compliance Costs: There are no compliance costs for local governments in these regulations. Small businesses bear no costs, other than the fees imposed by surety companies for the surety bond or by banks for issuing a letter of credit. This program is voluntary. If it is not financially advantageous for a company to participate, then it is not required to do so.

4. Economic and Technological Feasibility: There are no compliance costs for small businesses and local governments in these regulations so there is no basis for determining the economic and technological feasibility for compliance with the rule by small businesses and local governments.

5. Minimizing Adverse Impact: This rule has no adverse impacts on small businesses or local governments because it is designed to provide letters of credit to enhance the ability of small businesses to secure surety bonding.

6. Small Business and Local Government Participation: Small business contractors have repeatedly identified securing surety bonds as a major obstacle to securing government and private contracts.

Rural Area Flexibility Analysis

1. Types and Estimated Numbers of Rural Areas: Surety companies serving all of the 44 counties defined as rural by the Executive Law § 481(7), are eligible to apply for the Bonding Guarantee Assistance Program (the ''Program'') assistance pursuant to a State-wide request for proposals.

2. Reporting, Recordkeeping and Other Compliance Requirements and Professional Services: The rule will not impose any new or additional reporting or recordkeeping requirements other than those that would be required of any surety company receiving similar assistance regarding such matters as financial condition, required matching funds, and utilization of Program funds, and the statutorily required annual report on the use of Program funds; no additional acts will be needed to comply other than the said reporting requirements and the making of surety bonds to small businesses in the normal course of the business for any surety company that receives Program assistance; and, it is not anticipated that applicants will have to secure any additional professional services in order to comply with this rule.

3. Costs: The costs to surety companies that participate in the Program would depend on the extent to which they choose to participate in the Program, including the amount of required matching funds for their surety bonds to small businesses and the administrative costs in connection with such small business surety bonds and the fees, if any, charged to small businesses in connection with surety bonds to such businesses that include Program funds.

4. Minimizing Adverse Impact: The purpose of the Program is to provide surety companies the additional financial backing needed in order to induce such companies to issue payment and performance bonds for contractors that are small businesses, certified minority-owned enterprises or women-owned business enterprises, in order for such contractors to meet payment and performance bonding requirements for construction projects, including but not limited to, government sponsored, transportation related construction projects and to provide technical assistance in completing bonding applications for such contractors seeking surety bonding in preparation for bidding on construction projects, including transportation related projects. This rule provides a basis for cooperation between the State and surety companies, including surety companies that serve rural areas of the State, in order to maximize the Program's effectiveness and minimize any negative impacts for such surety companies and the small businesses, including small businesses located in rural areas of the State that such surety companies serve.

5. Rural Area Participation: This rule maximizes geographic participation by not limiting applicants to those located only in urban areas or only in rural areas. A number of surety companies that engage in underwriting surety bonds to rural and urban small businesses responded to a survey circulated by the Corporation regarding implementation of the Program. Their comments were considered in the rulemaking process.

Job Impact Statement

These regulations will not adversely affect jobs or employment opportunities in New York State. The regulations are intended to improve the economy of New York by providing small businesses greater access to surety bonds required to participate in the construction industry. The Program includes minorities, women and other New Yorkers who have difficulty accessing regular credit markets.

There will be no adverse impact on job opportunities in the state.