

# RULE MAKING ACTIVITIES

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

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

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

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## Office for the Aging

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

#### Limits on Administrative Expenses and Executive Compensation

I.D. No. AGE-22-12-00011-RP

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

**Proposed Action:** Addition of Part 6656 to Title 9 NYCRR.

**Statutory authority:** Elder Law, section 201(3)

**Subject:** Limits on Administrative Expenses and Executive Compensation.

**Purpose:** To implement guidelines regarding placing limitations on Administrative Expenses and Executive Compensation.

**Substance of revised rule:** The State of New York directly or indirectly funds with taxpayer dollars a large number of tax exempt organizations and for-profit entities that provide critical services to New Yorkers in need. The goal of this proposed rule is to ensure that taxpayers' dollars are used properly, efficiently, and effectively to improve the lives of New Yorkers. It is imperative that New York State and the New York State Office for the Aging ensure that state funds and state authorized funds are optimized for the purpose of providing services to those individuals who are in need of them. Utilizing state funds and state authorized funds primarily for the provision of direct care and services helps to guarantee that such funds are providing the greatest benefit to older New Yorkers. These regulations, which are required by Executive Order No. 38, will ensure that State funds or State-authorized payments paid by the New York State Office for the Aging to providers are used predominantly to provide direct care and services to older New Yorkers. In order to achieve these goals, the New York State Office is proposing a new Part 6656.

Section 6656.1 of the regulations sets forth the entities that are covered by the proposed rule.

Section 6656.2 sets forth the definitions that are applicable to the proposed rule.

Section 6656.3 outlines the limits on administrative expenses. Specifically, this section details the percentage of state funds and state authorized funds that must be used to cover program services. This section also details the fact that subcontractors of covered entities are also subject to these proposed regulations. Section 6656.3 also enumerates the fact that the New York State Office for the Aging is responsible for the covered provider's reporting under and compliance with the proposed regulations.

Section 6656.4 details the limits on executive compensation. Subsections (a) and (b) of section 6656.4 outline how executive compensation will be limited and what methods will be used to determine that compensation limit. Subsections 6656.4 (c), (d) and (e) further detail the factors that will be considered when determining the limits on executive compensation.

Section 6656.5 sets forth the factors and procedures under which waiver of the executive compensation limits and waiver of the reimbursement for administrative expenses will be considered. Subsection (c) of section 6656.5 details the procedure to be followed in the event a request for a waiver of the executive compensation limits and/or reimbursement of administrative expenses is denied.

Section 6656.6 enumerates the reporting procedures that must be followed by the covered entities. This section also outlines the potential penalties for the failure to report.

Section 6656.7 provides the procedure for penalizing and the potential penalties for non-compliant covered entities. This section details the steps that will be taken if non-compliance is suspected. These steps include a preliminary determination of non-compliance, a corrective action period, the filing, review and acceptance of a corrective action plan, the ramifications of a failure to cure the non-compliance issues and the appeal procedure.

**Revised rule compared with proposed rule:** Substantial revisions were made in sections 6656.1, 6656.2, 6656.3, 6656.4, 6656.5, 6656.6 and 6656.7.

**Text of revised proposed rule and any required statements and analyses may be obtained from** Stephen Syzdek, Office for the Aging, 2 Empire State Plaza, Albany, NY 12223, (518) 474-5041, email: stephen.syzdek@ofa.state.ny.us

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

**Public comment will be received until:** 30 days after publication of this notice.

#### Revised Regulatory Impact Statement

1. Statutory Authority – Section 201(3) of the New York State Elder Law allows the Director of the New York State Office for the Aging with the advice of the advisory committee for the aging to promulgate, adopt, amend or rescind rules and regulations necessary to carry out the provisions of Article II of the Elder Law.

Governor Cuomo's Executive Order #38 directs each state agency to promulgate regulations to address the extent and nature of administrative costs and executive compensation that providers of NYSOFA programs are reimbursed with State financial assistance or State-authorized payments for operating expenses.

2. Legislative Objectives – It is the objective of the New York State Legislature to ensure that NYSOFA administer programs and utilize program funds in the most effective and efficient manner possible for the benefit of older New Yorkers. This proposed regulation seeks to meet that legislative objective.

3. Needs and Benefits – The New York State Office for the Aging is proposing to adopt the following regulation because the State of New York directly or indirectly funds with taxpayer dollars a large number of tax exempt organizations and for-profit entities that provide critical services to New Yorkers in need and the goal is to ensure that taxpayers' dollars are used properly, efficiently, and effectively to improve the lives of New Yorkers. It is imperative that New York State and the New York

State Office for the Aging ensure that state funds and state authorized funds are optimized for the purpose of providing services to those individuals who are in need of them. Applying state funds and state authorized funds primarily to providing direct care and services helps to guarantee that such funds are providing the greatest benefit to older New Yorkers. These regulations, which are required by Executive Order No. 38, will ensure that State funds or State-authorized payments paid by the New York State Office for the Aging to providers are used predominantly to provide direct care and services to older New Yorkers.

4. Costs – The costs of implementing this rule to affected providers is anticipated to be minimal since most, if not all, of the information that must be reported by such providers is already gathered or reported for other purposes. The costs to the agency of implementation are expected to be very limited as well, and efforts to ensure efficient centralization of certain aspects of such implementation are underway.

5. Paperwork – The proposed regulatory amendments will require limited additional information to be reported to the agency by providers receiving State funds or State-authorized payments. To the extent feasible, such reporting shall be made electronically to avoid unnecessary paperwork costs.

6. Local Government Mandates – The proposed rule does not impose any new program, service, duty or responsibility upon any city, county, town, village, school district or other special district.

7. Duplication – This proposed rule does not duplicate, overlap, or conflict with any State or federal statute or rule. However, the proposed rule seeks to minimize the reporting requirements faced by providers by building upon those requirements in the federal internal revenue code that require certain tax-exempt organizations to report information concerning their executive compensation and administrative costs.

8. Alternatives – Executive Order #38 and Executive Order #43 requires the adoption of this proposed regulation.

9. Federal Standards – This rule does not exceed Federal standards.

10. Compliance Schedule – The rule will become effective upon adoption. The implementation date establishing the limits on administrative expenses and executive compensation will be April 1, 2013.

#### **Revised Regulatory Flexibility Analysis and Rural Area Flexibility Analysis**

The Office for the Aging has determined that changes made to the last published rule do not necessitate revision to the previously published Regulatory Flexibility Analysis and Rural Area Flexibility Analysis.

#### **Revised Job Impact Statement**

The New York State Office for the Aging has determined that this proposed rule will not have a substantial adverse impact on jobs. This proposed rule is designed to address executive compensation and administrative costs of those providers of program services that receive State fund or State-authorized payments paid by the New York State Office for the Aging.

#### **Assessment of Public Comment**

A Notice of Proposed Rule Making was published in the State Register on May 30, 2012.

All comments received were reviewed and evaluated. Many of the concerns expressed in the comments have been addressed by revisions to the various sections of the proposed regulation. Suggestions from others were determined to be contrary to the goals of the proposed rulemaking.

A number of comments objected generally to the underlying concept of the regulations, stating that the proposed regulation is overly broad in its authority and burdensome in its requirements. The Office for the Aging believes that the proposed limitations in the regulation further the legitimate goal of ensuring that public funds are properly expended and the use of such funds is properly monitored.

Clarification was requested concerning certain defined terms in the proposed regulation, in particular with respect to their intended scope. In response, and taking into account suggestions submitted, changes were made to the definitions of the following terms: administrative expenses, covered provider, covered executive, executive compensation, program services expenses, related entity, State-authorized payments and State funds.

Some commenters stated that the proposed limits on administrative expenses were burdensome and unnecessary, because they would interfere with existing contracts, because they were possibly duplicative of existing state and federal rules, or they will not enhance the protections already provided by restrictions from State reimbursement rates. Clarification was requested as to what will constitute administrative and program expenses. The proposed regulation has been revised to incorporate an allocation methodology for these two expenses.

There were a wide range of comments and suggestions on the definition of “executive compensation.” They covered such topics as: (a) general concerns about application of the definition, (b) exclusions, (c) limitations

and application of the definition, and (d) suggestions about surveys and their use. A summary of the comments and suggestions follows:

(a) General concerns regarding the regulation include that it: is too broad since it regulates use of funding sources not emanating from the state; is unrealistic, problematic and intrusive to operations; will adversely affect candidate pools, incumbents, service delivery and the ability of providers to meet the challenges and changes in the health care system; is intrusive to the for-profit sector where executive compensation is a private matter; is faulty in that it will institutionalize abuses through comparability data; and is duplicative as executive compensation is already controlled at the State and federal levels through rate setting, IRS rules and reporting, and the Not-For-Profit Corporation Law. Other comments stated that the regulation would encroach on the State Attorney General’s regulation and enforcement; is arbitrary in its establishment of the thresholds of \$500,000 and 30%; was exclusive of larger corporations; and inappropriately used a percentile standard that will gradually diminish compensation levels and lead to the existence of two levels of compensation. Commenters also suggested that covered providers subject to penalty should be allowed to submit documentation in advance of penalty review.

(b) Other comments focused on exclusions for not-for-profits and for not-for-profit long term care and senior services providers and an elimination of the 75th percentile threshold.

(c) Still other letters related to limitations and application of the definition of “executive compensation.” They suggested that executive compensation rules should only be applied to non-State funds or to State and State-authorized funds. The applicability of the rules with regard to contributions of other non-covered entities should be clarified. Also, letters received argued that the period covered by the limits on executive compensation should not begin on January 1, 2013, the executive compensation limits should be revisited periodically to adjust for changes, and the role of executives in the assurance of program services should be recognized.

(d) Commenters recommended several approaches to determining reasonable compensation, such as the use of recognized surveys or independent commissioned surveys or identification and recognition of specific compensation surveys to establish comparisons. It was suggested that surveys should allow for regional and geographic variations. Further, commenters suggested that the regulation also should address instances where a board or governing body does not exist.

The regulation was revised to address the comments on: the period to be covered by the limits on executive compensation, an annual review of the \$199,000 cap and the adjustment thereof, the consideration of the availability of a governing body as alternate to the covered provider’s board of directors, the submission of contemporaneous (but not prospective) documentation for penalty review, the recognition of supervisory services of executives as program services, the allocation methodology for reporting administrative and program service costs, the recognition of specific clinical and program personnel as providers of program services, and a method for subcontractors to be advised of the receipt of State or State-authorized funds from a covered provider.

The regulation was not revised to limit the rule to non-State funds, to exclude for-profits from being covered by the regulations, or to alter the 75th percentile threshold because these revisions would compromise the goal of the regulation. Eliminating the executive compensation requirements would eviscerate one of the key objectives of the executive order: limiting the extent of such compensation paid by covered providers that rely to a significant degree upon public funds for their program and administrative services funding. The Office for the Aging is proposing to adopt this regulation because the State of New York directly or indirectly funds with taxpayer dollars a large number of tax exempt organizations and for-profit entities that provide critical services to New Yorkers in need, and the goal is to ensure that taxpayer dollars are used properly, efficiently and effectively to improve the lives of New Yorkers. In certain instances, service providers that receive State funds or State-authorized payments have used such funds to pay for excessive administrative costs or inflated compensation for their senior executives, rather than devoting a greater proportion of such funds to providing direct care or services to their clients. Such abuses involving public funds harm both the people of New York who are paying for such services and those persons who must depend upon such services to be available and well-funded. These regulations provide a benchmark to ensure that State funds or State-authorized payments paid by this agency to providers are not used to support excessive compensation or unnecessary administrative costs. In part because of the funding of resources, their restriction is necessary to accomplish these objectives.

Some comments stated that the proposed waiver process is overly complex and lacking objective criteria. The revised regulation provides greater flexibility in the filing of a waiver application and also has pushed back the implementation date.

Comments received also criticized the proposed reporting requirements suggesting that they require providing information related to administrative and program expenses in a manner inconsistent with other current reporting obligations. The regulation has been amended to conform some of the requirements to those with which many covered providers must already comply, including provisions incorporating the definitions applicable with non-profits under the IRS Code.

Other submissions asked when penalties for excess compensation would be assessed, what the type of penalties would be imposed, and about the level of severity.

Commenters also requested details on the criteria for making penalty determination.

Changes have been made to the Penalties section in the revised text, including extending the time for submissions, a corrective action plan (CAP) and a request for an administrative appeal to 30 calendar days.

The full Assessment of Comments is available on the Office for the Aging website at [www.aging.ny.gov](http://www.aging.ny.gov)

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## Department of Agriculture and Markets

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

#### Compliance with Executive Order No. 38 of 2012

**I.D. No.** AAM-22-12-00013-RP

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

**Proposed Action:** Addition of Part 400 to Title 1 NYCRR.

**Statutory authority:** Agriculture and Markets Law, section 18

**Subject:** Compliance with Executive Order No. 38 of 2012.

**Purpose:** To limit administrative costs and executive compensation to ensure that services to New Yorkers are available and well-funded.

**Summary of revised rule:** The revised rule would add a new Part 400 to 1 NYCRR titled Limits on Administrative Expenses and Executive Compensation.

Section 400.1 provides the background and intent of the revised rule, which is to implement Executive Order No. 38, issued by Governor Andrew Cuomo on January 18, 2012.

Section 400.2 sets forth the statutory authority for the promulgation of the rule by the New York State Department of Agriculture and Markets (hereinafter the "Office").

Section 400.3 contains definitions for purposes of this Part, including definitions for administrative expenses, covered operating expenses, covered executive, covered provider, executive compensation, Office, program services, program services expenses, related organization, reporting period, State-authorized payments, and State funds.

Section 400.4 Limits on Administrative Expenses. Contains limits on the use of State funds or State-authorized payments for administrative expenses.

The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria.

The restriction will apply to covered providers receiving State funds or State-authorized payments from county or local governments, rather than directly from a State agency, pursuant to specified criteria.

The regulation addresses how the restriction will apply in the event that a covered provider has multiple sources of State funds or State-authorized payments.

Section 400.5 Limits Executive Compensation. Contains restrictions on executive compensation provided to covered executives.

The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria.

The restriction will apply to covered providers receiving State funds or State-authorized payments from county or local governments, rather than directly from a State agency, pursuant to specified criteria.

The revised rule addresses the application of this limit if the covered provider has multiple sources of State funds or State-authorized payments.

Section 400.6 Waivers. Processes are established for covered providers to seek waivers of the limit on administrative expenses and the limits on executive compensation.

Section 400.7 Reporting by Covered Providers. Covered providers are required to report information on an annual basis.

Section 400.8 Penalties. A process is established for the imposition of penalties in the event of non-compliance with the limit on administrative expenses or the limits on executive compensation.

A copy of the full text of the regulatory proposal is available on the New York State Department of Agriculture website, <http://www.agriculture.ny.gov/>

**Revised rule compared with proposed rule:** Substantial revisions were made in sections 400.1, 400.2, 400.3, 400.4, 400.5, 400.6, 400.7 and 400.8.

**Text of revised proposed rule and any required statements and analyses may be obtained from** Frederick B. Arnold, Esq., NYS Department of Agriculture and Markets, 10B Airline Drive, Albany, NY 12235, (518) 457-2449, email: [rick.arnold@agriculture.ny.gov](mailto:rick.arnold@agriculture.ny.gov)

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

**Public comment will be received until:** 30 days after publication of this notice.

#### Revised Regulatory Impact Statement

##### 1. Statutory authority:

Section 18 of the Agriculture and Markets Law provides, in part, that the Commissioner may enact, amend and repeal necessary rules which shall regulate and control the transaction of business by the Department and provide generally for the exercise of the powers and performance of the duties of the Department as prescribed in the Agriculture and Markets Law and the laws of the State and for the enforcement of their provisions and the provisions of the rules that have been enacted.

##### 2. Legislative objectives:

The statutory provision pursuant to which these regulations are proposed is intended to authorize the Department to promulgate rules necessary to properly exercise its powers and duties.

##### 3. Needs and benefits:

The proposed amendments implement the requirements set forth in Executive Order #38, which states that New York State directly or indirectly funds or authorizes reimbursements with other taxpayer dollars to contractors that provide critical services to New Yorkers in need; and expresses concern that such monies are being used for excessive administrative costs and executive compensation. The Executive Order directs that State agencies, including the Department, promulgate regulations to prevent excessive payment of taxpayer dollars for administrative expenses and executive compensation for these contractors.

The proposed regulations restrict administrative expenses for contractors to 25 percent and eventually 15 percent of the State's financial assistance or State-authorized payments. The proposed regulations also limit the annual compensation paid from State financial assistance or State-authorized payments to executives of contractors to \$199,000. The regulations provide that contractors may make an application to the Department for a waiver of these requirements. Recordkeeping requirements are also included in the proposal to ensure compliance with these requirements. Finally, the proposed regulations set forth measures in response to failure to comply with these requirements.

The proposed amendments benefit the State by ensuring that the most State and taxpayer monies possible are allocated to delivery of services to the people of the State rather than to excessive funding for administrative costs and executive compensation. The proposed amendments also benefit the people of the State by not only ensuring the proper, efficient and effective use of taxpayer dollars, but also ensuring that those taxpayer dollars are used, to the extent possible, to help New Yorkers in need.

##### 4. Costs:

(a) Costs to private regulated parties: Contractors would incur minimal costs in complying with the reporting requirements in the rule since most, if not all, of the information to be reported is likely already collected or reported by the contractor for other purposes. Contractors would be limited in the dollar amounts they could allocate from State contracts for their administrative costs and executive compensation. However, the overall State funding award amounts would not decrease.

(b) Costs to the Department, State and local governments: The cost to the Department is expected to be minimal and consist, in part, of developing a reporting form. The State and local governments will not incur any expenses.

(c) The cost analysis is based upon the requirements for agencies in the proposal.

##### 5. Local government mandate:

None.

##### 6. Paperwork:

Contractors would need to complete and file a reporting form, and a waiver application as needed. To the extent feasible, such reporting will be made electronically to avoid unnecessary paperwork costs.

##### 7. Duplication:

This proposed rule does not duplicate, overlap, or conflict with any State or federal statute or rule. However, the proposed rule seeks to minimize the reporting requirements faced by providers by building upon those

requirements in the federal internal revenue code that require certain tax-exempt organizations to report information concerning their executive compensation and administrative costs.

8. Alternatives:

Since Executive Order #38 of 2012 directs State agencies to promulgate this regulation, there is no alternative to proposing this rule.

9. Federal standards:

These amendments do not conflict with federal standards.

10. Compliance schedule:

This rule takes effect April 1, 2013.

**Revised Regulatory Flexibility Analysis**

Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this notice because the proposed rule will not impose any adverse economic impact on small businesses, nor will it impose new reporting, recordkeeping or other compliance requirements on small businesses or local governments.

**Revised Rural Area Flexibility Analysis**

A Rural Area Flexibility Analysis is not being submitted with this notice because the proposed rule will not impose any adverse economic impact on rural areas.

**Revised Job Impact Statement**

A Job Impact Statement is not being submitted with this notice because it is evident from the subject matter of the regulation that it will have no impact on jobs and employment opportunities.

**Assessment of Public Comment**

A Notice of Proposed Rule Making was published in the State Register on May 30, 2012. The New York State Department of Agriculture and Markets received several sets of comments during the public comment period associated with the proposed rulemaking. The issues and concerns raised in these comments are set forth below. Where more than one commenter raised the same issue or concern, the number of such commenters is noted. Issues and concerns have been grouped according to the part of the proposed rule they address because they are related or for convenience in providing an efficient response. The New York State Department of Agriculture and Markets response is provided for each issue or concern.

1 NYCRR Part 400

Section 400.3 Applicability

**Issue/Concern:** Through the Executive Order, the Governor has contravened the will of the State Legislature which has already specifically rejected the same proposal that the Governor made through the Executive Order to limit compensation during budget negotiations.

**Response:** The Legislature did not reject the proposal made in Executive Order #38. Rather, the Governor's Office chose to proceed by regulation in part to ensure that the rules developed in this area could be monitored and revised as necessary over time.

**Issue/Concern:** The Proposed Rule is inconsistent with or contradicts rules issued by other agencies in terms of limits, definitions and goals. Keeping track of the rules promulgated under this Order, as well as the rules issued by the IRS, the federal government, and others, will be an administrative expense that will have to be absorbed by the very organizations regulated by the Executive Order.

**Response:** The participating agencies are developing with the Division of the Budget a stream-lined reporting system that will be operational prior to the effective date of the regulation to ensure that the burden of reporting the information required by these regulations will be minimal.

**Issue/Concern:** Pursuant to SAPA, a State agency must engage in both a Regulatory Flexibility Analysis for Small Business and Local Government and a Job Impact Analysis.

**Response:** These impacts were considered extensively in the development of the regulation. With respect to small businesses in particular, the thresholds in the regulations were expressly developed to exclude from coverage providers that are small businesses and organizations.

**Issue/Concern:** It is expected that the 75th percentile/board approval test could serve as a default waiver for entities that pay executive compensation in excess of the Executive Order's standard, which is only applicable to compensation derived from state proceeds. However, the proposed rule applies this test to compensation from all sources of revenues. Regulations cannot exceed the underlying grant of regulatory authority. As such, this 75th percentile/board approval test should be amended to provide an alternative compliance test for compensation derived from state payments, or it should be stricken from the rule prior to adoption.

**Response:** The regulations are fully within the agency's regulatory authority. The compensation requirements are applicable solely to those providers whose activities are heavily funded by the State or by State-approved funds and, in many cases, pursuant to agreements with the State or local government. As a result, the State's interest in regulating their operations is substantial and the regulations are narrowly tailored to cover only such providers.

**Issue/Concern:** Nonprofit organizations are already subject to New York Attorney General oversight as well as Internal Revenue Service ("IRS") regulations. Annual reports to the IRS (Form 990 Part VI) are required to contain not only salary data for top staff but also to provide a description of how executive compensation is established. Payments through municipal or county contracts should not be considered for purposes of determining whether provider is covered. Funds awarded or granted by county or local governmental units should be excluded from the definitions of Covered Provider, State-Authorized Payments and State Funds. The regulations should cover only State-Authorized Payments.

**Response:** The regulations cover those funds that flow through a county or local government but which are either State funds or State-authorized funds. The regulations would not adequately address the targeted problems if only providers that contracted directly with a State agency were covered, and would create inequities among providers depending upon whether their funding was received directly or indirectly from the State.

**Issue/Concern:** We recommend deleting the Applicability section because it provides a partial description of its criteria and employs terms whose meaning is unclear and potentially misleading.

**Response:** This section has been deleted.

**Issue/Concern:** Public companies that are subject to the requirements of the Securities and Exchange Commission having to do with executive compensation disclosures and shareholder advisory votes on executive compensation should be exempt from the executive compensation provisions of the Executive Order.

**Response:** The disclosure and shareholder advisory vote requirements applicable to public companies are complementary but not duplicative of the requirements of Executive Order 38. Accordingly, such an exemption is not appropriate.

Section 400.4 (renumbered section 400.3) Definitions

Many commenters requested clarification of and changes in a variety of the definitions in the text, particularly administrative expenses, covered operating expenses, covered executive, covered provider, executive compensation, program services, program services expenses and related entity, State-authorized payments and State funds. Most of these definitions have been changed to reflect suggestions received during the public comment period and to address concerns expressed by providers or by their representatives.

**Issue/Concern:** With the new cap on administrative expenses, it is important to clearly define administrative costs as distinct from program costs and consider existing rate systems when doing so.

**Response:** The New York State Department of Agriculture and Markets agrees with this suggestion. The definition of administrative expenses has been developed with these considerations in mind.

**Issue/Concern:** Clarifying the definition of Covered Provider to be as clear as possible will facilitate compliance by those subject to the regulations. The lack of clarity in the definition of Covered Provider and the inclusion in the definition of funds administered through municipal and county governmental units is problematic.

**Response:** The New York State Department of Agriculture and Markets agrees with these comments. The definition of covered provider has been amended to address this concern.

**Issue/Concern:** The scope of the definition of covered providers should be narrowed by deleting the reference to state revenues, excluding State Funds (allow only State-authorized payments) and excluding funds administered through municipal or county contracts.

**Response:** The section of the regulation that identifies types of providers that shall not be considered covered providers has been amended to include several new types of providers.

**Issue/Concern:** Inclusion of funds administered through municipal and county governmental units are problematic because it would intrude on the contracting authority and unnecessarily burden such governmental units. Municipal and county governmental units have their own oversight processes for municipal and county contracts. Requiring such contracts to be subject to the Regulations would be duplicative and confusing.

**Response:** The New York State Department of Agriculture and Markets disagrees. The proposed regulation requires the New York State Department of Agriculture and Markets to be responsible for ensuring the necessary reporting and compliance by such covered providers, and shall issue guidance to affected county and local governments setting forth the procedures by which the New York State Department of Agriculture and Markets or its designee shall do so. Accordingly, the proposed regulation expressly clarifies that it does not impose a new enforcement obligation upon county or local governments.

Section 400.6 (renumbered section 400.5) Limits on executive compensation

**Issue/Concern:** The regulation is confusing on whether all three conditions must apply for determining compensation of a covered executive.

**Response:** The requirements regarding executive compensation have been amended to clarify their scope.

Issue/Concern: Covered executives from related entities may be outside of NY.

Response: The scope of coverage of executives in related organizations has been clarified and further limited.

Issue/Concern: The definition of what constitutes State funds or State-authorized funds should be clarified.

Response: There have been clarifying changes made to both of these terms in the revised text.

Issue/Concern: The definition of "compensation" should include only base salary, bonus, and similar incentive payments that are provided to an employee in return for services rendered and should not include dividends or any form of profit allocations or distributions to an individual by virtue of being an equity owner in a for-profit corporation.

Response: The definition of Executive Compensation has been amended to exclude certain distributions based upon comments received.

Issue/Concern: The terms "parent" and "subsidiary" are not defined for related entities.

Response: The term has been changed from "related entity" to "related organization" and has been defined using the definition of the same term in Schedule R of the Internal Revenue Service's Form 990, except that for purposes of this regulation, a related organization must have received or be anticipated to receive State funds or State-authorized payments from a covered provider during the reporting period.

Issue/Concern: All contracts let under the State Finance Law section 163 should be exempt from the Executive Order, not just contracts for program services awarded on a "lowest price" basis.

Response: The revised text expands the exemption for lowest price contracts.

Issue/Concern: Eliminate the 75th percentile cutoff on executive compensation.

Response: Eliminating the executive compensation requirements would eviscerate one of the key objectives of the executive order: limiting the extent of such compensation paid by covered providers that rely to a significant degree upon public funds for their program and administrative services funding. The New York State Department of Agriculture and Markets is proposing to adopt this regulation because the State of New York directly or indirectly funds with taxpayer dollars a large number of tax exempt organizations and for-profit entities that provide critical services to New Yorkers in need, and the goal is to ensure that taxpayer dollars are used properly, efficiently and effectively to improve the lives of New Yorkers. In certain instances, service providers that receive State funds or State-authorized payments have used such funds to pay for excessive administrative costs or inflated compensation for their senior executives, rather than devoting a greater proportion of such funds to providing direct care or services to their clients. Such abuses involving public funds harm both the people of New York who are paying for such services and those persons who must depend upon such services to be available and well-funded. These regulations provide a benchmark to ensure that State funds or State-authorized payments paid by this agency to providers are not used to support excessive compensation or unnecessary administrative costs in part because of the funding of resources, their restriction is necessary to accomplish these objectives.

Issue/Concern: The 75th percentile will drive salaries down as the large pool of outliers reduces salaries in order to comply with the regulation and eventually depress the maximum salary permitted under the regulations. Unless all executive compensation above the 75th percentile is granted a waiver, the 75th percentile limit will, over time, cause executive salaries that were at or near the 75th percentile to be at or near the 100th percentile.

Response: We anticipate that the agency will assess the impact on salaries, if any, on an ongoing basis and will address any necessary adjustments to the regulations accordingly.

Issue/Concern: The regulation does not consider access to executive compensation and operating expenses data of for-profit entities that is not normally publicly available.

Response: This concern will be addressed further in the implementation process.

Issue/Concern: The proposed regulation provides no guidance on how organizations should handle existing commitments under legal contract where the agreement does not meet the Executive Order proposed standards.

Response: Agreements with Covered Executives entered into prior to April 1, 2012, shall not be subject to the limits in this section during the term of the contract, except that Covered Providers must apply for a waiver for any contracts or agreements with Covered Executives for executive compensation that exceeds or otherwise fails to comply with these regulations if such contracts or agreements extend beyond April 1, 2014. Renewals of such contracts or agreements after the completion of their term must comply with these regulations.

Section 400.5 (renumbered section 400.4) Limits on administrative expenses

Issue/Concern: The language of the proposed rule effectively establishes inequities and abuses as the base line for future determinations of appropriate compensation.

Response: The language in this subsection has been amended to address the concerns raised.

Issue/Concern: If the benchmark for administrative expenses is based on historical expense data, it does not account for recent requirements that have inflated legitimate administrative overhead and created expense outliers, for example, new billing systems, electronic health records and HITECH, and future infrastructure investments needed to comply with the Affordable Care Act and Medicaid redesign.

Response: The revised regulations address these concerns. First, many of the expenses mentioned, such as billing systems and electronic records, may be considered program services expenses under the revised definition. Second, expenses in excess of \$10,000 that would otherwise be administrative expenses are excluded from consideration as either administrative or program service expenses when they are non-recurring (no more frequent than once every five years) or unanticipated.

Issue/Concern: The limits on administrative expenses do not allow providers to save money in a given year for future investments into program expansion, new technology or other programmatic enhancements. The regulation should allow a provider to reserve funds which would otherwise be spent on program service expenses for program service expenses in a future year.

Response: The definition of administrative expenses has been changed to exclude non-recurring or unanticipated expenses over \$100,000 that would otherwise be administrative expenses.

#### Section 400.7 (renumbered 400.6) Waivers

Issue/Concern: There is not enough time to collect data to apply for waivers, limitations already exist in state contracts, other means to enforce (AG; RFP process; comptroller/OMIG audits); IRS 990 already includes salary data and process for hiring, comparison studies, etc.

Response: The regulations have been revised to allow greater flexibility in the filing of waiver applications and to extend the effective date.

Issue/Concern: In both the definition and waiver subsections of the proposed regulation, any reference to days should specify whether they are business or calendar days.

Response: The language has been changed to clarify this distinction.

#### Section 400.8 (renumbered section 400.7) Reporting

Issue/Concern: The report due under the Regulations should contain financial information concerning a completed Reporting Period, instead of the pending or forthcoming one. Such reports should be due on a similar schedule as the IRS Form 990 or NYS CHAR 500.

Response: There were several questions and comments about the reporting system and what disclosure form would be used. The New York State Department of Agriculture and Markets is currently working to determine and prepare the reporting form and process and as a result, reporting dates and format will be provided separately prior to the effective date.

Issue/Concern: Executive Order #38 will impose significant new recordkeeping and reporting requirements on many private and public sector entities. Reporting procedures and definitions should use existing financial data. It should be possible to submit reports electronically, and forms should be simple and consistent across agencies to leverage existing definitions and documentation.

Response: The New York State Department of Agriculture and Markets agrees with these comments, and is working with the Division of Budget to create a streamlined reporting system that, to the greatest extent possible uses data that many providers already maintain or report.

#### Section 400.9 (renumbered section 400.8) Penalties

Issue/Concern: Allow 30 days for a non-profit to submit clarifying information as well as the submission of a corrective action plan.

Response: The timeframes for submitting both clarifying information and the corrective action plan have been changed to 30 days.

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## Office of Alcoholism and Substance Abuse Services

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

#### Limits on Administrative Expenses and Executive Compensation

I.D. No. ASA-22-12-00014-RP

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

**Proposed Action:** Addition of Part 812 to Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 19.07, 19.09, 19.21, 19.40, 32.01, 32.07; and Executive Order No. 38

**Subject:** Limits on Administrative Expenses and Executive Compensation.

**Purpose:** Ensure state funds paid by this agency to providers are not used for excessive compensation or unnecessary administrative costs.

**Substance of revised rule:** The revised rule would add a new Part 812 to 14 NYCRR titled Limits on Administrative Expenses and Executive Compensation.

Section 812.1: Provides the background and intent of the revised rule, which is to implement Executive Order No. 38, issued by Governor Andrew Cuomo on January 18, 2012.

Section 812.2: Sets forth the statutory authority for the promulgation of the rule by the Office of Alcoholism and Substance Abuse Services (hereinafter the "Office").

Section 812.3: Contains definitions for purposes of this Part, including definitions for administrative expenses, covered operating expenses, covered executive, covered provider, executive compensation, Office, program services, program services expenses, related organization, reporting period, State-authorized payments, and State funds.

Section 812.4: Limits on Administrative Expenses. Contains limits on the use of State funds or State-authorized payments for administrative expenses. The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria. The restriction will apply to covered providers receiving State funds or State-authorized payments from county or local governments, rather than directly from a State agency, pursuant to specified criteria. The revised regulation addresses how the restriction will apply in the event that a covered provider has multiple sources of State funds or State-authorized payments.

Section 812.5: Limits on Executive Compensation. Contains restrictions on executive compensation provided to covered executives. The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria. The restriction will apply to covered providers receiving State funds or State-authorized payments from county or local governments, rather than directly from a State agency, pursuant to specified criteria. The revised rule addresses the application of this limit if the covered provider has multiple sources of State funds or State-authorized payments.

Section 812.6: Waivers. Processes are established for covered providers to seek waivers of the limit on administrative expenses and the limits on executive compensation.

Section 812.7: Reporting by Covered Providers. Covered providers are required to report information on an annual basis.

Section 812.8: Penalties. A process is established for the imposition of penalties in the event of non-compliance with the limit on administrative expenses or the limits on executive compensation.

Section 812.9: Severability.

A copy of the full text of the regulatory proposal is available on the OASAS website at: <http://www.oasas.ny.gov/regs/index.cfm>

**Revised rule compared with proposed rule:** Substantial revisions were made in sections 812.3, 812.4, 812.5, 812.6, 812.7, 812.8 and 812.9.

**Text of revised proposed rule and any required statements and analyses may be obtained from** Sara Osborne, Senior Attorney, NYS Office of Alcoholism and Substance Abuse Services, 1450 Western Ave., Albany, NY 12203, (518) 485-2317, email: [SaraOsborne@oasas.ny.gov](mailto:SaraOsborne@oasas.ny.gov)

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

**Public comment will be received until:** 30 days after publication of this notice.

#### **Revised Regulatory Impact Statement**

##### **1. Statutory Authority:**

a) Section 19.07(c) of the Mental Hygiene Law (MHL) charges OASAS with the responsibility of seeing that persons who abuse or are dependent on alcohol and/or substances and their families are provided with care and treatment that is effective and of high quality.

b) Section 19.07(e) of the MHL authorizes the Commissioner of OASAS to adopt standards including necessary rules and regulations pertaining to chemical dependence treatment services.

c) Section 19.09(b) of the MHL authorizes the Commissioner to adopt regulations necessary and proper to implement any matter under his/her jurisdiction.

d) Section 19.21(b) of the MHL requires the Commissioner to establish and enforce regulations concerning the licensing, certification, and inspection of chemical dependence treatment services.

e) Section 19.21(d) of the MHL requires OASAS to establish reasonable performance standards for providers of services certified by OASAS.

f) Section 19.40 of the MHL authorizes the Commissioner to issue operating certificates for the provision of chemical dependence treatment services.

g) Section 32.01 of the MHL authorizes the Commissioner to adopt any regulation reasonably necessary to implement and effectively exercise the powers and perform the duties conferred by Article 32 of the MHL.

h) Section 32.07(a) of the MHL authorizes the commissioner to adopt regulations to effectuate the provisions and purposes of article 32 of the MHL.

i) Executive Order No. 38 directs certain executive agencies to promulgate regulations addressing the extent and nature of a funded service provider's administrative costs and executive compensation eligible for reimbursement with State financial assistance or State-authorized payments for operating expenses.

##### **2. Legislative Objectives:**

To comply with the requirements of Executive Order No. 38.

##### **3. Needs and Benefits:**

OASAS is proposing to adopt the following regulation because the State of New York directly or indirectly funds with taxpayer dollars a large number of tax exempt organizations and for-profit entities that provide critical services to New Yorkers in need and the goal is to ensure that taxpayers' dollars are used properly, efficiently, and effectively to improve the lives of New Yorkers. In certain instances, providers of services that receive State funds or State-authorized payments have used such funds to pay for excessive administrative costs or inflated compensation for their senior executives, rather than devoting a greater proportion of such funds to providing direct care or services to their clients. Such abuses involving public funds harm both the people of New York who are paying for such services, and those persons who must depend upon such services to be available and well-funded. These regulations, which are required by Executive Order No. 38, will ensure that State funds or State-authorized payments paid by OASAS to providers are not used to support excessive compensation or unnecessary administrative costs.

##### **4. Costs:**

The costs of implementing this rule to affected providers is anticipated to be minimal; most, if not all, of the information that must be reported by such providers is already gathered or reported for other purposes. Current regulations require the submission of substantial financial information, some of which will be additional to current requirements, or collected in another form. The costs to OASAS and providers of such implementation is expected to be limited, and efforts to ensure efficient centralization of certain aspects of such implementation are underway. OASAS estimates that minimal compliance activities will be needed to satisfy any additional reporting requirements.

##### **5. Paperwork:**

The proposed regulatory amendments will require limited additional information to be reported to the agency by providers receiving State funds or State-authorized payments. To the extent feasible, such reporting shall be made electronically to avoid unnecessary paperwork costs.

##### **6. Local Government Mandates:**

As this regulation does not apply to state and local governments, there are no new local government mandates.

##### **7. Duplications:**

This proposed rule does not duplicate, overlap, or conflict with any State or federal statute or rule. However, the proposed rule seeks to minimize the reporting requirements faced by providers by building upon those requirements in the federal internal revenue code that require certain tax-exempt organizations to report information concerning their executive compensation and administrative costs.

##### **8. Alternatives:**

Executive Order No. 38 requires the adoption of this proposed regulation.

##### **9. Federal Standards:**

These amendments do not conflict with federal standards.

##### **10. Compliance Schedule:**

This rule will become effective upon adoption; the implementation date establishing the limits on administrative expenses and executive compensation will be April 1, 2013.

#### **Revised Regulatory Flexibility Analysis**

A Revised Regulatory Flexibility Analysis for Small Businesses and Local Governments (RFASBLG) is not being submitted with this notice because the changes to the proposed rule will not impose any adverse economic impact on small businesses, nor will it impose new reporting, record keeping or other compliance requirements on small businesses or local governments.

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

A Revised Rural Area Flexibility Analysis (RAFA) is not being submitted with this notice because the changes to the proposed rule will not impose any adverse economic impact on rural areas.

#### **Revised Job Impact Statement**

A Revised Job Impact Statement (JIS) is not being submitted with this notice because it is evident from the subject matter of the regulation that it will have no impact on jobs and employment opportunities.

**Assessment of Public Comment**

A Notice of Proposed Rule Making was published in the State Register on May 30, 2012.

All comments received were reviewed and evaluated. Many of the concerns expressed in the comments have been addressed by revisions to the various sections of the proposed regulation. Suggestions from others were determined to be contrary to the goals of the proposed rulemaking.

A number of comments objected generally to the underlying concept of the regulations, stating that the proposed regulation is overly broad in its authority and burdensome in its requirements. The NYS Office of Alcoholism and Substance Abuse Services (OASAS)C believes that the proposed limitations in the regulation further the legitimate goal of ensuring that public funds are properly expended and the use of such funds is properly monitored.

Clarification was requested concerning certain defined terms in the proposed regulation, in particular with respect to their intended scope. In response, and taking into account suggestions submitted, changes were made to the definitions of the following terms: administrative expenses, covered provider, covered executive, executive compensation, program services expenses, related entity, State-authorized payments and State funds.

Some commenters stated that the proposed limits on administrative expenses were burdensome and unnecessary, because they would interfere with existing contracts, because they were possibly duplicative of existing state and federal rules, or they will not enhance the protections already provided by restrictions from State reimbursement rates. Clarification was requested as to what will constitute administrative and program expenses. The proposed regulation has been revised to incorporate an allocation methodology for these two expenses.

There were a wide range of comments and suggestions on the definition of "executive compensation." They covered such topics as: (a) general concerns about application of the definition, (b) exclusions, (c) limitations and application of the definition, and (d) suggestions about surveys and their use. A summary of the comments and suggestions follows:

(a) General concerns regarding the regulation include that it: is too broad since it regulates use of funding sources not emanating from the state; is unrealistic, problematic and intrusive to operations; will adversely affect candidate pools, incumbents, service delivery and the ability of providers to meet the challenges and changes in the health care system; is intrusive to the for-profit sector where executive compensation is a private matter; is faulty in that it will institutionalize abuses through comparability data; and is duplicative as executive compensation is already controlled at the State and federal levels through rate setting, IRS rules and reporting, and the Not-For-Profit Corporation Law. Other comments stated that the regulation would encroach on the State Attorney General's regulation and enforcement; is arbitrary in its establishment of the thresholds of \$500,000 and 30%; was exclusive of larger corporations; and inappropriately used a percentile standard that will gradually diminish compensation levels and lead to the existence of two levels of compensation. Commenters also suggested that covered providers subject to penalty should be allowed to submit documentation in advance of penalty review.

(b) Other comments focused on exclusions for not-for-profits and for not-for-profit long term care and senior services providers and an elimination of the 75th percentile threshold.

(c) Still other letters related to limitations and application of the definition of "executive compensation." They suggested that executive compensation rules should only be applied to non-State funds or to State and State-authorized funds. The applicability of the rules with regard to contributions of other non-covered entities should be clarified. Also, letters received argued that the period covered by the limits on executive compensation should not begin on January 1, 2013, the executive compensation limits should be revisited periodically to adjust for changes, and the role of executives in the assurance of program services should be recognized.

(d) Commenters recommended several approaches to determining reasonable compensation, such as the use of recognized surveys or independent commissioned surveys or identification and recognition of specific compensation surveys to establish comparisons. It was suggested that surveys should allow for regional and geographic variations. Further, commenters suggested that the regulation also should address instances where a board or governing body does not exist.

The regulation was revised to address the comments on: the period to be covered by the limits on executive compensation, an annual review of the \$199,000 cap and the adjustment thereof, the consideration of the availability of a governing body as alternate to the covered provider's board of directors, the submission of contemporaneous (but not prospective) documentation for penalty review, the recognition of supervisory services of executives as program services, the allocation methodology for reporting administrative and program service costs, the recognition of specific

clinical and program personnel as providers of program services, and a method for subcontractors to be advised of the receipt of State or State-authorized funds from a covered provider.

The regulation was not revised to limit the rule to non-State funds, to exclude for-profits from being covered by the regulations, or to alter the 75th percentile threshold because these revisions would compromise the goal of the regulation. Eliminating the executive compensation requirements would eviscerate one of the key objectives of the executive order: limiting the extent of such compensation paid by covered providers that rely to a significant degree upon public funds for their program and administrative services funding. [your agency] is proposing to adopt this regulation because the State of New York directly or indirectly funds with taxpayer dollars a large number of tax exempt organizations and for-profit entities that provide critical services to New Yorkers in need, and the goal is to ensure that taxpayer dollars are used properly, efficiently and effectively to improve the lives of New Yorkers. In certain instances, service providers that receive State funds or State-authorized payments have used such funds to pay for excessive administrative costs or inflated compensation for their senior executives, rather than devoting a greater proportion of such funds to providing direct care or services to their clients. Such abuses involving public funds harm both the people of New York who are paying for such services and those persons who must depend upon such services to be available and well-funded. These regulations provide a benchmark to ensure that State funds or State-authorized payments paid by this agency to providers are not used to support excessive compensation or unnecessary administrative costs. In part because of the funding of resources, their restriction is necessary to accomplish these objectives.

Some comments stated that the proposed waiver process is overly complex and lacking objective criteria. The revised regulation provides greater flexibility in the filing of a waiver application and also has pushed back the implementation date.

Comments received also criticized the proposed reporting requirements suggesting that they require providing information related to administrative and program expenses in a manner inconsistent with other current reporting obligations. The regulation has been amended to conform some of the requirements to those with which many covered providers must already comply, including provisions incorporating the definitions applicable with non-profits under the IRS Code.

Other submissions asked when penalties for excess compensation would be assessed, what the type of penalties would be imposed, and about the level of severity. Commenters also requested details on the criteria for making penalty determination.

Changes have been made to the Penalties section in the revised text, including extending the time for submissions, a corrective action plan (CAP) and a request for an administrative appeal to 30 calendar days.

The full Assessment of Comments is available on the OASAS website at: <http://www.oasas.ny.gov/regs/index.cfm>

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## Department of Audit and Control

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### NOTICE OF ADOPTION

#### Sets Forth the Procedures for the Use of Electronic Signatures and Records by the Retirement System

**I.D. No.** AAC-45-11-00010-A

**Filing No.** 1029

**Filing Date:** 2012-10-11

**Effective Date:** 2012-10-31

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

**Action taken:** Addition of Part 380 to Title 2 NYCRR.

**Statutory authority:** Retirement and Social Security Law, sections 11, 74, 311, 374, 519 and 614

**Subject:** Sets forth the procedures for the use of electronic signatures and records by the Retirement System.

**Purpose:** To clarify the use of electronic signatures.

**Text of final rule:** Part 380: *Electronic Signatures and Filing of Documents*

*Section 380.1 - Background.*

Article 3 of the State Technology Law, known as the Electronic Signatures and Records Act (ESRA), is intended to support and encourage electronic commerce and electronic government by allowing people to use electronic signatures and electronic records in lieu of handwritten signatures and paper documents. Administration of the State Technology Law is vested in the New York State Office of the Chief Information Officer and the New York State Office of Information Technology Services (CIO/ITS). CIO/ITS has promulgated regulations (9 NYCRR Subtitle N, Part 540) to establish rules governing the use of electronic signatures and records. CIO/ITS also issues policies, standards, and guidelines for technology usage.

Section 807 of the Retirement and Social Security Law, enacted pursuant to chapter 506 of the Laws of 2005, authorizes public retirement systems to promulgate rules and regulations to provide for alternate means of authentication in place of any requirement that a filing be duly executed and acknowledged and, consistent with the provisions of the state technology law, to provide for the electronic filing of documents. The State Comptroller as the administrative head of the New York State and Local Employees' Retirement System and the New York State and Local Police and Fire Retirement System ("the Retirement System") has the exclusive authority pursuant to sections 11, 74, 311, 374, 519 and 614 of the Retirement and Social Security Law to adopt rules and regulations for the administration of the retirement system.

This part is promulgated to set forth the procedures for the use of electronic signatures and records by the Retirement System.

#### 380.2 – Statement of Intent.

1. ESRA and this Part are designed to, among other things, afford the Retirement System the greatest latitude to determine the most effective protocols for producing, receiving, accepting, acquiring, recording, filing, transmitting, forwarding and storing electronic signatures and electronic records within the confines of existing statutory and regulatory requirements regarding privacy, confidentiality and records retention.

2. New technologies are frequently being introduced. The intent of this Part is to be flexible enough to embrace future technologies that comply with ESRA and all other applicable statutes and regulations.

#### 380.3 Electronic Signatures and Filing of Documents.

1. *Meaning of Terms.* Unless specifically stated otherwise, the meaning of terms and words in this Part shall be the same as in the state technology law and the regulations of CIO/ITS.

a. The "retirement system" means the New York State and Local Employees' Retirement System and the New York State and Local Police and Fire Retirement System.

b. An "electronic signature" or "digital signature" means the creation of an electronic identifier (i.e., an electronic sound, symbol, or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record) which the Comptroller determines is:

- i. unique to the signer;
- ii. capable of verification;
- iii. under the signer's control; and
- iv. linked to the record in such a manner that if the record is changed, the signature is invalidated.

2. *Authorization.* The Retirement System may provide for the electronic filing of forms and documents through its internet website and/or through the statewide network infrastructure (NYeNet).

3. *Coordination.* Administration of the internet website and use of NYeNet shall be coordinated by the Retirement System through the Chief Information Officer of the Office of the State Comptroller.

4. *State Technology Law.* The Retirement System shall conform to the internet security and privacy act, the electronic signatures and records act, and the regulations and other requirements of CIO/ITS.

5. *Retirement System Electronic Signatures.* The signature of those persons executing, and/or authenticating, any decision or determination or other document by or on behalf of the Comptroller, may do so digitally for documents prepared in an electronic format.

6. *Use of Electronic Signatures.* Unless specifically provided otherwise by law, an electronic signature may be used in lieu of a signature affixed by hand. The use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand. A verified electronic signature shall also be deemed to be acknowledged, when required by law.

7. *Disclosure of Records.* Electronic records shall be considered and treated as any other records for the purposes of disclosure of those records as set forth in Article 6-A of the Public Officers Law.

8. *Freedom of Information Law.* Electronic records shall be considered and treated as any other records for the purposes of the Freedom of Information Law as set forth in Article 6 of the Public Officers Law.

9. *Use of Electronic Records.* An electronic record shall have the same force and effect as those records not produced by electronic means.

10. *Admissibility into Evidence.* Electronic records, electronically

stored and reproduced copies of records, and electronic signatures, shall be admissible into evidence in Retirement System administrative proceedings under the same rules as those records and signatures not produced or stored and reproduced, by electronic means.

11. *Use of Electronic Records and Signatures to be Voluntary.* Nothing in this Part shall require any entity or person to use an electronic record or an electronic signature unless otherwise provided by law.

**Final rule as compared with last published rule:** Nonsubstantive changes were made to Part number, formerly Part 379.

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

#### Assessment of Public Comment

The agency received no public comment.

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## Office of Children and Family Services

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

#### Establishing Limitations on Administrative Expenses and Executive Compensation of Service Providers Supported by State Funds

I.D. No. CFS-22-12-00010-RP

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

**Proposed Action:** Addition of Part 409 to Title 18 NYCRR; and addition of Subpart 166-5 to Title 9 NYCRR.

**Statutory authority:** Social Services Law, sections 20(3)(d) and 34(3)(f); and Executive Law, section 501(5)

**Subject:** Establishing limitations on administrative expenses and executive compensation of service providers supported by State funds.

**Purpose:** To comply with Executive Order numbers 38 and 43.

**Substance of revised rule:** The revised rule would add a new Part 409 to 18 NYCRR and a new Subpart 166-5 to 9 NYCRR entitled "Limits on Administrative Expenses and Executive Compensation".

Sections 409.1 and 166-5.1 provide the background and intent of the revised rule, which is to implement Executive Order No. 38, issued by Governor Andrew Cuomo on January 18, 2012.

Sections 409.2 and 166-5.2 set forth the statutory authority for the promulgation of the rule by the New York State Office of Children and Family Services (OCFS).

Sections 409.3 and 166-5.3 contain definitions for purposes of the relevant Parts, including definitions for administrative expenses, covered operating expenses, covered executive, covered provider, executive compensation, OCFS, program services, program services expenses, related organization, reporting period, State-authorized payments, and State funds.

Sections 409.4 and 166-5.4 are entitled "Limits on Administrative Expenses". These sections contain limits on the use of State funds or State-authorized payments for administrative expenses.

The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria.

The restriction will apply to covered providers receiving State funds or State-authorized payments from county or local governments, rather than directly from a State agency, pursuant to specified criteria.

The revised regulation addresses how the restriction will apply in the event that a covered provider has multiple sources of State funds or State-authorized payments.

Sections 409.5 and 166-5.5 are entitled "Limits on Executive Compensation". These sections contain restrictions on executive compensation provided to covered executives.

The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria.

The restriction will apply to covered providers receiving State funds or State-authorized payments from county or local governments, rather than directly from a State agency, pursuant to specified criteria.

The revised rule addresses the application of this limit if the covered provider has multiple sources of State funds or State-authorized payments.

Sections 409.6 and 166-5.6 address waivers. These sections establish processes for covered providers to seek waivers of the limits on administrative expenses and the limits on executive compensation.

Sections 409.7 and 166-5.7 are entitled "Reporting by Covered Providers". These sections require covered providers to report information on an annual basis.

Sections 409.8 and 166-5.8 address penalties. In these sections, a process is established for the imposition of penalties in the event of non-compliance with the limits on administrative expenses or the limits on executive compensation.

A copy of the full text of the regulatory proposal is available on the OCFS website at <http://ocfs.ny.gov>

**Revised rule compared with proposed rule:** Substantial revisions were made in Part 409 and Subpart 166-5.

**Text of revised proposed rule and any required statements and analyses may be obtained from** Public Information Office, NYS Office of Children and Family Services, 52 Washington Street, Rensselaer, NY 12144, (518) 473-7793

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

**Public comment will be received until:** 30 days after publication of this notice.

#### **Revised Regulatory Impact Statement**

##### 1. Statutory authority:

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

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

Section 501(5) of the Executive Law authorizes the Commissioner of OCFS to promulgate regulations necessary to establish, operate and maintain programs operated and oversee by OCFS under the Executive Law.

##### 2. Legislative objectives:

The proposed regulations are necessary in order for New York State to maintain appropriate controls on administrative expenses and the amount of State funds going toward the purpose of executive compensation. This will support the legislative goal that State funds be expended in a manner consistent with the best fiscal interests of the State, as provided for throughout the State Finance Law.

##### 3. Needs and benefits:

OCFS is proposing to adopt the regulation because the State of New York directly or indirectly funds with taxpayer dollars a large number of tax exempt not-for-profit organizations and for-profit entities that provide critical services to New Yorkers in need. The goal of the regulation is to establish appropriate controls so that taxpayer dollars are used properly, efficiently, and effectively to improve the lives of New Yorkers. In certain instances, providers of services that receive State funds or State-authorized payments have used such funds to pay for excessive administrative costs or inflated compensation for their senior executives, rather than devoting a greater proportion of such funds to providing direct care or services to their clients. Such abuses involving public funds harm both the people of New York who are paying for such services, and those persons who must depend upon such services to be available and well-funded. These regulations, which are required by Executive Order No. 38, will establish standards to prevent the use of State funds or State-authorized payments that come through OCFS for support of excessive executive compensation or unnecessary administrative costs.

##### 4. Costs:

The compliance cost to providers of services is expected to be minimal because most, if not all, of the information that will be required to be reported by providers of services is already gathered and reported by such providers for other purposes.

It is estimated that the cost to OCFS of implementing this rule will be minimal, as the State will be making efforts to centralize as many of the functions associated with the rule as possible in order to efficiently implement the rule.

##### 5. Local government mandates:

The proposed regulations will impose very minimal additional mandates on social services districts. The social services districts may be asked to provide some information to OCFS concerning service providers with which the local districts have contractual relationships, or to provide a reporting form or reporting information to their prospective contractors for the contractors to send to OCFS, but the administrative functions required by the proposed regulations will be carried out by OCFS.

##### 6. Paperwork:

The proposed regulations will require some additional reporting of information to the State by service providers receiving State funds or State-authorized payments. The State will, to the extent feasible, provide that

such reporting be done electronically to avoid unnecessary paperwork costs.

##### 7. Duplication:

The proposed regulations do not duplicate, overlap, or conflict with any other State or federal requirements. However, the proposed regulations seek to minimize the reporting requirements faced by service providers by building upon existing requirements in the federal Internal Revenue Code that require certain tax-exempt organizations to report information concerning their executive compensation and administrative costs.

##### 8. Alternatives:

Since Executive Order No. 38 requires the adoption of the proposed regulations, there is no viable alternative to implementing the proposed regulations.

##### 9. Federal standards:

The regulatory amendments do not conflict with any federal standards.

##### 10. Compliance schedule:

This rule will become effective upon adoption. The implementation date establishing the limits on administrative expenses and executive compensation will be April 1, 2013.

#### **Revised Regulatory Flexibility Analysis**

Although substantive changes were made to the proposed regulations, those changes do not require changes to the Regulatory Flexibility Analysis as originally published.

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

Although substantive changes were made to the proposed regulations, those changes do not require changes to the Rural Area Flexibility Analysis as originally published.

#### **Revised Job Impact Statement**

Although substantive changes were made to the proposed regulations, those changes do not require changes to the Job Impact Statement as originally published.

#### **Assessment of Public Comment**

A Notice of Proposed Rule Making was published in the State Register on May 30, 2012.

All comments received were reviewed and evaluated. Many of the concerns expressed in the comments have been addressed by revisions to the various sections of the proposed regulation. Suggestions from others were determined to be contrary to the goals of the proposed rulemaking.

A number of comments objected generally to the underlying concept of the regulations, stating that the proposed regulation is overly broad in its authority and burdensome in its requirements. The New York State Office of Children and Family Services (OCFS) believes that the proposed limitations in the regulation further the legitimate goal of ensuring that public funds are properly expended and the use of such funds is properly monitored.

Clarification was requested concerning certain defined terms in the proposed regulation, in particular with respect to their intended scope. In response, and taking into account suggestions submitted, changes were made to the definitions of the following terms: administrative expenses, covered provider, covered executive, executive compensation, program services expenses, related entity, State-authorized payments and State funds.

Some commenters stated that the proposed limits on administrative expenses were burdensome and unnecessary, because they would interfere with existing contracts, because they were possibly duplicative of existing state and federal rules, or they will not enhance the protections already provided by restrictions from State reimbursement rates. Clarification was requested as to what will constitute administrative and program expenses. The proposed regulation has been revised to incorporate an allocation methodology for these two expenses.

There were a wide range of comments and suggestions on the definition of "executive compensation." They covered such topics as: (a) general concerns about application of the definition, (b) exclusions, (c) limitations and application of the definition, and (d) suggestions about surveys and their use. A summary of the comments and suggestions follows:

(a) General concerns regarding the regulation include that it: is too broad since it regulates use of funding sources not emanating from the state; is unrealistic, problematic and intrusive to operations; will adversely affect candidate pools, incumbents, service delivery and the ability of providers to meet the challenges and changes in the health care system; is intrusive to the for-profit sector where executive compensation is a private matter; is faulty in that it will institutionalize abuses through comparability data; and is duplicative as executive compensation is already controlled at the State and federal levels through rate setting, IRS rules and reporting, and the Not-For-Profit Corporation Law. Other comments stated that the regulation would encroach on the State Attorney General's regulation and enforcement; is arbitrary in its establishment of the thresholds of \$500,000 and 30%; was exclusive of larger corporations; and inap-

appropriately used a percentile standard that will gradually diminish compensation levels and lead to the existence of two levels of compensation. Commenters also suggested that covered providers subject to penalty should be allowed to submit documentation in advance of penalty review.

(b) Other comments focused on exclusions for not-for-profits and for not-for-profit long term care and senior services providers and an elimination of the 75th percentile threshold.

(c) Still other letters related to limitations and application of the definition of "executive compensation." They suggested that executive compensation rules should only be applied to non-State funds or to State and State-authorized funds. The applicability of the rules with regard to contributions of other non-covered entities should be clarified. Also, letters received argued that the period covered by the limits on executive compensation should not begin on January 1, 2013, the executive compensation limits should be revisited periodically to adjust for changes, and the role of executives in the assurance of program services should be recognized.

(d) Commenters recommended several approaches to determining reasonable compensation, such as the use of recognized surveys or independent commissioned surveys or identification and recognition of specific compensation surveys to establish comparisons. It was suggested that surveys should allow for regional and geographic variations. Further, commenters suggested that the regulation also should address instances where a board or governing body does not exist.

The regulation was revised to address the comments on: the period to be covered by the limits on executive compensation, an annual review of the \$199,000 cap and the adjustment thereof, the consideration of the availability of a governing body as alternate to the covered provider's board of directors, the submission of contemporaneous (but not prospective) documentation for penalty review, the recognition of supervisory services of executives as program services, the allocation methodology for reporting administrative and program service costs, the recognition of specific clinical and program personnel as providers of program services, and a method for subcontractors to be advised of the receipt of State or State-authorized funds from a covered provider.

The regulation was not revised to limit the rule to non-State funds, to exclude for-profits from being covered by the regulations, or to alter the 75th percentile threshold because these revisions would compromise the goal of the regulation. Eliminating the executive compensation requirements would eviscerate one of the key objectives of the executive order: limiting the extent of such compensation paid by covered providers that rely to a significant degree upon public funds for their program and administrative services funding. OCFS is proposing to adopt this regulation because the State of New York directly or indirectly funds with taxpayer dollars a large number of tax exempt organizations and for-profit entities that provide critical services to New Yorkers in need, and the goal is to ensure that taxpayer dollars are used properly, efficiently and effectively to improve the lives of New Yorkers. In certain instances, service providers that receive State funds or State-authorized payments have used such funds to pay for excessive administrative costs or inflated compensation for their senior executives, rather than devoting a greater proportion of such funds to providing direct care or services to their clients. Such abuses involving public funds harm both the people of New York who are paying for such services and those persons who must depend upon such services to be available and well-funded. These regulations provide a benchmark to ensure that State funds or State-authorized payments paid by this agency to providers are not used to support excessive compensation or unnecessary administrative costs. In part because of the funding of resources, their restriction is necessary to accomplish these objectives.

Some comments stated that the proposed waiver process is overly complex and lacking objective criteria. The revised regulation provides greater flexibility in the filing of a waiver application and also has pushed back the implementation date.

Comments received also criticized the proposed reporting requirements suggesting that they require providing information related to administrative and program expenses in a manner inconsistent with other current reporting obligations. The regulation has been amended to conform some of the requirements to those with which many covered providers must already comply, including provisions incorporating the definitions applicable with non-profits under the IRS Code.

Other submissions asked when penalties for excess compensation would be assessed, what the type of penalties would be imposed, and about the level of severity. Commenters also requested details on the criteria for making penalty determination. Changes have been made to the Penalties section in the revised text, including extending the time for submissions, a corrective action plan (CAP) and a request for an administrative appeal to 30 calendar days.

The full Assessment of Comments is available on the OCFS website at: <http://ocfs.ny.gov>

## Department of Corrections and Community Supervision

### NOTICE OF ADOPTION

#### Queensboro Correctional Facility

**I.D. No.** CCS-35-12-00007-A

**Filing No.** 1031

**Filing Date:** 2012-10-15

**Effective Date:** 2012-10-31

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

**Action taken:** Amendment of section 100.83(c) of Title 7 NYCRR.

**Statutory authority:** Correctional Law, sections 70 and 73

**Subject:** Queensboro Correctional Facility.

**Purpose:** Add the additional designation of residential treatment facility to the functions performed by Queensboro CF.

**Text or summary was published in:** the August 29, 2012 issue of the Register, I.D. No. CCS-35-12-00007-P.

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

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

**Assessment of Public Comment**

The agency received no public comment.

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

#### Limits on Administrative Expenses and Executive Compensation

**I.D. No.** CCS-22-12-00015-RP

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

**Proposed Action:** Addition of Part 513 to Title 7 NYCRR.

**Statutory authority:** Correction Law, section 112

**Subject:** Limits on Administrative Expenses and Executive Compensation.

**Purpose:** To ensure the proper use of taxpayer dollars and the most effective provision of such services to the public.

**Substance of revised rule:** The revised rule would add a new Part 513 to 7 NYCRR titled Limits on Administrative Expenses and Executive Compensation.

Section 513.1 provides the background and intent of the revised rule, which is to implement Executive Order No. 38, issued by Governor Andrew Cuomo on January 18, 2012.

Section 513.2 sets forth the statutory authority for the promulgation of the rule by the Department of Corrections and Community Supervision (hereinafter the "Office").

Section 513.3 contains definitions for purposes of this Part, including definitions for administrative expenses, covered operating expenses, covered executive, covered provider, executive compensation, Office, program services, program services expenses, related organization, reporting period, State-authorized payments, and State funds.

Section 513.4, Limits on Administrative Expenses, contains limits on the use of State funds or State-authorized payments for administrative expenses.

The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria.

The restriction will apply to covered providers receiving State funds or State-authorized payments from county or local governments, rather than directly from a State agency, pursuant to specified criteria.

The revised regulation addresses how the restriction will apply in the event that a covered provider has multiple sources of State funds or State-authorized payments.

Section 513.5 Limits on Executive Compensation, contains restrictions on executive compensation provided to covered executives.

The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria.

The restriction will apply to covered providers receiving State funds or State-authorized payments from county or local governments, rather than directly from a State agency, pursuant to specified criteria.

The revised rule addresses the application of this limit if the covered provider has multiple sources of State funds or State-authorized payments.

Section 513.6 Waivers: Processes are established for covered providers to seek waivers of the limit on administrative expenses and the limits on executive compensation.

Section 513.7 Reporting by Covered Providers: Covered providers are required to report information on an annual basis.

Section 513.8 Penalties: A process is established for the imposition of penalties in the event of non-compliance with the limit on administrative expenses or the limits on executive compensation.

A copy of the full text of the regulatory proposal is available on the DOCCS website @ <http://www.doccn.ny.gov>

**Revised rule compared with proposed rule:** Substantial revisions were made in sections 513.3, 513.4, 513.5, 513.6, 513.7, 513.8 and 513.9.

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

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

**Public comment will be received until:** 30 days after publication of this notice.

#### **Revised Regulatory Impact Statement**

Statutory Authority:  
Correction Law, Section 112

Legislative Objectives:

Correction Law section 112 authorizes the Commissioner of the Department of Corrections and Community Supervision to promulgate regulations in the best interest of meeting the agencies objectives while ensuring the proper use of taxpayer dollars and the effective provision for the delivery of services to the public.

Needs and Benefits:

The Department of Corrections and Community Supervision is proposing to adopt the following regulation because the State of New York directly or indirectly funds with taxpayer dollars a large number of tax exempt organizations and for-profit entities that provide critical services to New Yorkers in need and the goal is to ensure that taxpayers' dollars are used properly, efficiently, and effectively to improve the lives of New Yorkers. In certain instances, providers of services that receive State funds or State-authorized payments have used such funds to pay for excessive administrative costs or inflated compensation for their senior executives, rather than devoting a greater proportion of such funds to providing direct care or services to their clients. Such abuses involving public funds harm both the people of New York who are paying for such services, and those persons who must depend upon such services to be available and well-funded. These regulations, which are required by Executive Order No. 38, will ensure that State funds or State-authorized payments paid by this agency to providers are not used to support excessive compensation or unnecessary administrative costs.

Costs:

The costs of implementing this rule to affected providers is anticipated to be minimal as most, if not all, of the information that must be reported by such providers is already gathered or reported for other purposes. The costs to the agency of such implementation are expected to be very limited as well, and efforts to ensure efficient centralization of certain aspects of such implementation are underway.

Paperwork/Reporting Requirements:

The proposed regulatory amendments will require limited additional information to be reported to the agency by providers receiving State funds or State-authorized payments. To the extent feasible, such reporting shall be made electronically to avoid unnecessary paperwork costs.

Local Government Mandates:

The proposed regulatory amendments does not anticipate any additional mandates.

Duplication:

This proposed rule does not duplicate, overlap, or conflict with any State or federal statute or rule. However, the proposed rule seeks to minimize the reporting requirements faced by providers by building upon those requirements in the federal internal revenue code that require certain tax-exempt organizations to report information concerning their executive compensation and administrative costs.

Alternatives:

Executive Order #38 and Executive Order #43 require the adoption of this proposed regulation; therefore no alternatives were considered.

Federal Standards:

These amendments do not conflict with federal standards.

Compliance Schedule:

The rule will become effective upon adoption. The implementation date establishing the limits on administrative expenses and executive compensation will be April 1, 2013.

#### **Revised Regulatory Flexibility Analysis**

A Revised Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this notice because the proposed rule will not impose any adverse economic impact on small businesses, nor will it impose new reporting, recordkeeping or other compliance requirements on small businesses or local governments.

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

A Revised Rural Area Flexibility Analysis is not being submitted with this notice because the proposed rule will not impose any adverse economic impact on rural areas.

#### **Revised Job Impact Statement**

A Revised Job Impact Statement is not being submitted with this notice because it is evident from the subject matter of the regulation that it will have no impact on jobs and employment opportunities.

#### **Assessment of Public Comment**

A Notice of Proposed Rule Making was published in the State Register on May 30, 2012.

All comments received were reviewed and evaluated. Many of the concerns expressed in the comments have been addressed by revisions to the various sections of the proposed regulation. Suggestions from others were determined to be contrary to the goals of the proposed rulemaking.

A number of comments objected generally to the underlying concept of the regulations, stating that the proposed regulation is overly broad in its authority and burdensome in its requirements. The Department of Corrections and Community Supervision believes that the proposed limitations in the regulation further the legitimate goal of ensuring that public funds are properly expended and the use of such funds is properly monitored.

Clarification was requested concerning certain defined terms in the proposed regulation, in particular with respect to their intended scope. In response, and taking into account suggestions submitted, changes were made to the definitions of the following terms: administrative expenses, covered provider, covered executive, executive compensation, program services expenses, related entity, State-authorized payments and State funds.

Some commenters stated that the proposed limits on administrative expenses were burdensome and unnecessary, because they would interfere with existing contracts, because they were possibly duplicative of existing state and federal rules, or they will not enhance the protections already provided by restrictions from State reimbursement rates. Clarification was requested as to what will constitute administrative and program expenses. The proposed regulation has been revised to incorporate an allocation methodology for these two expenses.

There were a wide range of comments and suggestions on the definition of "executive compensation." They covered such topics as: (a) general concerns about application of the definition, (b) exclusions, (c) limitations and application of the definition, and (d) suggestions about surveys and their use. A summary of the comments and suggestions follows:

(a) General concerns regarding the regulation include that it: is too broad since it regulates use of funding sources not emanating from the state; is unrealistic, problematic and intrusive to operations; will adversely affect candidate pools, incumbents, service delivery and the ability of providers to meet the challenges and changes in the health care system; is intrusive to the for-profit sector where executive compensation is a private matter; is faulty in that it will institutionalize abuses through comparability data; and is duplicative as executive compensation is already controlled at the State and federal levels through rate setting, IRS rules and reporting, and the Not-For-Profit Corporation Law. Other comments stated that the regulation would encroach on the State Attorney General's regulation and enforcement; is arbitrary in its establishment of the thresholds of \$500,000 and 30%; was exclusive of larger corporations; and inappropriately used a percentile standard that will gradually diminish compensation levels and lead to the existence of two levels of compensation. Commenters also suggested that covered providers subject to penalty should be allowed to submit documentation in advance of penalty review;

(b) Other comments focused on exclusions for not-for-profits and for not-for-profit long term care and senior services providers and an elimination of the 75th percentile threshold.

(c) Still other letters related to limitations and application of the definition of "executive compensation." They suggested that executive compensation rules should only be applied to non-State funds or to State and State-authorized funds. The applicability of the rules with regard to

contributions of other non-covered entities should be clarified. Also, letters received argued that the period covered by the limits on executive compensation should not begin on January 1, 2013, the executive compensation limits should be revisited periodically to adjust for changes, and the role of executives in the assurance of program services should be recognized.

(d) Commenters recommended several approaches to determining reasonable compensation, such as the use of recognized surveys or independent commissioned surveys or identification and recognition of specific compensation surveys to establish comparisons. It was suggested that surveys should allow for regional and geographic variations. Further, commenters suggested that the regulation also should address instances where a board or governing body does not exist.

The regulation was revised to address the comments on: the period to be covered by the limits on executive compensation, an annual review of the \$199,000 cap and the adjustment thereof, the consideration of the availability of a governing body as alternate to the covered provider's board of directors, the submission of contemporaneous (but not prospective) documentation for penalty review, the recognition of supervisory services of executives as program services, the allocation methodology for reporting administrative and program service costs, the recognition of specific clinical and program personnel as providers of program services, and a method for subcontractors to be advised of the receipt of State or State-authorized funds from a covered provider.

The regulation was not revised to limit the rule to non-State funds, to exclude for-profits from being covered by the regulations, or to alter the 75th percentile threshold because these revisions would compromise the goal of the regulation. Eliminating the executive compensation requirements would eviscerate one of the key objectives of the executive order: limiting the extent of such compensation paid by covered providers that rely to a significant degree upon public funds for their program and administrative services funding. The Department of Corrections and Community Supervision is proposing to adopt this regulation because the State of New York directly or indirectly funds with taxpayer dollars a large number of tax exempt organizations and for-profit entities that provide critical services to New Yorkers in need, and the goal is to ensure that taxpayer dollars are used properly, efficiently and effectively to improve the lives of New Yorkers. In certain instances, service providers that receive State funds or State-authorized payments have used such funds to pay for excessive administrative costs or inflated compensation for their senior executives, rather than devoting a greater proportion of such funds to providing direct care or services to their clients. Such abuses involving public funds harm both the people of New York who are paying for such services and those persons who must depend upon such services to be available and well-funded. These regulations provide a benchmark to ensure that State funds or State-authorized payments paid by this agency to providers are not used to support excessive compensation or unnecessary administrative costs. In part because of the funding of resources, their restriction is necessary to accomplish these objectives.

Some comments stated that the proposed waiver process is overly complex and lacking objective criteria. The revised regulation provides greater flexibility in the filing of a waiver application and also has pushed back the implementation date.

Comments received also criticized the proposed reporting requirements suggesting that they require providing information related to administrative and program expenses in a manner inconsistent with other current reporting obligations. The regulation has been amended to conform some of the requirements to those with which many covered providers must already comply, including provisions incorporating the definitions applicable with non-profits under the IRS Code.

Other submissions asked when penalties for excess compensation would be assessed, what the type of penalties would be imposed, and about the level of severity. Commenters also requested details on the criteria for making penalty determination.

Changes have been made to the Penalties section in the revised text, including extending the time for submissions, a corrective action plan (CAP) and a request for an administrative appeal to 30 calendar days.

The full Assessment of Comments is available on the Department of Corrections and Community Supervision website at [www.doccs.ny.gov](http://www.doccs.ny.gov).

## Division of Criminal Justice Services

### NOTICE OF ADOPTION

#### Probation Supervision

**I.D. No.** CJS-25-12-00006-A

**Filing No.** 1037

**Filing Date:** 2012-10-16

**Effective Date:** 2013-06-01

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

**Action taken:** Repeal of Part 351; and addition of new Part 351 to Title 9 NYCRR.

**Statutory authority:** Executive Law, sections 243(1) and 257(4)

**Subject:** Probation Supervision.

**Purpose:** To reflect newly emerging offender supervision principles/practices and provide mandate relief to probation departments.

**Substance of final rule:** The proposed rule repeals existing Part 351 and adds a new Part 351 governing probation supervision.

Section 351.1 is the definitional section. This section defines over thirty key operational terms to ensure consistency statewide with respect to language interpretation. Among these are the definition of "active case" and various types of "contact" with respect to supervision to clarify what is meant by specific contact terminology. New definitions of "administrative case" and "contact substitution" set forth parameters by which departments are afforded additional supervision flexibility in certain regulatory requirements. Further, there are added several new definitional terms to reflect latest principles and practices in managing offenders in the community. For example, the terms "graduated sanctions", "merit credit", "merit credit activities", and "pro-social community activities" are defined to ensure there is universal understanding of what is meant by these terms in New York State, and to encourage these new supervisory approaches.

Section 351.2 sets forth the Objective which is twofold: (1) to provide local probation departments with procedures for persons who receive a probation sentence or are placed on probation supervision or under interim probation supervision by the courts, and (2) to promote evidence-based practices in the field of probation to promote public safety by holding the offender accountable, improving offender competencies, restoring victims, and reducing recidivism.

Section 351.3 governs applicability and establishes that it shall be applicable to all probation departments for family and criminal court probation supervision as well as interim supervision cases.

Section 351.4 establishes parameters relative to case assignment, in terms of timeframes, review of pertinent material, verification, and assignment where applicable to specialized caseloads.

Section 351.5 governs assessment and case planning, and delineates timeframes and critical procedures that must be undertaken to determine an individual offender's appropriate probation supervision classification level. For example, this section requires completion of the risk and need assessment if not already done at the time of investigation, recognizes a department may complete other specialized assessments, where available, and delineates specific confirmation of applicable legal case requirements are met, including DNA sample obtained, Sex Offender Registration Act status compliance, fingerprints obtained, and where ordered, a restitution account is established for collection.

Section 351.6 entitled "Probation Supervision" contains the main supervision standards to be followed. It distinguishes between "active" and "administrative" cases and delineates the various differential supervision classification levels and supervision contact requirements that must be met along with setting forth parameters by which probation departments may utilize greater flexibility in the area of certain contact provisions. A chart summarizing minimum contact provisions by classification level and merit credit/activities, where applicable is incorporated to foster better understanding and promote compliance. Additionally this section sets forth parameters governing periodic reassessments/case reviews.

Section 351.7 governs probation supervision practices relative to victim services, probationer referrals, risk management, risk reduction, technology, and supervisory directives/instructions.

Section 351.8 governs interstate and intrastate transfer cases and compliance requirements which must be met.

Section 351.9 sets forth criteria surrounding probation departments requesting termination of a sentence in accordance with statutory law.

Section 351.10 enumerates the types of probation case closing options.

Section 351.11 reiterates regulatory reporting parameters to the Division of Criminal Justice Services which is similar to existing regulations.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in sections 351.6(c) and 351.8.

**Text of rule and any required statements and analyses may be obtained from:** Linda J. Valenti, Assistant Counsel, NYS Division of Criminal Justice Services, 4 Tower Place, Albany, NY 12203, (518) 457-8413, email: linda.valenti@dcls.ny.gov

#### **Revised Regulatory Impact Statement**

##### 1. Statutory authority:

Pursuant to Chapter 56 of the Laws of 2010, the former Division of Probation and Correctional Alternatives (DPCA) was merged within the Division of Criminal Justice Services (DCJS) and is now the Office of Probation and Correctional Alternatives (OPCA). Section 8 of Part A of this Chapter specifically transferred all rules and regulations of DPCA to DCJS and provided that such shall continue in full force and effect until duly modified or abrogated by the Commissioner of DCJS. Additionally, section 17 of Part A of this Chapter amended Executive Law Section 243(1) to make conforming changes and establish in pertinent part that the DCJS Commissioner has authority to adopt "general rules which shall regulate methods and procedure in the administration of probation services, including ... supervision... so as to secure the most effective application of the probation system and the most effective enforcement of the probation laws throughout the state." Further, Executive Law Section 257(4) requires that probation officers contact probationers "at least once a month" pursuant to rules promulgated by the Commissioner. Such rules are binding with the force and effect of law.

##### 2. Legislative objectives:

In general, these regulatory amendments, which replace the existing rule in this area, are consistent with legislative intent regarding critical probation functions and the promotion of professional standards which govern administration and delivery of probation supervision services for both family court and criminal court persons receiving a probation disposition or sentence. By vesting the DCJS Commissioner with rule-making authority, the Legislature authorized DCJS to set minimum probation supervision standards.

The overarching goal of these amendments is to reflect newly emerging and recognized evidence-based offender supervision principles and practices for effective interventions and better outcomes to reduce recidivism, and to afford additional flexibility to probation departments relative to certain supervisory management decision-making in an effort to provide mandate relief. Specifically, the new rule will incorporate evidence-based practices around case assessment, case planning, and reassessment, encourage the use of technology, where appropriate, promote the use of effective risk management and risk reduction strategies, provide greater flexibility in terms of supervision levels and how, when, and where supervision contacts can be made, and reduce unnecessary paperwork. Through modernization of minimum supervision standards, this rule will advance statewide application of best supervision practices throughout all probation departments in New York State (NYS).

##### 3. Needs and benefits:

Since the last major revision of the rule occurred over 20 years ago, model contemporary probation practices have been incorporated into this rule to guarantee statewide utilization of sound supervision strategies that promote probationer accountability, rehabilitation and behavioral change. These amendments emphasize the importance of actuarial risk and need assessments, recognize case planning protocols which research indicates help achieve better outcomes, and incorporate the protocol of reassessing cases on a regular periodic basis, which have proven to be an effective method to measure how an offender is progressing, or not, toward the goals of their conditions of probation and case plan. These amendments reflect nationally recognized evidence-based practice principles demonstrated in research to reduce risk of recidivism by addressing needs underlying the presenting delinquent or criminal behaviors. Through screening and assessment and case planning and reassessment protocols, probation departments will have greater insight into individual risks and needs and responsiveness to supervision strategies in order to more effectively implement changes as the case progresses. Recognizing greater utilization of technology, with a strong emphasis on core principles surrounding effective risk and needs strategies, also will benefit probation departments to structure their supervisory caseloads according to risk and need, supervise accordingly, and achieve probation supervisory management in a more efficient manner. While certain amendments are more prescriptive, special care and attention was paid to provide enhanced flexibility for departments to develop and implement policies and procedures that meet their local needs and resource capacities.

Finally, these amendments update the existing rule consistent with recent statutory changes relative to interstate/intrastate transfers and interim probation supervision, and embrace several key terms and strategies consistent with other adopted DCJS rules relative to community corrections and programmatic initiatives to reduce recidivism, positively change behavior, and assist victims.

##### 4. Costs:

DCJS anticipates no additional costs beyond what is currently required in law and regulation. Good assessments at the beginning of each case, case plans based on the dynamic risk factors, and meaningful reassessments will achieve more effective probation supervision and efficiency of staff supervisory deployment and concomitantly facilitate offender capacity to lead productive, law-abiding lives. DCJS believes such efforts can optimally avoid, or at a minimum reduce, short-term and long-term state and local incarceration and/or placement costs for offenders at risk of continued involvement with the juvenile justice or criminal justice system and associated court costs involved. Notably, probation population and individual risks and needs are not static in nature and vary across the State, the scope of enhanced probation services differs among jurisdictions, and in recent years numerous probation departments have experienced reduced local fiscal aid, yet increased workload. Consequently, DCJS cannot definitively quantify governmental cost savings. However, it is anticipated that changes will help departments better manage their finite resources in a more efficient manner.

Significantly, DCJS has made available, at no cost to jurisdictions, the Youth Assessment and Screening Instrument (YASI) tools and software for youth and the Correctional Offender Management Profiling for Alternative Sanctions (NY COMPAS) for adults. Fifty-seven counties currently use YASI and COMPAS. Consistent application and sharing of screening, assessment, case planning, and reassessment protocols and results will avoid duplication of efforts within and across probation departments.

As part of the State's efforts to streamline recordkeeping, prevent duplication, and achieve cost savings, OPCA supported the deployment of web-based case management software, known as Caseload Explorer (CE) to standardize probation information and reporting in a more efficient manner. Currently, 47 departments are implementing this software and it is anticipated that several other departments will participate in the near future.

As to any anticipated in-service costs of educating staff, DCJS believes orientation can be readily accomplished through memoranda, statewide trainings via Live Meeting technology, OPCA technical assistance on an as-needed basis, and director/supervisory oversight without incurring any direct costs. Overall, any minimal costs are outweighed by the benefits of avoiding or lessening unnecessary reliance on jail or State incarceration and/or juvenile placement, reducing attendant costs associated therewith, and serving the best interests of youth and adult offenders.

##### 5. Local government mandates:

While this regulatory reform requires specific attention to key areas, including slightly greater minimum supervisory contact with greatest risk and high risk probationers, amendments provide considerable flexibility and appropriate contact substitution consistent with public safety. It acknowledges certain operational policy and resource differences among departments.

Importantly, former DPCA always had agency rules governing probation supervision, and current DCJS regulations are consistent with its statutory authority. Therefore continuance of DCJS supervisory rules does not anticipate that any new supervisory requirements will be burdensome. DCJS already requires actuarial risk and needs assessments along with case planning tools and protocols approved by the Commissioner. DCJS has made assessment software available to all jurisdictions free of charge. As the state oversight agency with respect to administration of probation services, State approval of any assessment tool is appropriate.

##### 6. Paperwork:

The rule does not require additional reports or forms. Deployment of CE case management software has streamlined several paper requirements and avoided duplication of efforts. While refinement of certain reports and forms to reflect the revised regulatory content will be necessitated, OPCA convened a specific workgroup of state and local probation professionals which developed specifications and to determine requisite software changes to occur prior to implementation.

##### 7. Duplication:

These amendments do not duplicate any State or Federal law or regulation.

##### 8. Alternatives:

These amendments integrate law, research, and model probation practices to establish specific minimum standards for probation's provision of supervision for both juvenile and adult offenders who are subject to terms and conditions of probation in the community. Strengthening and supporting consistent application of probation supervision is essential to ensure

public safety through risk management and risk reduction approaches. By addressing offenders' needs within the context of their families and communities and reducing offender recidivism, the State and local government can realize savings in jail, imprisonment, placement, and social costs.

It is OPCA's statutory responsibility to exercise general supervision over the administration of probation services and DCJS has been empowered with rulemaking authority governing probation services, including but not limited to supervision, to secure the most effective application of the probation system and the most efficient enforcement of probation laws throughout the State. Accordingly, it is necessary to maintain its rule governing probation supervision and this updated rule helps achieve these statutory goals with respect to oversight of probation supervision services.

In the preparation and drafting of regulatory amendments, OPCA was diligent in engaging probation, juvenile justice, and criminal justice professionals from around NYS, as well as reaching out to other states and organizations to become better informed on data and current research. In February 2010, OPCA convened a Supervision Rule Revision Workgroup with representatives across the state from small, medium, and large jurisdictions representing urban and rural jurisdictions as well as staff from DCJS. Also included in the workgroup were representatives from the NYS Probation Officers Association (POA) and the NYS Council of Probation Administrators (COPA). Monthly meetings were held throughout 2010 and into early 2011. While monthly meetings were occurring, OPCA reached out to other states and organizations with expertise in the area of community supervision (Colorado; Arizona; Texas; Michigan; Council of State Governments; American Probation and Parole Association) and invited Orbis Partners, author of YASI, Northpointe, author of COMPAS, and the DCJS Research Unit to present NYS probation data to the workgroup. In March 2011, OPCA circulated a refined draft to all probation directors for their informal review and feedback. While in June 2011 OPCA presented the proposed rule at the COPA Summer Institute, OPCA officials also met with probation directors from COPA Area 3 in May, Area 1 in July, and Area 2 in September of 2011 relative to this new rule. In August 2011 OPCA provided probation departments with a draft Practice Commentary to accompany the rule and provide more insight into and guidance surrounding new provisions. In September 2011 the Probation Commission approved the rule. In all, eighteen regulatory drafts were developed, critiqued and debated, and edited to address the feedback from probation and criminal justice professionals from across the State.

Most of the feedback indicated that these amendments reflect current model best probation practices and some sought clarification of language, alternate language, or increased flexibility. The majority of substantive suggestions were incorporated in this final version, and the workgroup clarified issues raised, and increased flexibility in certain instances. Overall, OPCA received favorable support from probation agencies that these amendments are manageable and consistent with good professional practice. For reasons stated throughout this document relative to approval and use of actuarial tools, and while NYC Probation is the sole remaining non-YASI and non-COMPAS jurisdiction and has in the past objected to State approval of their assessment tools, it is essential that DCJS ensure departments are using fully validated instruments. Notably, there exists regulatory flexibility to allow New York City to choose another validated assessment tool, approved by DCJS, and State agency permission previously has been granted in this area.

#### 9. Federal standards:

There are no federal standards governing the provision of probation supervision in NYS.

#### 10. Compliance schedule:

COPA had expressed concern that new rule implementation not occur until CE software changes are made. As noted earlier, a workgroup was established to identify necessary changes. DCJS agreed to defer implementation until changes are completed and such changes will occur on or about the first quarter of 2013. OPCA has already provided regional training throughout the state to departments on the proposed rule. Accordingly, through prompt staff dissemination of the adopted rule, its summary, and the Practice Commentary, local departments should be able to implement and comply with new provisions by June 1, 2013.

### **Revised Regulatory Flexibility Analysis**

#### 1. Effect of Rule:

This proposed rule revises existing regulatory procedures in the area of probation supervision for both family court and criminal court cases and will impact local probation departments which are responsible for the delivery of such services.

These amendments reflect newly emerging and nationally recognized evidence-based offender supervision principles and practices demonstrated in research to reduce risk of recidivism by addressing needs underlying the presenting delinquent or criminal behavior. Specifically, model contemporary probation practices have been incorporated into the proposed rule to guarantee statewide utilization of sound supervision strategies that promote probationer accountability, rehabilitation and

behavioral change. Through modernization of minimum supervision standards, this proposed rule will advance statewide application of best supervision practices throughout all probation departments in New York State (NYS).

These regulatory amendments emphasize the importance of actuarial risk and need assessments, recognize case planning protocols which research indicates help achieve better outcomes, and incorporate the protocol of reassessing cases on a periodic basis, which has proven to be an effective method to measure how an offender is progressing, or not, toward the goals of their conditions of probation and case plan. Strengthening and supporting consistent application of probation supervision is essential to ensure effective and efficient risk management and risk reduction as appropriate.

Additional flexibility is afforded to probation departments relative to certain supervisory management decision-making and contact requirements in an effort to provide mandate relief. Recognizing greater utilization of technology, with a strong emphasis on core principles surrounding effective risk and needs strategies, also will benefit probation departments to structure their supervisory caseloads according to risk and need, supervise accordingly, and achieve probation supervisory management in a more efficient manner. While certain amendments are more prescriptive, special care and attention was paid to provide enhanced flexibility for departments to develop and implement policies and procedures that meet their local needs and resource capacities.

By addressing probationer needs within the context of their families, schools, employment, treatment programs, and communities, and reducing offender recidivism, the State and local governments can better realize savings in jail, state imprisonment, placement, and social costs. Such efforts will further assist probation departments in more efficiently and effectively managing their supervisory workload.

No small businesses are impacted by these proposed regulatory amendments.

#### 2. Compliance Requirements:

Importantly, OPCA and its predecessor agency, the Division of Probation, always had agency rules governing probation supervision. The proposed regulatory amendments continue minimum probation supervision requirements to ensure similar service delivery throughout the state. While this regulatory reform requires specific attention to key areas, including slightly greater minimum supervisory contact with greatest risk and high risk probationers, amendments provide considerable flexibility and appropriate contact substitution consistent with public safety. It further acknowledges certain operational policy and resource differences among departments. DCJS does not anticipate that any new supervisory requirements will be problematic in terms of compliance as the agency was diligent in working together with local probation professionals to update the rule to achieve current best supervision practices, afford mandate relief, and guarantee workable provisions that can be met.

DCJS already requires actuarial risk and needs assessments along with case planning tools and protocols approved by the Commissioner and has made assessment software available to probation departments. Therefore, regulatory provisions in this area ought not to be problematic in terms of implementation. As the state oversight agency with respect to administration of probation services, State approval of any assessment tool is appropriate.

With respect to paperwork, the proposed rule does not require additional reports or forms and does not change the monthly workload reporting requirements to DCJS. Additionally, DCJS has made case management software available to all probation departments to promote greater efficiency and facilitate electronic record sharing where appropriate. While refinement of certain reports and forms to reflect the revised regulatory content will be necessitated, OPCA has convened a workgroup of state and local probation professionals to develop necessary specifications and changes will occur prior to implementation.

There are no small business compliance requirements imposed by these proposed rule amendments.

#### 3. Professional Services:

No professional services are required for probation departments to comply with the proposed rule changes. Additionally, as this rule does not impact small businesses, there are no professional services required of small business associated with these proposed rule amendments.

#### 4. Compliance Cost:

DCJS anticipates no additional costs in adhering to these amendments beyond what is currently required in law and regulation. Good assessments at the beginning of each case, case plans based on the dynamic risk factors, and meaningful reassessments will achieve more effective probation supervision and efficiency of staff supervisory deployment and concomitantly facilitate offender capacity to lead productive, law-abiding lives. DCJS believes such efforts can optimally avoid, or at a minimum reduce, short-term and long-term State and local incarceration and/or placement costs for offenders at risk of continued involvement with the ju-

venile justice or criminal justice system and the associated court costs involved. Notably, probation population and individual risks and needs are not static in nature and vary across the State, the scope of enhanced probation services differs among jurisdictions, and in recent years numerous probation departments have experienced reduced local fiscal aid, yet increased workload. Consequently, DCJS cannot definitively quantify governmental cost savings. However, it is anticipated that changes will help departments better manage their finite resources in a more efficient manner.

Significantly, DCJS has made available, at no cost to jurisdictions, the Youth Assessment and Screening Instrument (YASI) tools and software for youth and the Correctional Offender Management Profiling for Alternative Sanctions (NY COMPAS) for adults. Fifty-seven counties currently use YASI and COMPAS. Consistent application and sharing of screening, assessment, case planning, and reassessment protocols and results will avoid duplication of efforts within and across probation departments.

As part of the State's efforts to streamline recordkeeping, prevent duplication, and achieve cost savings, OPCA supported the deployment of web-based case management software, known as Caseload Explorer (CE), to standardize probation information and reporting in a more efficient manner. Currently, 44 departments are utilizing the software and it is anticipated that several other departments will participate in the near future.

As to any anticipated in-service costs of educating staff, DCJS believes orientation can be readily accomplished through memoranda, statewide trainings via Live Meeting technology, OPCA technical assistance on an as-needed basis, and director/supervisory oversight without incurring any direct costs. Overall, any minimal costs are outweighed by the benefits of avoiding or lessening unnecessary reliance on jail or State incarceration and/or juvenile placement, reducing attendant costs associated therewith, and serving the best interests of youth and adult offenders.

#### 5. Economic and Technological Feasibility:

Local probation departments should have no problem in complying with this rule. All departments, with the exception of New York City (NYC), are using both the YASI and COMPAS risk and needs assessment software which enables them to have a validated DCJS approved risk and needs assessment tool. Further, NYC Department of Probation has been granted State permission to utilize other instruments and has recently expressed some interest in YASI and COMPAS. As noted earlier, DCJS also has supported deployment of CE case management software for interested probation departments and the clear majority of probation departments are utilizing this software and additional departments will be participating in the near future. Further, OPCA has recently convened a workgroup of state and local professionals to ensure that CE software changes will be made prior to rule implementation. DCJS does not anticipate any economic or technological problems experienced by probation departments as a result of final adoption of these rule changes. There are no economic or technological issues faced by small businesses as these proposed rules do not affect them.

#### 6. Minimizing Adverse Impacts:

In the preparation and drafting of the proposed amendments, OPCA was diligent in engaging probation, juvenile justice, and criminal justice professionals from around the State, as well as reaching out to other states and organizations to become better informed on data and current research. In February 2010, OPCA convened a Supervision Rule Revision Workgroup with representatives across the state from small, medium, and large jurisdictions representing urban and rural jurisdictions as well as staff from DCJS. Also included in the workgroup were representatives from the NYS Probation Officers Association (POA) and the NYS Council of Probation Administrators (COPA). Monthly meetings were held throughout 2010 and into early 2011. While monthly meetings were occurring, OPCA reached out to other states and organizations with expertise in the area of community supervision (Colorado; Arizona; Texas; Michigan; Council of State Governments; American Probation and Parole Association) and invited Orbis Partners, author of YASI, Northpointe, author of COMPAS, and the DCJS Research Unit to present NYS probation data to the workgroup. In March 2011, OPCA circulated a refined draft to all probation directors/commissioners for their informal review and feedback. While in June 2011 OPCA officials presented the proposed rule at the COPA Summer Institute, OPCA officials also met with probation directors from COPA Area 3 in May, Area 1 in July, and Area 2 in September of 2011 relative to this new rule. In August 2011 OPCA provided probation across NYS with a draft Practice Commentary document to accompany the rule and provide more insight into and guidance surrounding proposed regulatory provisions. In September 2011 the Probation Commission approved the rule. In all, eighteen drafts of the proposed rule were developed, critiqued and debated, and edited to address the feedback from probation and criminal justice professionals from across the State.

Most of the feedback indicated that these amendments reflect current

model best probation practices. Some feedback sought clarification of language, alternate language, or increased flexibility. The majority of substantive suggestions for change were incorporated in this final version, and the workgroup clarified issues raised, and increased flexibility in certain instances. Overall, OPCA received favorable support from probation agencies that these amendments are manageable and consistent with good professional practice. For reasons stated throughout this document relative to approval and use of actuarial tools, and while NYC Probation is the sole remaining non-YASI and non-COMPAS jurisdiction and has in the past objected to State approval of their assessment tools, it is essential that DCJS ensure departments are using fully validated instruments. Notably, there exists regulatory flexibility to allow New York City to choose another validated assessment tool, approved by DCJS, and State agency permission previously has been granted in this area.

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

See Section 6 above with respect to local government participation in reform of this supervision rule and in assisting DCJS finalize necessary specifications of case management software changes.

This proposed rule does not impact small businesses within the state and, therefore, there was no need to involve small businesses across the state in rule reform in this area.

#### Revised Rural Area Flexibility Analysis

##### 1. Types and estimated number of rural areas:

Forty-four local probation departments are located in rural areas and will be affected by the proposed rule amendments.

##### 2. Reporting, recordkeeping, and other compliance requirements, and professional services:

The newly proposed supervision rule continues current and expands slightly on regulatory requirements that probation directors maintain certain local written policies and procedures governing key aspects of probation supervision functions for both juvenile and adult offenders receiving a disposition or sentence of probation. These key areas for local policy development were carefully vetted with probation departments across the State and are consistent with best professional practices surrounding delivery of probation supervision and ensure departments maintain flexibility that takes into account local needs and resources. Some regulatory amendments establishing minimum timeframes, criteria, and/or contact requirements surrounding assessments, reassessments, case planning, classification level, and case record documentation are consistent with current regulations in this area. Others afford additional flexibility to probation departments or strengthen supervision requirements in accordance with best professional practices surrounding delivery of probation supervision services and to enhance probation supervisory management flexibility cognizant of local needs and resources. With respect to supervision record keeping, the regulatory changes revamp contact requirements and expand somewhat upon recording of key supervision areas to reflect sound minimum supervision standards. While this new rule does not change the monthly workload reporting requirements to DCJS which is integral to maintain current relevant statistical information on probation supervision operations, there has been considerable efforts in recent years to streamline and automate probation record keeping and reporting through software initiatives and further detail of such enhanced measures and the benefits to probation departments across the State are explained in more detail under the Costs section. Overall, regulatory language emphasizes that record keeping governing probation services are to be in accordance with the DCJS Case Record Management rule. Notably, DCJS is in the process of revising this specific rule in terms of affording greater mandate relief and management flexibility and updating provisions to reflect automation of records.

DCJS does not believe that these regulatory changes will prove difficult to achieve. Through prompt dissemination to staff of this new rule and its summary, statewide trainings via Live Meeting technology, OPCA technical assistance on an as-needed basis, and normal director/supervisory oversight of supervision services, local probation departments should be able to promptly implement these amendments and comply with the rule's provisions ninety days after formal adoption. DCJS has agreed to defer implementation until certain software changes have been made and it has established a workgroup to develop necessary specifications regarding changes necessitated.

As to professional service requirements, there are no additional professional services necessitated in any rural area to comply with this rule.

##### 3. Costs:

DCJS anticipates no additional costs in adhering to these amendments beyond what is currently required in law and regulation. Good assessments at the beginning of each case, case plans based on the dynamic risk factors, and meaningful reassessments will achieve more effective probation supervision and efficiency of staff supervisory deployment and concomitantly facilitate offender capacity to lead productive, law-abiding lives. DCJS believes such efforts can optimally avoid or at a minimum reduce short-term and long-term State and local incarceration and/or place-

ment costs for offenders at risk of continued involvement with the juvenile justice or criminal justice system and associated court costs involved. Notably, probation population and individual risks and needs are not static in nature and vary across the State, the scope of enhanced probation services differs among jurisdictions, and in recent years numerous probation departments have experienced reduced local fiscal aid, yet increased workload. Consequently, DCJS cannot definitively quantify governmental cost savings. However, it is anticipated that changes will help departments better manage their finite resources in a more efficient manner.

Significantly, DCJS has made available, at no cost to jurisdictions, the Youth Assessment and Screening Instrument (YASI) tools and software for youth and the Correctional Offender Management Profiling for Alternative Sanctions (NY COMPAS) for adults. Fifty-seven counties, including every rural jurisdiction's probation department, currently use YASI and COMPAS. Consistent application and sharing of screening, assessment, case planning, and reassessment protocols and results will avoid duplication of efforts within and across probation departments.

As part of the State's efforts to streamline recordkeeping, prevent duplication, and achieve cost savings, OPCA supported the deployment of web-based case management software, known as Caseload Explorer (CE) to standardize probation information and reporting in a more efficient manner. Currently, 44 departments utilize this software and it is anticipated that several other departments will participate in the near future. Overall, participating rural counties benefit from this software and none of the remaining rural jurisdictions have voiced concern with any of the supervisory reporting or recordkeeping requirements.

As to any anticipated in-service costs of educating staff, DCJS believes orientation can be readily accomplished through memoranda, statewide trainings via Live Meeting technology, OPCA technical assistance on an as-needed basis, and director/supervisory oversight without incurring any direct costs. Any minimal costs are outweighed by the benefits of avoiding or lessening unnecessary reliance on jail or State incarceration and/or juvenile placement, reducing attendant costs associated therewith, and serving the best interests of youth and adult offenders.

DCJS believes that more effective probation supervision in the community can reduce long-term State and local governmental costs for those probationers who are at risk of continued involvement with the juvenile justice or criminal justice system. DCJS anticipates no additional costs in adhering to these regulatory amendments beyond what is currently required in law and regulation.

#### 4. Minimizing adverse impact:

DCJS foresees that these regulatory amendments will have no adverse impact on rural areas. OPCA collaborated with jurisdictions across the state, including rural areas in developing the proposed rule and incorporated numerous suggestions from probation departments representing urban, rural, and suburban areas to clarify or address issues raised and to reflect good probation practice across the State. To our knowledge no adverse impact on rural areas were identified, and the new supervision rule embraced flexibility where it was found to be consistent with good practice.

In the preparation and drafting of the proposed amendments, DCJS was diligent in engaging probation, juvenile justice, and criminal justice professionals from around the State, as well as reaching out to other states and organizations to become better informed on data and current research. In February 2010, OPCA convened a Supervision Rule Revision Workgroup with representatives across the state from small, medium, and large jurisdictions representing urban and rural jurisdictions as well as staff from DCJS. Also included in the workgroup were representatives from the NYS Probation Officers Association (POA) and the NYS Council of Probation Administrators (COPA). Monthly meetings were held throughout 2010 and into early 2011. While monthly meetings were occurring, OPCA reached out to other states and organizations with expertise in the area of community supervision (Colorado; Arizona; Texas; Michigan; Council of State Governments; American Probation and Parole Association) and invited Orbis Partners, author of YASI, Northpointe, author of COMPAS, and the DCJS Research Unit to present NYS probation data to the workgroup. In March 2011, OPCA circulated a refined draft to all probation directors for their informal review and feedback. While in June 2011 OPCA presented the proposed rule at the COPA Summer Institute, OPCA officials also met with probation directors from COPA Area 3 in May, Area 1 in July, and Area 2 in September of 2011 relative to this new rule. In August 2011 OPCA provided probation departments with a draft Practice Commentary to accompany the rule and provide more insight into and guidance surrounding proposed regulatory provisions. In September 2011 the Probation Commission approved the rule. In all, eighteen regulatory drafts were developed, critiqued and debated, and edited to address the feedback from probation and criminal justice professionals from across the State.

#### 5. Rural area participation:

These revisions were developed by an OPCA workgroup comprised of

DCJS staff and several local probation departments representing all geographic regions of the state, including rural, and involving all levels of probation staff, including director, deputy director, supervisor, senior probation officer, and probation officer. Additionally, there was representation from the NYS Probation Officers Association and the NYS Council of Probation Administrators. See Section 4 above for details.

Most of the feedback indicated that these amendments reflect current model best probation practices and some sought clarification of language, alternate language, or increased flexibility. The majority of substantive suggestions were incorporated in this final version, and the workgroup clarified issues raised, and increased flexibility in certain instances. Overall, OPCA received favorable support from probation agencies that these amendments are manageable and consistent with good professional practice. For reasons stated throughout this document relative to approval and use of actuarial tools, and while NYC Probation is the sole remaining non-YASI and non-COMPAS jurisdiction and has in the past objected to State approval of their assessment tools, it is essential that DCJS ensure departments are using fully validated instruments. Notably, there exists regulatory flexibility to allow New York City to choose another validated assessment tool, approved by DCJS, and State agency permission previously has been granted in this area.

As OPCA did not find significant differences among urban, rural, and suburban jurisdictions as to issues raised or suggestions for change, and this rule satisfactorily addresses issues raised, DCJS is confident that these regulatory changes have the flexibility to accommodate rural probation department needs.

#### Revised Job Impact Statement

A job impact statement is not being submitted with these proposed regulations because the Division of Criminal Justice Services (DCJS) believes there will be no adverse effect on private or public jobs or employment opportunities.

These regulatory changes establish new minimum probation supervision standards, yet simultaneously afford greater flexibility to probation departments in performing supervision functions, especially in certain supervisory management decision-making and contact requirements. As noted in other regulatory documents, this rule was developed with considerable input of local probation departments across the state to incorporate nationally recognized evidence-based offender supervision practices and principles, afford mandate relief, and guarantee workable provisions that can be met. A Supervision Rule Revision workgroup was formed by the Office of Probation and Correctional Alternatives (OPCA) with state and local probation professionals across the state from small, medium, and large jurisdictions and also with representatives from the NYS Probation Officers Association and the NYS Council of Probation Administrators to ensure regulatory reform met all the aforementioned goals. Additionally, another workgroup was convened of state and local probation professionals to ensure web-based case management software changes, utilized by the overwhelming majority of departments, will be made prior to rule implementation. Further, through recognition of greater utilization of technology with a strong emphasis on core principles surrounding effective risk and needs strategies, probation departments will have the ability to better structure their supervisory caseloads according to risk and need and achieve probation supervisory management in a more efficient manner.

As to any anticipated in-service costs of educating staff, DCJS believes orientation can be readily accomplished through memoranda, statewide trainings via Live Meeting technology, OPCA technical assistance on an as needed basis, and director/supervisory oversight without incurring any direct costs.

#### Assessment of Public Comment

The Division of Criminal Justice Services (DCJS) received four written comments relative to the proposed regulatory Part 351 governing probation supervision during the official public comment period. A summary of these comments and our agency analysis and response follows:

The first comment was received from the Greene County Probation Director relative to the definitional term of "positive home contact", but it was satisfactorily resolved after follow-up agency communication with him as to its rationale.

The second comment, from an Orange County probation officer, registered general concerns as to staffing resources and the ability to timely carry out probation officer supervisory responsibilities. DCJS believes the officer's concern is unwarranted as this new rule provides for greater flexibility and local probation departmental discretion in reallocating resources as determined by risk level. Further, any specific regulatory timeframes were carefully weighed and consensus reached by DCJS' Office of Probation and Correctional Alternatives (OPCA) Supervision Rule Revision Workgroup with representatives across the state from small, medium, and large jurisdictions representing urban and rural jurisdictions as well as staff from DCJS. Also included in the workgroup were

representatives from the NYS Probation Officers Association (NYSPOA) and the NYS Council of Probation Administrators (COPA). Numerous internal regulatory drafts were circulated to local probation directors, NYSPOA, and COPA. In all, eighteen regulatory drafts were developed, critiqued and debated, and edited to address the feedback from probation and criminal justice professionals from across the State. All proposed timeframes and supervision activities reflected in this new rule were carefully vetted and consensus reached by the Workgroup. Notably, certain existing regulatory timeframes were revamped in this new rule to afford probation departments additional time to complete specific actions.

The third comment, from the Suffolk County Probation Officer's Association, voiced five specific concerns with the new rule. The first which was intended to refer to the term "positive home contact" was critical of the definition itself and expressed workload demands in meeting its requirement, especially for Level 2 or medium risk caseloads. The aforementioned Workgroup debated and discussed at length this term and differentiating between various contact definitions. However, significantly in the end, Workgroup consensus was reached that the proposed "positive home contact" definition which reflects a face-to-face contact with the probationer at his/her residence and any minimum positive home contact reference in the rule were achievable and in keeping with best practice-necessary for public safety and offender accountability. The other type of contact suggested by this Association would count as a collateral contact. It is further noteworthy to clarify that only one positive home contact requirement is required for a Level 2 case during the first forty-five calendar days from assignment, and thereafter only as needed. Moreover, this new rule gives probation department management greater flexibility as to how it can manage its resources and therefore their collective concerns are unwarranted.

With respect to the specific concern with the timeframe in which to conduct the initial interview being eight business days from the date of assignment, the proposed rule provides four additional days than current regulatory requirements and therefore it should not prove burdensome but be viewed as consistent with mandate relief.

As to this Association's concern with the new rule requirement that there be an in-person contact every week until the supervision case plan is completed pending the classification of the probationer, this requirement is by its very nature limited in duration and clearly in the interest of offender accountability and public safety and notably DCJS has heard no opposition to this from COPA, NYSPOA, the Workgroup, or any local probation director that this new regulatory expectation is burdensome or unreasonable.

Regarding high risk supervision requirements and the minimum requirement of one in-person contact per week and one positive home contact per month, this concern is disconcerting as the regulatory language herein relative to such similar contacts is consistent with current regulatory compliance language. As to the ability of probation officers with caseloads of medium and high risk probationers achieving these contact requirements, it is important and expected that officers utilize the reassessment tool and protocol to regularly reevaluate risk level and DCJS foresees that utilization of merit time allowances with respect to appropriate cases will prove helpful to probation departments in managing their staff resources.

As to the Association's concerns raised with kiosks and other forms of electronic reporting, DCJS believes that utilization of these supervision tools, where appropriate, in conjunction with effective intervention is what research indicates can help reduce criminal activity. Our current supervision rule has recognized these tools and the new rule incorporates them as well, and both the current and new rule retains discretion and provides flexibility to probation directors as to their usage.

Lastly, the fourth comment, from the New York City Department of Probation (NYCDOP), recommended that language regarding the availability of contact substitutions be broadened to embrace more young probationers given anticipated changes in how New York State will in the future treat young people accused of criminal acts. It appears that this comment is referring to the expectation that New York will soon join forty-nine states which have already raised their Juvenile Delinquency age up to eighteen from sixteen. The NYCDOP proposed language would change language referring "only for Juvenile Delinquent and Persons In Need of Supervision probationers under age 18 at the time of disposition" by striking reference to these two specific Family Court status populations. The remaining parameters regarding contact substitution would be retained. DCJS believes that the new rule language is sufficient in this area as it is already written broad enough should New York raise the maximum juvenile delinquency age to eighteen. In light of this observation and that our rule language was carefully crafted by the aforementioned Workgroup and neither OPCA or DCJS has heretofore heard the need to modify the language from any probation department or professional association during the vetting process, maintaining retention of our regulatory language at this time appears sound.

The only minor technical changes which OPCA recommended and DCJS made in adopting this new supervision rule were with respect to cases classified as Administrative as delineated in Rule Section 351.6(c) and to clarify language in Rule Section 351.8 with respect to interstate cases. Specifically, DCJS added two new administrative case categories to reflect Chapters 347 and 470 of the Laws of 2012 which were both enacted since submission of the proposed new rule to the State Register. As the former authorizes intrastate transfer of an Interim Probation Supervision case, yet establishes that the original court retains jurisdiction and the latter establishes new procedures with respect to family court intrastate probation transfers which will in certain instances lead to the original court retaining jurisdiction or receiving the case back for handling, specific language was added to establish when such cases would be handled administratively by the sending probation department. Two other administrative categories were added with respect to interstate cases to recognize instances when such offenders would not be available for active supervision in New York State. One of these clarifies the intent of certain language under Rule Section 351.8 with respect to interstate cases and the technical changes in Rule Section 351.8 better conforms with Interstate Compact rules relative to supervision responsibilities between the sending and receiving states. For additional input, OPCA had forwarded its recommended new technical amendments to COPA. Subsequently, at COPA's request, OPCA clarified language regarding one interstate administrative criteria to avoid confusion as to regulatory intent. COPA officials have communicated to OPCA their acceptance of these additional changes.

## REVISED RULE MAKING NO HEARING(S) SCHEDULED

### Limits on Administrative Expenses and Executive Compensation

I.D. No. CJS-22-12-00016-RP

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

**Proposed Action:** Addition of Part 6157 to Title 9 NYCRR.

**Statutory authority:** Executive Order No. 38; and Executive Law, section 837(13)

**Subject:** Limits on Administrative Expenses and Executive Compensation.

**Purpose:** To implement Executive Order No. 38 issued by Governor Andrew Cuomo on January 18, 2012.

**Substance of revised rule:** The revised rule would add a new Part 6157 to 9 NYCRR entitled Limits on Administrative Expenses and Executive Compensation.

Section 6157.1 provides the background and intent of the revised rule, which is to implement Executive Order No. 38, issued by Governor Andrew Cuomo on January 18, 2012.

Section 6157.2 contains definitions for purposes of this Part, including definitions for administrative expenses, commissioner, covered operating expenses, covered executive, covered provider, division, executive compensation, program services, program services expenses, related organization, reporting period, State-authorized payments, and State funds.

Section 6157.3 Limits on Administrative Expenses. Contains limits on the use of State funds or State-authorized payments for administrative expenses.

The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria.

The restriction will apply to covered providers receiving State funds or State-authorized payments from county or local governments, rather than directly from a State agency, pursuant to specified criteria.

The revised regulation addresses how the restriction will apply in the event that a covered provider has multiple sources of State funds or State-authorized payments.

Section 6157.4 Limits on Executive Compensation. Contains restrictions on executive compensation provided to covered executives.

The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria.

The restriction will apply to covered providers receiving State funds or State-authorized payments from county or local governments, rather than directly from a State agency, pursuant to specified criteria.

The revised rule addresses the application of this limit if the covered provider has multiple sources of State funds or State-authorized payments.

Section 6157.5 Waivers. Processes are established for covered providers to seek waivers of the limits on administrative expenses and the limits on executive compensation.

Section 6157.6 Reporting. Covered providers are required to report information on an annual basis.

Section 6157.7 Penalties. A process is established for the imposition of

penalties in the event of non-compliance with the limits on administrative expenses or the limits on executive compensation.

A copy of the full text of the regulatory proposal is available on the Division of Criminal Justice Services website at <http://www.criminaljustice.ny.gov/>.

**Revised rule compared with proposed rule:** Substantial revisions were made in sections 6157.2, 6157.3(a), 6157.4, 6157.5 and 6157.7.

**Text of revised proposed rule and any required statements and analyses may be obtained from** Natasha M. Harvin, NYS Division of Criminal Justice Services, 4 Tower Place, Albany, New York 12203, (518) 485-0857, email: [natasha.harvin@dcjs.ny.gov](mailto:natasha.harvin@dcjs.ny.gov)

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

**Public comment will be received until:** 30 days after publication of this notice.

#### Revised Regulatory Impact Statement

Statutory Authority:

Executive Order (E.O.) No. 38; Executive Law § 837(13). Executive Law § 837(13) authorizes the Division of Criminal Justice Services to adopt, amend or rescind regulations “as may be necessary or convenient to the performance of the functions, powers and duties of the [D]ivision.”

Legislative Objectives:

E.O. No. 38, which was issued by Governor Andrew Cuomo on January 18, 2012, provides for a limit on administrative expenses and executive compensation of providers of program services in order to meet the State’s ongoing obligation to ensure the proper use of taxpayer dollars and the most effective provision of such services to the public. The purpose of these regulations is to implement E.O. No. 38 by exercising the authority of the Commissioner of the Division of Criminal Justice Services to issue regulations governing the use of State funds and State-authorized payments in connection with providing program services to members of the public.

Needs and Benefits:

The Division of Criminal Justice Services is proposing to adopt the following regulation because the State of New York directly or indirectly funds with taxpayer dollars a large number of tax exempt organizations and for-profit entities that provide critical services to New Yorkers in need and the goal is to ensure that taxpayer dollars are used properly, efficiently and effectively to improve the lives of New Yorkers. In certain instances, providers of services that receive State funds or State-authorized payments have used such funds to pay for excessive administrative costs or inflated compensation for their senior executives, rather than devoting a greater proportion of such funds to providing direct care or services to their clients. Such abuses involving public funds harm both the people of New York who are paying for such services, and those persons who must depend upon such services to be available and well-funded. These regulations, which are required by E.O. No. 38, will ensure that State funds or State-authorized payments paid by this agency to providers are not used to support excessive compensation or unnecessary administrative costs.

Costs:

The costs of implementing this rule to affected providers is anticipated to be minimal as most, if not all, of the information that must be reported by such providers is already gathered or reported for other purposes. The costs to the agency of such implementation is expected to be very limited as well, and efforts to ensure efficient centralization of certain aspects of such implementation are underway.

Local Government Mandates:

None. The Commissioner or his or her designee, rather than the county or local unit of government, shall be responsible for obtaining the necessary reporting from and compliance by such covered providers, and shall issue guidance to affected county and local governments to set forth the procedures by which the Commissioner or his or her designee shall do so.

Paperwork/Reporting Requirements:

The proposed regulatory amendments will require limited additional information to be reported to the agency by providers receiving State funds or State-authorized payments. To the extent feasible, such reporting shall be made electronically to avoid unnecessary paperwork costs.

Duplication:

This proposed rule does not duplicate, overlap or conflict with any State or federal statute or rule. However, the proposed rule seeks to minimize the reporting requirements faced by providers by building upon those requirements in the federal internal revenue code that require certain tax-exempt organizations to report information concerning their executive compensation and administrative costs.

Alternatives:

E.O. No. 38 requires the adoption of this proposed regulation.

Federal Standards:

These amendments do not conflict with federal standards.

Compliance Schedule:

This rule will become effective when adopted and the Notice of Adop-

tion is published in the State Register. The implementation date establishing the limits on administrative expenses and executive compensation will be April 1, 2013.

#### Revised Regulatory Flexibility Analysis

A revised Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this notice because the changes will not impose any adverse economic impact on small businesses, nor will it impose new reporting, recordkeeping or other compliance requirements on small businesses or local governments.

The proposed regulatory amendments are designed to address executive compensation and administrative costs of those providers of program services that receive State funds or State-authorized payments paid by the Division of Criminal Justice Services.

#### Revised Rural Area Flexibility Analysis

A revised Rural Area Flexibility Analysis is not being submitted with this notice because the changes will not impose any adverse economic impact on rural areas or reporting, recordkeeping or other compliance requirements on public or private entities in rural areas.

The proposed regulatory amendments are designed to address executive compensation and administrative costs of those providers of program services that receive State funds or State-authorized payments paid by the Division of Criminal Justice Services.

#### Revised Job Impact Statement

A revised Job Impact Statement is not being submitted with this notice because it is evident from the subject matter of the regulation that it will have no impact on jobs and employment opportunities.

#### Assessment of Public Comment

A Notice of Proposed Rule Making was published in the State Register on May 30, 2012.

All comments received were reviewed and evaluated. Many of the concerns expressed in the comments have been addressed by revisions to the various sections of the proposed regulation. Suggestions from others were determined to be contrary to the goals of the proposed rulemaking.

A number of comments objected generally to the underlying concept of the regulations, stating that the proposed regulation is overly broad in its authority and burdensome in its requirements. The Division of Criminal Justice Services (Division) believes that the proposed limitations in the regulation further the legitimate goal of ensuring that public funds are properly expended and the use of such funds is properly monitored.

Clarification was requested concerning certain defined terms in the proposed regulation, in particular with respect to their intended scope. In response, and taking into account suggestions submitted, changes were made to the definitions of the following terms: administrative expenses, covered provider, covered executive, executive compensation, program services expenses, related entity, State-authorized payments and State funds.

Some commenters stated that the proposed limits on administrative expenses were burdensome and unnecessary, because they would interfere with existing contracts, because they were possibly duplicative of existing State and federal rules, or they will not enhance the protections already provided by restrictions from State reimbursement rates. Clarification was requested as to what will constitute administrative and program expenses. The proposed regulation has been revised to incorporate an allocation methodology for these two expenses.

There were a wide range of comments and suggestions on the definition of “executive compensation.” They covered such topics as: (a) general concerns about application of the definition, (b) exclusions, (c) limitations and application of the definition, and (d) suggestions about surveys and their use. A summary of the comments and suggestions follows:

(a) General concerns regarding the regulation include that it: is too broad since it regulates use of funding sources not emanating from the State; is unrealistic, problematic and intrusive to operations; will adversely affect candidate pools, incumbents, service delivery and the ability of providers to meet the challenges and changes in the health care system; is intrusive to the for-profit sector where executive compensation is a private matter; is faulty in that it will institutionalize abuses through comparability data; and is duplicative as executive compensation is already controlled at the State and federal levels through rate setting, IRS rules and reporting, and the Not-For-Profit Corporation Law. Other comments stated that the regulation would encroach on the State Attorney General’s regulation and enforcement; is arbitrary in its establishment of the thresholds of \$500,000 and 30%; was exclusive of larger corporations; and inappropriately used a percentile standard that will gradually diminish compensation levels and lead to the existence of two levels of compensation. Commenters also suggested that covered providers subject to penalty should be allowed to submit documentation in advance of penalty review.

(b) Other comments focused on exclusions for not-for-profits and for not-for-profit long term care and senior services providers and an elimination of the 75th percentile threshold.

(c) Still other letters related to limitations and application of the definition of "executive compensation." They suggested that executive compensation rules should only be applied to non-State funds or to State and State-authorized funds. The applicability of the rules with regard to contributions of other non-covered entities should be clarified. Also, letters received argued that the period covered by the limits on executive compensation should not begin on January 1, 2013, the executive compensation limits should be revisited periodically to adjust for changes, and the role of executives in the assurance of program services should be recognized.

(d) Commenters recommended several approaches to determining reasonable compensation, such as the use of recognized surveys or independent commissioned surveys or identification and recognition of specific compensation surveys to establish comparisons. It was suggested that surveys should allow for regional and geographic variations. Further, commenters suggested that the regulation also should address instances where a board or governing body does not exist.

The regulation was revised to address the comments on: the period to be covered by the limits on executive compensation; an annual review of the \$199,000 cap and the adjustment thereof; the consideration of the availability of a governing body as alternate to the covered provider's board of directors; the submission of contemporaneous (but not prospective) documentation for penalty review; the recognition of supervisory services of executives as program services; the allocation methodology for reporting administrative and program service costs; the recognition of specific clinical and program personnel as providers of program services; and a method for subcontractors to be advised of the receipt of State or State-authorized funds from a covered provider.

The regulation was not revised to limit the rule to non-State funds, to exclude for-profits from being covered by the regulations, or to alter the 75th percentile threshold because these revisions would compromise the goal of the regulation. Eliminating the executive compensation requirements would viscerate one of the key objectives of the executive order: limiting the extent of such compensation paid by covered providers that rely to a significant degree upon public funds for their program and administrative services funding. The Division is proposing to adopt this regulation because the State of New York directly or indirectly funds with taxpayer dollars a large number of tax exempt organizations and for-profit entities that provide critical services to New Yorkers in need, and the goal is to ensure that taxpayer dollars are used properly, efficiently and effectively to improve the lives of New Yorkers. In certain instances, service providers that receive State funds or State-authorized payments have used such funds to pay for excessive administrative costs or inflated compensation for their senior executives, rather than devoting a greater proportion of such funds to providing direct care or services to their clients. Such abuses involving public funds harm both the people of New York who are paying for such services and those persons who must depend upon such services to be available and well-funded. These regulations provide a benchmark to ensure that State funds or State-authorized payments paid by this agency to providers are not used to support excessive compensation or unnecessary administrative costs. In part because of the funding of resources, their restriction is necessary to accomplish these objectives.

Some comments stated that the proposed waiver process is overly complex and lacking objective criteria. The revised regulation provides greater flexibility in the filing of a waiver application and also has pushed back the implementation date.

Comments received also criticized the proposed reporting requirements suggesting that they require providing information related to administrative and program expenses in a manner inconsistent with other current reporting obligations. The regulation has been amended to conform some of the requirements to those with which many covered providers must already comply, including provisions incorporating the definitions applicable with non-profits under the IRS Code.

Other submissions asked when penalties for excess compensation would be assessed, what the type of penalties would be imposed, and about the level of severity. Commenters also requested details on the criteria for making penalty determination. Changes have been made to the Penalties section in the revised text, including extending the time for submissions, a corrective action plan (CAP) and a request for an administrative appeal to 30 calendar days.

The full Assessment of Public Comments is available on the Division of Criminal Justice Services website at <http://www.criminaljustice.ny.gov/>.

## Department of Economic Development

### EMERGENCY RULE MAKING

#### Empire State Jobs Retention Program Tax Credit

**I.D. No.** EDV-44-12-00004-E

**Filing No.** 1030

**Filing Date:** 2012-10-15

**Effective Date:** 2012-10-15

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

**Action taken:** Addition of Parts 210-216 of Title 5 NYCRR.

**Statutory authority:** Economic Development Law, art. 20

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

**Specific reasons underlying the finding of necessity:** Regulatory action is needed immediately to implement the Empire State Jobs Retention Program ("the Program") which was created by Chapter 56 of the Laws of 2011. The Program is created to support the retention of the state's most strategic businesses in the event of an emergency. The program creates a jobs tax credit for each job of a strategic business directly impacted by an emergency and retained and protects state taxpayer's dollars by ensuring that New York provide tax benefits only to businesses that can demonstrate substantial physical damage and economic harm resulting from an event leading to an emergency declaration by the governor.

The emergency rule is required in order to immediately implement the statute contained in Article 20 of the Economic Development Law, creating the Empire State Jobs Retention Program. The statute directed the Commissioner of Economic Development to adopt regulations with respect to an application process and eligibility criteria and authorized the adoption of such regulations on an emergency basis notwithstanding any provisions to the contrary in the state administrative procedures act.

In 2011, many parts of New York State were devastated by Hurricane Irene and Tropical Storm Lee. The impact of these storms is still being felt and the State needs to be able to respond quickly to provide economic development assistance to strategic businesses whose operations were several damaged or destroyed by these disasters and ensure that the impacted jobs are retained in NYS.

The Empire State Jobs Retention Program will be one of the State's key economic development tools for assisting strategic businesses impacted by Hurricane Irene and Tropical Storm Lee. It is imperative that this Program be implemented immediately so that the State can respond quickly to the dislocation and potential job losses that resulted from the devastation caused at certain facilities.

It bears noting that section 426 of the Economic Development Law directs the Commissioner of Economic Development to promulgate regulations and explicitly indicates that such regulations may be adopted on an emergency basis.

**Subject:** Empire State Jobs Retention Program tax credit.

**Purpose:** Allow Department to implement the Empire State Jobs Retention Program tax credit.

**Substance of emergency rule:** The regulation creates new Parts 210-216 in 5 NYCRR as follows:

1) The regulation adds the definitions relevant to the empire state jobs retention program (the "Program"). Key definitions include, but are not limited to, certificate of eligibility, preliminary schedule of benefits, impacted jobs, new business, significant capital investment and substantial physical damage and economic harm.

2) The regulation creates the application and review process for the Program. In order to become a participant in the Program, an applicant must submit a complete application within (1) one hundred eighty days of the declaration of an emergency by the governor in the county in which the business enterprise is located or (2) one hundred eighty days of the enactment of Chapter 56 of the Laws of 2011, if such date is later than the date specified in (1) above. An applicant must also agree to a variety of requirements, including, but not limited to, the following: (a) allowing the exchange of its tax information between Department of Taxation and Finance and Department of Economic Development (the "Department"); (b) allowing the exchange of its tax and employer information between the

Department of Labor and the Department; (c) agreeing to be permanently disqualified for empire zones benefits at any location or locations that qualify for empire state jobs retention benefits if admitted into the Program for such location or locations.

3) Upon receiving a complete application, the Commissioner of the Department shall review the application to ensure it meets eligibility criteria set forth in the statute (see 4 below). If it does not, the application shall not be accepted. If it does meet the eligibility criteria, the Commissioner may admit the applicant into the Program. If admitted into the Program, an applicant will receive a certificate of eligibility and a preliminary schedule of benefits by year based on the applicant's projections as set forth in its application.

4) The regulation sets forth the eligibility criteria for the Program. In order to qualify for the Program, a participant must: (1) be operating predominantly in one of the following strategic industries: (a) financial services data center or a financial services back office operation; (b) manufacturing; (c) software development and new media; (d) scientific research and development; (e) agriculture; (f) the creation or expansion of back office operations in the state; or (g) distribution center; and (2) must be located in a county in which an emergency has been declared by the governor on or after January first, two thousand eleven, must demonstrate substantial physical damage and economic harm resulting from the event leading to the emergency declaration by the governor, and must have had at least one hundred full-time equivalent jobs in the county in which an emergency has been declared by the governor on the day immediately preceding the day on which the event leading to the emergency declaration by the governor occurred, and must retain or exceed that number of jobs in New York state. Jobs impacted but not retained by a participant are not eligible for the jobs retention tax credit.

In addition a business entity must be in compliance with all worker protection and environmental laws and regulations and must not owe past due federal or state taxes or local property taxes, unless those taxes are being paid pursuant to an executed payment plan. A not-for-profit business entity, a business entity whose primary function is the provision of services including personal services, business services, or the provision of utilities, a business entity engaged predominantly in the retail or entertainment industry, and a business entity engaged in the generation or distribution of electricity, the distribution of natural gas, or the production of steam associated with the generation of electricity are not eligible to participate in the program.

5) The regulation sets forth the eleven (11) evaluation standards that the Commissioner can utilize when determining whether to admit an applicant to the Program. These include, but are not limited to, the following: (1) whether the applicant is proposing to substantially renovate contaminated, abandoned or underutilized facilities; or (2) whether the applicant will use energy-efficient measures, including, but not limited to, the reduction of greenhouse gas and emissions and the Leadership in Energy and Environmental Design (LEED) green building rating system for the project identified in its application; or (3) the degree of economic distress in the area where the applicant will locate the project identified in its application; or (4) the degree of applicant's financial viability, strength of financials, readiness and likelihood of completion of the project identified in the application; or (5) the degree to which the project identified in the application supports New York State's minority and women business enterprises; or (6) the degree to which the project identified in the application supports the principles of Smart Growth; or (7) the estimated return on investment that the project identified in the application will provide to the State; or (8) the overall economic impact that the project identified in the application will have on a region, including, but not limited to, the impact of any direct and indirect jobs that will be retained or created; or (9) the degree to which other state or local incentive programs are available to the applicant; or (10) the likelihood that the project identified in the application would be located outside of New York State or would not occur but for the availability of state or local incentives; or (11) the recommendation of the relevant regional economic development council or the commissioner's determination that the proposed project aligns with the regional strategic priorities of the respective region.

6) The regulation states that the Commissioner shall prepare a program report on a quarterly basis for posting on the Department's website.

7) The regulation calls for removal of a participant in the Program for failing to meet the application requirements or eligibility criteria of the statute. Upon removal, a participant will be notified in writing and have the right to appeal such removal.

8) The regulation lays out the appeal process for participant's who have been removed from the Program. A participant will have thirty (30) days to appeal to the Department. An appeal officer will be appointed and shall evaluate the merits of the appeal and any response from the Department. The appeal officer will determine whether a hearing is necessary and the level of formality required. The appeal officer will prepare a report and make recommendations to the Commissioner. The Commissioner will then issue a final decision in the case.

The full text of the emergency rule is available at the Department's website at <http://esd.ny.gov/BusinessPrograms.html>.

**This notice is intended** to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires January 12, 2013.

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

#### **Regulatory Impact Statement**

##### **STATUTORY AUTHORITY:**

Chapter 56 of the Laws of 2011 established Article 20 of the Economic Development Law, creating the Empire State Jobs Retention Program credit and authorizing the Commissioner of Economic Development to adopt, on an emergency basis, rules and regulations governing the Program.

##### **LEGISLATIVE OBJECTIVES:**

The emergency rulemaking accords with the public policy objectives the Legislature sought to advance because they directly address the legislative findings and declarations that New York State needs, as a matter of public policy, to create competitive financial incentives to retain strategic businesses and jobs that are at risk of leaving the state due to the impact on its business operations of an event leading to an emergency declaration by the governor. The Empire State Jobs Retention Program is created to support the retention of the state's most strategic businesses in the event of an emergency. The Program creates a jobs tax credit for each retained job of a strategic business directly impacted by an emergency and protects state taxpayer's dollars by ensuring that New York provide tax benefits only to businesses that can demonstrate substantial physical damage and economic harm resulting from an event leading to an emergency declaration by the governor. The emergency rule is specifically authorized by the Legislature.

##### **NEEDS AND BENEFITS:**

The emergency rule is required in order to immediately implement the statute contained in Article 20 of the Economic Development Law, creating the Empire State Jobs Retention Program. The statute directed the Commissioner of Economic Development to adopt regulations with respect to an application process and eligibility criteria and authorized the adoption of such regulations on an emergency basis notwithstanding any provisions to the contrary in the state administrative procedures act.

In 2011, many parts of New York State were devastated by Hurricane Irene and Tropical Storm Lee. The impact of these storms is still being felt and the State needs to be able to respond quickly to provide economic development assistance to strategic businesses whose operations were severely damaged or destroyed by these disasters and ensure that the impacted jobs are retained in New York State.

The Empire State Jobs Retention Program will be one of the State's key economic development tools for assisting strategic businesses impacted by Hurricane Irene and Tropical Storm Lee. It is imperative that this Program be implemented immediately so that the State can respond quickly to the dislocation and potential job losses that resulted from the devastation caused at certain facilities.

This rule will establish the process and procedures for launching this new Program in the most efficient and cost-effective manner while protecting all New York State taxpayers with rules to ensure accountability, performance and adherence to commitments by businesses choosing to participate in the Program.

##### **COSTS:**

A. Costs to private regulated parties: None. There are no regulated parties in the Empire State Jobs Retention Program, only voluntary participants.

B. Costs to the agency, the State, and local governments: The Department of Economic Development does not anticipate any significant costs with respect to implementation of this program. There is no additional cost to local governments.

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

##### **LOCAL GOVERNMENT MANDATES:**

None. There are no mandates on local governments with respect to the Empire State Jobs Retention Program. This emergency rule does not impose any costs to local governments for administration of the Empire State Jobs Retention Program.

##### **PAPERWORK:**

The emergency rule requires businesses choosing to participate in the Empire State Jobs Retention Program to establish and maintain complete and accurate books relating to their participation in the Program for a period of three years beyond their participation in the Program. However, this requirement does not impose significant additional paperwork burdens on businesses choosing to participate in the Program but instead simply requires that information currently established and maintained be shared

with the Department in order to verify that the business has met its job retention commitments.

**DUPLICATION:**

The emergency rule does not duplicate any state or federal statutes or regulations.

**ALTERNATIVES:**

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

**FEDERAL STANDARDS:**

There are no federal standards in regard to the Empire State Jobs Retention Program. Therefore, the emergency rule does not exceed any Federal standard.

**COMPLIANCE SCHEDULE:**

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

**Regulatory Flexibility Analysis**

1. Effect of rule

The emergency rule imposes recordkeeping requirements on all businesses (small, medium and large) that choose to participate in the Empire State Jobs Retention Program. The emergency rule requires all businesses that participate in the Program to establish and maintain complete and accurate books relating to their participation in the Program for the duration of their term in the Program plus three additional years. Local governments are unaffected by this rule.

2. Compliance requirements

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

3. Professional services

The information that businesses choosing to participate in the Empire State Jobs Retention Program would be required to keep is information such businesses already must establish and maintain in order to operate, i.e. wage reporting, financial records, tax information, etc. No additional professional services would be needed by businesses in order to establish and maintain the required records. Local governments are unaffected by this rule.

4. Compliance costs

Businesses (small, medium or large) that choose to participate in the Empire State Jobs Retention Program must retain jobs in order to receive any tax incentives under the Program. If businesses choosing to participate in the Program do not fulfill their job retention, such businesses would not receive the tax incentives. There are no other initial capital costs that would be incurred by businesses choosing to participate in the Empire State Jobs Retention Program. Annual compliance costs are estimated to be negligible for businesses because the information they must provide to demonstrate their compliance with their commitments is information that is already established and maintained as part of their normal operations. Local governments are unaffected by this rule.

5. Economic and technological feasibility

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

6. Minimizing adverse impact

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

7. Small business and local government participation

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

**Rural Area Flexibility Analysis**

The Empire State Jobs Retention Program is a tax credit program which creates a jobs tax credit for each retained job of a strategic business directly impacted by an emergency and protects state taxpayer's dollars by ensuring that New York provide tax benefits only to businesses that can demonstrate substantial physical damage and economic harm resulting from an event leading to an emergency declaration by the governor. The emergency rule does not impose any special reporting, recordkeeping or other compliance requirements on private entities in rural areas. Therefore, the emergency rule will not have a substantial adverse economic impact on rural areas nor on the reporting, recordkeeping or other compliance requirements on public or private entities in such rural areas. Accordingly, a rural area flexibility analysis is not required and one has not been prepared.

**Job Impact Statement**

The emergency rule relates to the Empire State Jobs Retention Program. The proposed program creates a jobs tax credit for each retained job of a strategic business directly impacted by an emergency and protects state taxpayer's dollars by ensuring that New York provide tax benefits only to businesses that can demonstrate substantial physical damage and economic harm resulting from an event leading to an emergency declaration by the governor.

This Program, given its design and purpose, will have a substantial positive impact on job retention. The emergency rule will immediately enable the Department to fulfill its mission of job retention in the state's most strategic businesses. Because this emergency rule will authorize the Department to immediately begin offering financial incentives to firms that retain jobs that are at the risk of the leaving the state due to an event leading to an emergency declaration by the governor, it will have a positive impact on job and employment opportunities. Accordingly, a job impact statement is not required and one has not been prepared.

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## Education Department

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**NOTICE OF EMERGENCY  
ADOPTION  
AND REVISED RULE MAKING  
NO HEARING(S) SCHEDULED**

**Diploma Requirements for Students with Disabilities**

**I.D. No.** EDU-27-12-00010-ERP

**Filing No.** 1036

**Filing Date:** 2012-10-16

**Effective Date:** 2012-10-31

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

**Action Taken:** Amendment of section 100.5 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101 (not subdivided), 207 (not subdivided), 208 (not subdivided), 209 (not subdivided), 305(1) and (2), 308 (not subdivided) and 309 (not subdivided)

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

**Specific reasons underlying the finding of necessity:** The proposed amendment establishes a new safety net local diploma option, which would provide opportunity for certain students with disabilities to earn a local high school diploma based on performance on Regents examinations or approved alternatives. Specifically, the proposed amendment would allow students with disabilities, who first enter grade nine in September 2005 or thereafter, to earn a local high school diploma if:

(1) the student attains a score of 55-64 on each of the five required Regents exams (English, mathematics, U.S history and government, science, and global history and geography) and/or passes an alternative examination; or

(2) the student scores 45-54 on one or more of the five required Regents exams, other than the English or mathematics exam, but scores 65 or higher on one or more of the other required Regents exams, in which case, for purposes of earning a local diploma, the lower score(s) can be compensated by the higher score(s); provided that:

(a) each examination for which the student scores 45-54 must be compensated by a score of 65 or higher on a separate examination;

(b) the student must have also attained a passing grade, that meets or exceeds the required passing grade by the school, for the course in the subject area of the Regents examination in which he or she received a score of 45-54;

(c) the student must have a satisfactory attendance rate, in accordance with the district's or school's attendance policy established pursuant to section 104.1(i)(2)(v) of this Title, for the school year during which the student took the Regents examination in which he or she received a score of 45-54, exclusive of excused absences; and

(d) a student cannot use the compensatory score option if the student is using a passing score on one or more Regents competency tests pursuant to section 100.5(b)(7)(vi)(a).

Since publication of the proposed amendment was published in the State Register on July 3, 2012, the proposed amendment has been revised in response to public comment.

Because the Board of Regents meets at scheduled intervals, the

December 10-11, 2012 meeting is the earliest the revised proposed rule could be presented for permanent adoption, after publication of a Notice of Revised Rule Making in the State Register and expiration of the 30-day public comment period required under State Administrative Procedure Act § 202(4-a). Pursuant to SAPA § 203(1), the earliest effective date of the proposed amendment, if adopted at the December Regents meeting, would be December 26, 2012, the date a Notice of Adoption will be published in the State Register. However, school districts and eligible students need to know now what graduation options will be available under the safety net amendments, so that they may be timely implemented during the 2012-2013 school year.

Emergency action to adopt the proposed amendment is necessary for the preservation of the general welfare in order to ensure the timely implementation, during the 2012-2013 school year, of the safety net options for students with disabilities to graduate with a local diploma.

It is anticipated that the proposed amendment will be presented for adoption at the January 14-15, 2013 Regents meeting, after publication of a Notice of Emergency Adoption and Revised Rule Making in the State Register on October 31, 2012 and expiration of the 30-day public comment period for revised rule makings.

**Subject:** Diploma Requirements for Students with Disabilities.

**Purpose:** Provide new safety net option for students with disabilities to earn a local diploma through the use of compensatory scoring.

**Text of emergency/revised rule:** Section 100.5 of the Regulations of the Commissioner of Education is amended, effective October 31, 2012, as follows:

§ 100.5 Diploma requirements.

(a) General requirements for a Regents or a local high school diploma. Except as provided in paragraph (d)(6) of this section, the following general requirements shall apply with respect to a Regents or local high school diploma. Requirements for a diploma apply to students depending upon the year in which they first enter grade nine. A student who takes more than four years to earn a diploma is subject to the requirements that apply to the year that student first entered grade nine. Students who take less than four years to complete their diploma requirements are subject to the provisions of subdivision (e) of this section relating to accelerated graduation.

- (1) . . .
- (2) . . .
- (3) . . .
- (4) . . .

(5) State assessment system. (i) Except as otherwise provided in subparagraphs (ii), (iii) and (iv) of this paragraph, all students shall demonstrate attainment of the New York State learning standards:

- (a) . . .
- (b) . . .
- (c) United States history and government:
  - (1) . . .
  - (2) . . .

(3) for students with disabilities who first enter grade nine in or after September 1998 and prior to September 2011 and who fail the Regents examination in United States history and government, the United States history and government requirements for a local diploma may be met by passing the Regents competency test in United States history and government. For students with disabilities who first enter grade nine in September 2005 and thereafter, the United States history and government requirements for a local diploma may also be met by passing the Regents examination in United States history and government with a score of 55-64 or as provided in subparagraph (b)(7)(vi) of this section. This provision shall apply only to students with disabilities who are entitled to attend school pursuant to Education Law, section 3202 or 4402(5);

- (4) . . .
- (d) Science:
  - (1) . . .
  - (2) . . .

(3) for students with disabilities who first enter grade nine in or after September 1999 and prior to September 2011 and who fail a Regents examination in science, the science requirements for a local diploma may be met by passing the Regents competency test in science. For students with disabilities who first enter grade nine in September 2005 and thereafter, the science requirements for a local diploma may also be met by passing a Regents examination in science with a score of 55-64 or as provided in subparagraph (b)(7)(vi) of this section. This provision shall apply only to students with disabilities who are entitled to attend school pursuant to Education Law, section 3202 or 4402(5);

- (4) . . .
- (e) Global history and geography:
  - (1) . . .
  - (2) . . .

(3) for students with disabilities who first enter grade nine in or after September 1998 and prior to September 2011 and who fail the Regents examination in global history and geography, the global history and geography requirements for a local diploma may be met by passing the Regents competency test in global studies. For students with disabilities who first enter grade nine in September 2005 and thereafter, the global history and geography requirements for a local diploma may also be met by passing the Regents examination in global history and geography with a score of 55-64 or as provided in subparagraph (b)(7)(vi) of this section. This provision shall apply only to students with disabilities who are entitled to attend school pursuant to Education Law, section 3202 or 4402(5);

- (4) . . .
- (ii) . . .
- (iii) . . .
- (iv) . . .
- (v) . . .
- (6) . . .
- (7) . . .
- (8) . . .

(b) Additional requirements for the Regents diploma. Except as provided in paragraph (d)(6) of this section, the following additional requirements shall apply for a Regents diploma.

- (1) . . .
- (2) . . .
- (3) . . .
- (4) . . .
- (5) . . .
- (6) . . .
- (7) Types of diplomas.
  - (i) . . .
  - (ii) . . .
  - (iii) . . .
  - (iv) . . .
  - (v) . . .

(vi) Local diploma options for students with disabilities. The provisions of this subparagraph shall apply only to students with disabilities who are entitled to attend school pursuant to Education Law section 3202 or 4402(5).

(a) For students with disabilities who first enter grade nine in or after September 2001 and prior to September 2011 and who fail required Regents examinations for graduation but pass Regents competency tests in those subjects, as provided for in paragraph (a)(5) of this section, a local diploma may be issued by the local school district.

(b) For students with disabilities who first enter grade nine in September 2005 and thereafter, a score by such student of 55-64 may be considered as a passing score on any Regents examination required for graduation, and in such event and subject to the requirements of paragraph (c)(6) of this section, the school may issue a local diploma to such student. [This provision shall apply only to students with disabilities who are entitled to attend school pursuant to Education Law, section 3202 or 4402(5).]

(c) Notwithstanding the provisions of clause (b) of this subparagraph, for students with disabilities who first enter grade nine in September 2005 and thereafter, a student's score of 45-54 on a Regents examination required for graduation, other than the English and mathematics examinations, may, for purposes of earning a local diploma, be compensated by a score of 65 or higher on one of the other required Regents examinations; provided that:

- (1) each examination for which the student earned a score of 45-54 must be compensated by a score of 65 or higher on a separate examination; a score of 65 or higher on a single examination may not be used to compensate for more than one examination for which the student earned a score of 45-54; and
- (2) the student has attained a passing grade, that meets or exceeds the required passing grade by the school, for the course in the subject area of the Regents examination in which he or she received a score of 45-54; and
- (3) the student has a satisfactory attendance rate, in accordance with the district's or school's attendance policy established pursuant to subparagraph 104.1(i)(2)(v) of this Title, for the school year during which the student took the Regents examination in which he or she received a score of 45-54, exclusive of excused absences; and

(4) a student shall not use the compensatory score option if the student is using a passing score on one or more Regents competency tests (RCT) pursuant to clause (a) of this subparagraph to graduate with a local diploma.

- (vii) . . .
- (viii) . . .
- (ix) . . .

- (x) . . .
- (c) . . .
- (d) . . .
- (e) . . .
- (f) . . .

**This notice is intended** to serve as both a notice of emergency adoption and a notice of revised rule making. The notice of proposed rule making was published in the *State Register* on July 3, 2012, I.D. No. EDU-27-12-00010-P. The emergency rule will expire January 13, 2013.

**Emergency rule compared with proposed rule:** Substantial revisions were made in section 100.5(b)(7).

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

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

**Public comment will be received until:** 30 days after publication of this notice.

**Revised Regulatory Impact Statement**

Since publication of a Notice of Proposed Rule Making in the State Register on July 3, 2012, the proposed rule has been revised as follows:

Section 100.5(b)(7)(vi)(c)(2) has been revised to require that the student have attained a passing grade for the course in the subject area of the regents examination in which he or she received a score of 45-54, rather than require that the student have attained at least a 65 course average in the subject area of the Regents examination in which he or she received a score of 45-54.

Section 100.5(b)(7)(vi)(c)(3) has been revised to delete the proposed requirement that the student have an attendance rate of at least 95 percent for the school year during which the student took the Regents examination in which he or she received a score of 45-54, exclusive of excused absences and replace it with a requirement that the student have an acceptable attendance rate, in accordance with district policy established pursuant to Commissioner’s Regulations subparagraph 104.1(i)(2)(v), for the school year during which the student took the Regents examination in which he or she received a score of 45-54, in consideration of excused absences.

Section 100.5(b)(7)(vi)(c)(1) was revised to correct a typographical error, and for purposes of clarification, respectively, by adding the terms “or” and “for” as follows: “(1) each examination for which the student earned a score of 45-54 must be compensated by a score of 65 or higher on a separate examination; a score of 65 or higher on a single examination may not be used to compensate for more than one examination for which the student earned a score of 45-54; and.”

The above revisions require that the Needs and Benefits section of the previously published Regulatory Impact Statement be revised to read as follows:

**3. NEEDS AND BENEFITS:**

Over a decade ago, the Regents Competency Test (RCT) safety net option was adopted as a temporary measure to provide students with disabilities increased opportunities to earn a diploma. Access to the RCTs was meant to terminate once districts revised their instructional programs to provide students with disabilities full access to the general education standards in both elementary and secondary school. To provide adequate time for the transition, the Board of Regents delayed the phase out of the RCT three times and decided to apply the phase-out to the entering cohort of September 2011. As a result, under current regulations, only the 55-64 pass score Safety Net option to earn a local diploma remains available to students with disabilities entering ninth grade in September 2011 and thereafter.

In January 2012, the Regents discussed the need to consider additional options for students with disabilities to earn a local diploma. Discussions around the Safety Net focused on the group of students with disabilities who, with appropriate accommodations, supports and services, can reach the State’s learning standards at the Commencement Level. At the April 2012 Regents Meeting, the Department recommended that the Board expand the safety net options for students with disabilities to earn a local diploma beyond the current option of the 55-64 pass score on the five required Regents exams.

The proposed amendment establishes a new safety net local diploma option, that would provide opportunity for approximately the same number of students with disabilities to earn a local high school diploma based on performance on Regents examinations or approved alternatives. Specifically, the proposed amendment would allow students with disabilities, who first enter grade nine in September 2005 or thereafter, to earn a local high school diploma if:

(1) the student attains a score of 55-64 on each of the five required Regents exams (English, mathematics, U.S history and government, science, and global history and geography) and/or passes an alternative examination; or

(2) the student scores 45-54 on one or more of the five required Regents exams, other than the English or mathematics exam, but scores 65 or higher on one or more of the other required Regents exams, in which case, for purposes of earning a local diploma, the lower score(s) can be compensated by the higher score(s); provided that

(a) each examination for which the student scores 45-54 must be compensated by a score of 65 or higher on a separate examination;

(b) the student must have also attained a passing grade for the course in the subject area of the Regents examination in which he/she obtained a score of 45-54;

(c) the student has a satisfactory attendance rate, in accordance with the district’s or school’s attendance policy established pursuant to subparagraph 104.1(i)(2)(v) of this Title, for the school year during which the student took the Regents examination in which he or she received a score of 45-54, exclusive of excused absences; and

(d) a student cannot use the compensatory score option if the student is using a passing score on one or more Regents competency tests pursuant to section 100.5(b)(7)(vi)(a).

**Revised Regulatory Flexibility Analysis**

Since publication of a Notice of Proposed Rule Making in the State Register on July 3, 2012, the proposed rule has been revised as described in the Revised Regulatory Impact Statement submitted herewith.

The revisions require that the Compliance section of the previously published Regulatory Flexibility Analysis be revised to read as follows:

**1. COMPLIANCE REQUIREMENTS:**

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

The proposed amendment would expand the safety net options for students with disabilities that currently exist in section 100.5 of the Regulations of the Commissioner of Education to further enable graduation with a local diploma. Specifically, the proposed amendment would allow students with disabilities, who first enter grade nine in September 2005 or thereafter, to earn a local high school diploma if:

(1) the student attains a score of 55-64 on each of the five required Regents exams (English, mathematics, U.S history and government, science, and global history and geography) and/or passes an alternative examination; or

(2) the student scores 45-54 on one or more of the five required Regents exams, other than the English or mathematics exam, but scores 65 or higher on one or more of the other required Regents exams, in which case, for purposes of earning a local diploma, the lower score(s) can be compensated by the higher score(s); provided that

(a) each examination for which the student scores 45-54 must be compensated by a score of 65 or higher on a separate examination;

(b) the student must have also attained a passing grade for the course in the subject area of the Regents examination in which he/she obtained a score of 45-54;

(c) the student has a satisfactory attendance rate, in accordance with the district’s or school’s attendance policy established pursuant to subparagraph 104.1(i)(2)(v) of this Title, for the school year during which the student took the Regents examination in which he or she received a score of 45-54, exclusive of excused absences; and

(d) a student cannot use the compensatory score option if the student is using a passing score on one or more Regents competency tests pursuant to section 100.5(b)(7)(vi)(a).

**Revised Rural Area Flexibility Analysis**

Since publication of a Notice of Proposed Rule Making in the State Register on July 3, 2012, the proposed rule has been revised as described in the Revised Regulatory Impact Statement submitted herewith.

The revisions require that the Reporting, Recordkeeping and Other Compliance Requirements; and Professional Services section of the previously published Regulatory Flexibility Analysis be revised to read as follows:

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

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

The proposed amendment would expand the safety net options for students with disabilities that currently exist in section 100.5 of the Regulations of the Commissioner of Education to further enable graduation with a local diploma. Specifically, the proposed amendment would allow students with disabilities, who first enter grade nine in September 2005 or thereafter, to earn a local high school diploma if:

(1) the student attains a score of 55-64 on each of the five required Regents exams (English, mathematics, U.S history and government, sci-

ence, and global history and geography) and/or passes an alternative examination; or

(2) the student scores 45-54 on one or more of the five required Regents exams, other than the English or mathematics exam, but scores 65 or higher on one or more of the other required Regents exams, in which case, for purposes of earning a local diploma, the lower score(s) can be compensated by the higher score(s); provided that

(a) each examination for which the student scores 45-54 must be compensated by a score of 65 or higher on a separate examination;

(b) the student must have also attained a passing grade for the course in the subject area of the Regents examination in which he/she obtained a score of 45-54;

(c) the student has a satisfactory attendance rate, in accordance with the district's or school's attendance policy established pursuant to subparagraph 104.1(i)(2)(v) of this Title, for the school year during which the student took the Regents examination in which he or she received a score of 45-54, exclusive of excused absences; and

(d) a student cannot use the compensatory score option if the student is using a passing score on one or more Regents competency tests pursuant to clause 100.5(b)(7)(vi)(a).

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

#### **Revised Job Impact Statement**

Since publication of a Notice of Proposed Rule Making in the State Register on July 3, 2012, the proposed rule has been revised as described in the Revised Regulatory Impact Statement submitted herewith.

The proposed amendment, as so revised, is necessary to implement Regents policy to expand the safety net for students with disabilities that currently exist in section 100.5 of the Regulations of the Commissioner of Education to further enable graduation with a local diploma.

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

#### **Assessment of Public Comment**

The following is a summary assessing the public comment received by the State Education Department (SED) since publication of a Notice of Proposed Rule Making in the State Register on July 3, 2012.

##### **COMMENT:**

Proposal enables more students with disabilities to earn local diploma, enroll in armed forces, training schools, and have careers; will reduce drop out rates; is all-encompassing and relevant; will result in less test anxiety; allows students with disabilities to be treated similarly to nondisabled peers; will keep students engaged; and recognizes different modes of learning.

##### **DEPARTMENT RESPONSE:**

Comments supportive in nature; no response necessary.

##### **COMMENT:**

Proposal establishes "students with disabilities only" diploma and may result in over-identification of students needing special education. Make local diploma available to all students. May be inconsistent with Americans with Disabilities Act and IDEA as it results in separate, secondary and less valuable education, testing, and diploma track, significantly limiting postsecondary opportunities.

##### **DEPARTMENT RESPONSE:**

To earn a local diploma, students must pass required coursework. Proposal does not result in separate, secondary or less valuable education but rather addresses concern for students who pass required courses, but have difficulty with Regents examinations because of disability-related factors. Local diploma option also available to students who satisfactorily appeal two Regents test scores.

##### **COMMENT:**

Does not provide alternatives to Regents examinations for students to demonstrate knowledge. It is not a safety net for many learning disabled students; is unachievable for students who cannot score 65 on any exam; does not address disability-related factors that preclude students from passing Regents exams; ignores needs of students with reading and language disabilities unable to score 55 on English language arts (ELA) and math exams; assumes average skills in one area; pushes defective testing process; is encumbered by burdensome bureaucratic process; and devalues integrity of diploma options. Approve curricular and exam for business and consumer math.

##### **DEPARTMENT RESPONSE:**

Some students can pass required coursework, but have difficulty passing Regents examinations because of disability-related factors. Proposal was developed in consideration of data showing significant number of students with disabilities pass math and English Regents, but not one or

more other required Regents examinations. Standards for regular high school diploma must be rigorous and represent readiness for employment or postsecondary education. Required score of 55 or higher on ELA and Math Regents tests ensures students leave school with appropriate level of knowledge in foundation skills.

##### **COMMENT:**

Does not go far enough to develop meaningful pathways to a regular diploma for all students. Need to address college and career readiness in comprehensive fashion; pathways to Regents diploma based on students' abilities and/or career goals; and alternative for students not eligible for alternative assessment whose disabilities preclude earning a local diploma. Students who pass courses should not have to take State tests. Diploma must have value to employers and colleges and make meaningful links to post-secondary opportunities.

##### **DEPARTMENT RESPONSE:**

Proposal was not intended to create an alternate pathway to a diploma. Regents are having separate discussions on alternate pathways.

##### **COMMENT:**

Without addressing instructional practice issues of classroom pace, learning style and technique and inabilities due to disability, schools will not graduate more students with disabilities. Stricter requirements and decisions that do not consider individual needs/abilities may result in students falling through the cracks and encourage students to drop out. Districts will not increase classroom resources due to current fiscal climate.

##### **DEPARTMENT RESPONSE:**

Proposal recognizes unique challenges presented by students' disabilities in demonstrating certain knowledge, while representing a rigorous standard that ensures students are appropriately prepared for post-school education and/or employment. Agree there is need to accelerate improvements in teaching and learning for students with disabilities and many students with disabilities would benefit from increased access to CTE courses. Most schools are working to improve instructional programs through implementation of Common Core standards and Teacher Leader Evaluation system. Regents will consider comments as they continue to discuss broader policy on alternative pathways to graduation for all students.

##### **COMMENT:**

Develop CTE/Vocational local diploma option. Provide skill preparation and trade diploma. Permit passing CTE course grade to substitute for one Regents exam. Recognize transition goals that enable students to leave school with work skills. Develop vocational and college preparatory diploma tracks.

##### **DEPARTMENT RESPONSE:**

Regents are discussing an alternate credential that could supplement a regular diploma for students with disabilities and would recognize student achievement and experiences toward Career Development and Occupational Studies (CDOS) State learning standards. Comments supporting CTE diploma will be further considered in Regents discussions on alternate pathways, expansions to CTE coursework and recognition of CTE alternative assessments. Regents have discussed creating CTE programs of study that begin in middle school and continue to high school, solidifying connections between grade levels and articulating roadmap to college and career and developing greater opportunities for students to enter high school with diploma credit.

##### **COMMENT:**

Proposal is lower standard than RCT option; lowers bar without recognizing unique needs of students with disabilities, examining instruction provided, or allowing meaningful evaluation of students.

##### **DEPARTMENT RESPONSE:**

Disagree that proposed safety net is lower standard than RCT option. RCTs are not aligned with State learning standards and often require students to engage in substitute courses/instruction to pass. Proposal addresses students who reach commencement level learning standards, but because of disability-related factors, cannot pass all Regents exams. Proposal is based on guiding principles that students with disabilities must demonstrate appropriate level of knowledge in foundation skills; while recognizing challenges presented by students' disabilities in demonstrating certain knowledge, students must show competence in range of subject areas through successful coursework and an objective measure of knowledge.

##### **COMMENT:**

Consider options for students with disabilities: develop list of approved alternatives to Regents exams; have low-pass option on all Regents exams; develop a more achievable alternative test; allow math and science Regents exams or vocational exam to substitute for Global History and Geography exams; have Global exam at end of each year; allow two years to complete Regents courses; propose more rigorous exams than RCTs, but less difficult than Regents; require student's percentile score on Regents exams to meet or exceed percentile score over preceding ten

years; allow students to earn a certificate in field of potential employment; develop alternate forms of assessment, including combination of options.

**DEPARTMENT RESPONSE:**

In the alternate pathways discussions, the Regents have discussed establishing processes to evaluate technical assessments for inclusion on the approved list to identify selected College and Career Ready CTE technical assessments that could be used as acceptable measures for accountability purposes.

Regulations provide 55-64 low-pass option on required Regents examinations for students to earn a local diploma. Regents are also considering revisions to Global and Geography requirements. Option to offer students two years to complete Regents coursework before challenging the assessment is currently available based on district policy.

Developing State tests/forms, more rigorous than RCTs but less rigorous than Regents examinations, is not fiscally or programmatically feasible. Alternate forms of assessment would not provide an objective and consistent measure for a Regents-recognized diploma. Proficiency must be objectively demonstrated to warrant Regents endorsement and end to entitlement to free appropriate public education (FAPE) under IDEA upon receipt of a regular diploma.

**COMMENT:**

Consider principles of respect for student and family choice; value to employers and colleges and linkage to post-secondary opportunities and preparedness; development of student strengths; connection with curricula; and be flexible enough to benefit students who experience interruptions or changes in schooling.

**DEPARTMENT RESPONSE:**

Comments will be considered as Regents continue to discuss broader policy on alternative pathways to graduation for all students.

**COMMENT:**

RCTs are better measure of success. Allow use of compensatory score with RCTs. Retain RCTs until policies are developed regarding alternate pathways. Number of students predicted to benefit from compensatory model is less than number that met diploma requirements using RCT option. Score of 45-54 on up to two examinations establishes lower standard than was assessed using RCTs.

**DEPARTMENT RESPONSE:**

RCT policy was adopted as temporary measure to provide students with disabilities increased opportunities to earn a diploma. RCTs were to terminate once districts had revised instructional programs to provide full access to general education standards. Existing RCT is only available to students with disabilities entering grade 9 prior to September 2011. Because RCTs are not aligned with Regents coursework, and recognizing that standards for a regular high school diploma must be rigorous and represent readiness for employment or postsecondary education, we do not recommend extending RCT option. It is difficult to predict what will happen when there is a greater focus on Regents courses and assessments, and the impact decisions based on discussions of multiple pathways will have on the State's graduation rate for students with disabilities.

**COMMENT:**

Allow students with disabilities to pass ELA and/or math Regents exams with 45-54 as quality of education and testing accommodations for this population is substandard. Change low pass option to 50-64 for required Regents exams.

**DEPARTMENT RESPONSE:**

To earn a Regents recognized diploma, students with disabilities must demonstrate appropriate knowledge in foundation skills fundamental to career or postsecondary education and/or training; show content subject area knowledge through successful coursework and objective and recognized assessment measures. If instruction is substandard, SED expects schools to improve teaching and learning, not lower expectations for students with disabilities.

**COMMENT:**

Floor score of 45-54 is not an appropriate measure for students to be college or career ready. More students will require remediation and weaker college preparation will lower potential for successful completion and subsequent employment. Course content mastery of less than 50% will negatively impact value of diploma.

**DEPARTMENT RESPONSE:**

Floor of not less than 45 ensures that districts provide students with meaningful access to participate and progress in required coursework and encourage students to put forth their full effort to pass courses and Regents exams with as high a score as possible. Score of 45-54 does not signify an acceptable level of achievement. Therefore, students must also pass required coursework and meet attendance requirement to be awarded a local diploma.

**COMMENT:**

Clarify if students must earn 65 on both ELA and math Regents exams.

**DEPARTMENT RESPONSE:**

Proposal requires students to earn at least a 55-64 on math and ELA

Regents exams. Score of 65 or higher on these exams may compensate for scores between 45-54 on one or more other required Regents exams.

**COMMENT:**

Proposal establishes different attendance requirements for students with disabilities to qualify for safety net. Requirement is too strict and unrealistic and would prohibit some students who pass course from graduating. Attendance is affected by legitimate reasons and does not predict competence in specific skills. Allow exceptions for documented circumstances. Special education students should have same local level appeal opportunity as general education students. Define attendance rate policies more clearly.

**DEPARTMENT RESPONSE:**

Proposal has been revised to delete required attendance rate and replace it with requirement that a student have a satisfactory attendance rate, in accordance with the district's or school's attendance policy.

**COMMENT:**

Proposal is complex and difficult to understand, track and interpret for students and families and will result in increased record keeping. Imposes burdensome procedures.

**DEPARTMENT RESPONSE:**

Districts must review transcripts to determine if students have completed diploma requirements. SED will provide further guidance.

**COMMENT:**

Implement proposal beginning with first graduating class not covered by RCTs.

**DEPARTMENT RESPONSE:**

There is no disadvantage to providing this option to all currently enrolled students with disabilities and offers maximum opportunity for these students to graduate with a regular diploma.

**COMMENT:**

Question how compensatory model is linked to growth model.

**DEPARTMENT RESPONSE:**

Student growth is measured based on student progress, not on whether students earn local or Regents diploma.

**COMMENT:**

Questioned why students receiving outside tutoring receive Regents diploma, but students receiving school-based tutoring receive local diploma.

**DEPARTMENT RESPONSE:**

Regents diploma available to anyone who meets criteria for Regents diploma.

**COMMENT:**

Extend school day by one class period and provide that students with disabilities qualifying for academic intervention services be entitled to these as general education service.

**DEPARTMENT RESPONSE:**

Comments are beyond scope of proposed regulations.

## NOTICE OF ADOPTION

### Transitional B and C Certificates and Program Registration Standards Leading to Such Certificates

**I.D. No.** EDU-31-12-00005-A

**Filing No.** 1034

**Filing Date:** 2012-10-16

**Effective Date:** 2012-10-31

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

**Action taken:** Amendment of section 52.21 and Part 80 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided), 305(1), 3001(2), 3006(1)(b) and 3009(1)

**Subject:** Transitional B and C certificates and Program Registration Standards Leading to Such Certificates.

**Purpose:** To allow certified teachers to enter a Transitional B or C certificate program to become certified in a different area.

**Text or summary was published** in the August 1, 2012 issue of the Register, I.D. No. EDU-31-12-00005-P.

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

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

**Assessment of Public Comment**

The agency received no public comment.

## NOTICE OF ADOPTION

## Polysomnographic Technologists

I.D. No. EDU-31-12-00006-A

Filing No. 1035

Filing Date: 2012-10-16

Effective Date: 2012-10-31

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

**Action taken:** Addition of sections 52.42 and 79-4.8–79-4.17 to Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided), 212(3), 6504 (not subdivided), 6506(1), (2), (5), (6), (8), (9) and (10), 6507(2)(a), 6508(1), (2), (3) and (7), and 8505(5) and L. 2011, ch. 262

**Subject:** Polysomnographic technologists.

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

**Text or summary was published** in the August 1, 2012 issue of the Register, I.D. No. EDU-31-12-00006-P.

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

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

**Assessment of Public Comment**

Since publication of a Notice of Proposed Rule Making in the August 1, 2012 State Register, the State Education Department received the following comments.

## 1. COMMENT:

As proposed, the educational requirements encumber future applicants from entering the field of sleep technology, as they will be unable to meet the requirements set by the state. The criteria proposed unnecessarily exceed the established curriculum for sleep technologists. Only one NYS program accredited by the national accrediting body currently meets the educational standards outlined in the proposal. There is a defined need for more programs that meet the proposed requirements before the regulation is put into effect.

## DEPARTMENT RESPONSE:

Currently there are four schools in NYS that are in process of developing licensure qualifying programs. Additionally, proposed section 79-4.16(d) of the Regulations of the Commissioner specifies that, while the grandparenting provisions are otherwise scheduled to end on February 3, 2014, they will continue until such time as there are four licensure-qualifying programs in place in New York State. This provision, as well as the associate's degree requirement for licensure, were part of the discussions on the original draft of the legislation and were agreed to by all stakeholders involved in those discussions.

## 2. Comment:

The lack of a sufficient number of licensure-qualifying programs will result in numerous sleep centers not being able to operate at full capacity due to staffing shortages, and some centers will be forced to close their doors entirely if the pipeline to enter the field of sleep technology in New York is changed. If sleep facilities are compelled to reduce their operations or close, it will create a significant access to care crisis in the state of New York.

## DEPARTMENT RESPONSE:

The grandparenting provisions of the proposed regulation, coupled with existing and developing educational programs in the field of polysomnographic technology, will be sufficient to ensure adequate staffing levels of qualified professionals in the field of sleep medicine. Additionally, respiratory therapists can also perform the work performed by polysomnographic technologists, assuming they are competent to perform such services. The workforce shortages that once existed in the field of respiratory therapy no longer exist in New York, thereby providing another source of qualified professionals to work in the field of sleep medicine.

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## Department of Environmental Conservation

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

#### To Amend Part 189 Related to the Discovery of Chronic Wasting Disease in Deer in Pennsylvania

I.D. No. ENV-44-12-00014-EP

Filing No. 1039

Filing Date: 2012-10-16

Effective Date: 2012-10-16

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

**Proposed Action:** Amendment of Part 189 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 3-0301, 11-0325, 11-1905 and 27-0703

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

**Specific reasons underlying the finding of necessity:** On October 11, 2012 DEC was notified that Pennsylvania confirmed its first case of chronic wasting disease (CWD). New York must ensure that no infected material is transported into the State and therefore needs to remove Pennsylvania from the list of states that are allowed to export the carcasses of wild, captive or captive bred cervids obtained or harvested from Pennsylvania into New York.

**Subject:** To amend Part 189 related to the discovery of chronic wasting disease in deer in Pennsylvania.

**Purpose:** To prevent importation of chronic wasting disease infectious material from the State of Pennsylvania into New York.

**Text of emergency/proposed rule:** Subparagraph 189.3 (e)(1)(i) is amended to read as follows:

(i) United States: Alabama, Connecticut, Delaware, Florida, Georgia, Kentucky, Maine, Massachusetts, Mississippi, New Hampshire, New Jersey, North Carolina, Ohio, [Pennsylvania], Rhode Island, South Carolina, Tennessee, and Vermont.

**This notice is intended:** to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire January 13, 2013.

**Text of rule and any required statements and analyses may be obtained from:** Patrick Martin, New York State Department of Environmental Conservation, 625 Broadway, Albany, New York 12233, (518) 402-8920, email: sshurst@gw.dec.state.ny.us

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

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

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

**Regulatory Impact Statement**

## 1. Statutory authority:

The Commissioner of the Department of Environmental Conservation (department), pursuant to Environmental Conservation Law (ECL) section 3-0301, has authority to protect the wildlife resources of New York State.

ECL section 11-0325 provides the authority to take action necessary to protect fish and wildlife from dangerous diseases. Where a disease is a threat to livestock, as well as to the fish and wildlife populations of the State, ECL section 11-0325 requires the department consult the Department of Agriculture and Markets. If the department and the Department of Agriculture and Markets jointly determine that a disease, which endangers the health and welfare of fish or wildlife populations, or of domestic livestock, exists in any area of the state or is in imminent danger of being introduced into the state, the department is authorized to adopt measures or regulations necessary to prevent the introduction or spread of such disease.

ECL section 11-1905 provides the department with authority to regulate the possession, propagation, transportation and sale of captive-bred white-tailed deer.

ECL section 27-0703 provides the department with authority to regulate the disposal of solid waste.

2. Legislative objectives:

The legislative objective of ECL section 3-0301 is to grant the Commissioner the powers necessary for the department to protect New York's natural resources, including wildlife, in accordance with the environmental policy of the State.

The legislative objective of ECL section 11-0325 is to provide the department with broad authority to respond to the presence or threat of a disease that endangers the health or welfare of fish or wildlife populations. In addition, this section provides for collaboration between the Department and the Department of Agriculture and Markets when such disease also poses a threat to livestock.

The legislative objective of ECL section 11-1905 is to provide the department with authority to regulate the captive-bred white-tailed deer population in New York.

The legislative objective of ECL section 27-0703 is to provide the department with authority to regulate the disposal of solid waste.

3. Needs and benefits:

This rule making is in response to the recent discovery of chronic wasting disease (CWD) in white-tailed deer in Pennsylvania. CWD is an infectious neurological disease of cervids, the family which includes deer, elk and moose. CWD is a transmissible spongiform encephalopathy, and is a progressively fatal disease with no known immunity, vaccine or treatment. Management of CWD is further complicated by the fact that it is a poorly understood disease with clinical signs not apparent for at least 18 months following exposure and an unknown mode of transmission.

This rule making is necessary to protect New York's white-tailed deer herd from CWD by preventing the importation of CWD infectious materials into New York from newly identified sources. Prior to the recent discovery of CWD in Pennsylvania, CWD regulations were adopted by the department and the Department of Agriculture and Markets in an effort to prevent CWD from entering the State from outside sources, but those regulations did not include Pennsylvania because this state was not a known source of CWD at that time. With the discovery of CWD in white-tailed deer in Pennsylvania, amendment of 6 NYCRR Part 189 is necessary to prevent importation of CWD infectious materials from this new source.

The rule making will place restrictions on the importation of wild deer carcasses and parts from Pennsylvania.

The white-tailed deer herd in New York is estimated to be approximately 900,000 animals. In 2010, over 560,000 licenses were sold to hunt white-tailed deer in New York, resulting in expenditures by hunters and for hunting related activities of approximately \$8,000,000 dollars.

4. Costs:

This rule making could result in additional costs to hunters who must process deer taken in Pennsylvania prior to importing it into New York.

5. Local government mandates:

The proposed rule does not impose any mandates on local government.

6. Paperwork:

The proposed rule does not impose any additional recordkeeping.

7. Duplication:

The proposed amendment does not duplicate any state or federal requirement.

8. Alternatives:

The department could take no action, but has rejected this option. Failing to act to prevent the importation of CWD infectious material could allow the disease to become established in New York State. CWD has not been found in New York for over five years. The spread of CWD could compromise the health of New York's white-tailed deer herd and could have significant economic impacts on commercial and recreational activities associated with white-tailed deer.

9. Federal standards:

The United States Department of Agriculture-Animal and Plant Health Inspection Service (USDA-APHIS) developed an Environmental Assessment (EA) in 2002. The EA outlined the role of the federal government in CWD management. This role included providing coordination and assistance with research, surveillance, disease management, diagnostic testing, technology, communications, information dissemination, education and funding for State CWD Programs. At this time, there are no federal standards governing management of deer, moose or elk.

10. Compliance schedule:

Compliance will be required upon adoption of the final rule.

**Regulatory Flexibility Analysis**

1. Effect of Rule:

The proposed regulation is necessary to protect the white-tailed deer population in New York State from Chronic Wasting Disease (CWD). The white-tailed deer is a very important natural resource to small businesses and local governments in New York. The purpose of the new regulation is to protect this resource so that New Yorkers may continue to

enjoy viewing deer, and benefit from deer hunting, and the positive economic and social effects of deer and deer hunting.

Under the proposed regulations, Pennsylvania will be dropped from the list of states exempt for the importation restrictions. All CWD positive states are subject to the same importation restrictions. Although this will impact New York residents who may hunt in Pennsylvania and plan to return to New York with whole carcasses of the deer they harvest, it is anticipated that this will effect relatively few hunters and, with some advanced planning, hunters can easily comply with these regulations without losing hunting opportunity.

No local governments will be affected by this rule.

2. Compliance Requirements:

Resident hunters who harvest a deer in Pennsylvania will be required to remove specific parts from the animal before bringing it into New York.

3. Professional Services:

The rule will not require local governments or small businesses to engage professional services to comply with this rule.

4. Compliance Costs:

Some successful hunters will be required to pay for the processing of their harvested deer before returning to the State. Most hunters who hunt in the CWD restricted states have their harvested game processed before they return as a matter of course.

5. Economic and Technological Feasibility:

There is no economic or technological affect on local governments or small businesses. The rule will not require any technological changes or capital expenditures to comply with the new regulation.

6. Minimizing Adverse Impact:

As the serious nature of CWD is explained to the public, the new restrictions are likely to be accepted as reasonable and balanced. The Department of Environmental Conservation (department) strongly supports continued research on CWD to understand the modes of transmission, and associated risk variables. As new information becomes available, the department will adjust regulations in response to new data or findings.

7. Small Business and Local Government Participation:

When CWD was first confirmed, the department held public meetings to explain the nature of the disease and the department's initial response. Since early April 2005, the department has issued press releases to continue to inform the public of developments and findings relative to the CWD monitoring program. Similarly, as the department establishes appropriate and necessary regulations to contain the disease outreach to affected stakeholders (businesses and local governments) will be done so that the importance of the new regulations is understood.

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 that could have on the health of cervids. Immediate compliance with this rule is necessary to prevent further introduction of this disease into New York State and prevent exportation of this disease outside of New York. Compliance is also required to ensure that the general welfare of the public is protected.

**Rural Area Flexibility Analysis**

This rule making is directed at the importation of certain animal parts into New York from the State of Pennsylvania. It does not have any direct impacts on rural areas or entities therein. Therefore, the department has determined that this rule making will not have any adverse impacts on rural areas. In fact, the rule making will have a positive impact on rural areas by preventing the importation of CWD infectious materials and the introduction of CWD to new areas of the state. The department has further determined that this rule will not impose any reporting, record-keeping, or other compliance requirements on public or private entities in rural areas. Therefore, a rural area flexibility analysis is not required for this rule making.

**Job Impact Statement**

This rule making is necessary to protect New York States's white-tailed deer herd from Chronic Wasting Disease (CWD) by preventing the importation of CWD infectious materials into New York from the State of Pennsylvania. In 2011, CWD was found in white-tailed deer in the State of Pennsylvania.

The Department of Environmental Conservation (department) has determined that this rule making will not have a substantial adverse impact on jobs and employment opportunities, and that by its nature and purpose (protecting the New York State white-tailed deer resource), the proposed rule will protect jobs and employment opportunities. Therefore, the department has determined that a job impact statement is not required.

**PROPOSED RULE MAKING  
HEARING(S) SCHEDULED**

**Sulfur-In-Fuel Standards**

**I.D. No.** ENV-44-12-00015-P

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

**Proposed Action:** Amendment of Part 200; repeal of Subpart 225-1; and addition of new Subpart 225-1 to Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 1-0101, 3-0301, 19-0103, 19-0105, 19-0301, 19-0303, 19-0305, 19-0325, 71-2103 and 71-2105

**Subject:** Sulfur-in-fuel standards.

**Purpose:** Lower sulfur-in-fuel limits for distillate and residual oils, remove expired provisions and correct typographical errors.

**Public hearing(s) will be held at:** 2:00 p.m., Dec. 17, 2012 at Department of Environmental Conservation Region 2 Office, 1 Hunters Point Plaza, 47-40 21st St., Rm. 834, Long Island City, NY; 2:00 p.m., Dec. 18, 2012 at Department of Environmental Conservation Region 8 Office, Conference Rm., 6274 E. Avon-Lima Road (Rtes. 5 and 20), Avon, NY; and 2:00 p.m., Dec. 20, 2012 at Department of Environmental Conservation, 625 Broadway, Public Assembly Rm. 129, Albany, NY.

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

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

**Text of proposed rule:** A new Subdivision 200.1(cw) is added as follows:

(cw) *Waste Oil. Used and/or reprocessed engine lubricating oil and/or any other used oil, including but not limited to, fuel oil, engine oil, gear oil, cutting oil, transmission fluid, hydraulic fluid, dielectric fluid, oil storage tank residue, animal oil, and vegetable oil, which has not subsequently been re-refined.*

(Existing sections 200.2 through 200.8 remain unchanged.)

Existing section 200.9, Table 1 is amended as follows:

Regulation	Referenced Material	Availability
225-1.5(b)	40 CFR Part 60, Appendix B, July 1, 2006, Performance Specification 2, pages 639-646	*
225-1.5(b)(3)	40 CFR Part 75, July 1, 2008	*
[225-1.7(b)]	[40 CFR Part 60, Appendix B (July 1989) Performance Specification 2, pages 981-988]	[*]

(Existing section 200.10 through section 200.16 remains unchanged.)

Existing 6 NYCRR Subpart 225-1, Fuel Composition and Use - Sulfur Limitations is repealed.

A new Subpart 225-1, Fuel Composition and Use - Sulfur Limitations is added as follows:

**Section 225-1.1 Definitions.**

(a) *To the extent that they are not inconsistent with the specific definitions in Subdivision (b) of this Section, the general definitions of Part 200 and Part 201 of this Title apply.*

(b) *For the purpose of this Subpart, the following definitions also apply:*

(1) *Fuel distributor. Any person who transports, stores, or causes the transportation or storage of distillate oil, residual oil, and/or coal at any point between a refinery/mine or importer's facility and a retail outlet or wholesale purchaser-consumer's facility.*

**Section 225-1.2 Sulfur-in-fuel limitations.** *No person will sell, offer for sale, purchase, or fire any fuel which exceeds the sulfur-in-fuel limitations of this Section, except as provided in Sections 225-1.3 or 225-1.4 of this Subpart. For the purposes of this Subpart liquid bio-fuels, other than waste oils, will be required to meet the sulfur-in-fuel standards of either number two heating oil or distillate oil.*

(a) *Owners and/or operators of any stationary combustion installation(s) that fire(s) coal and has a total heat input greater than 250 million Btu per hour, where an application for a permit was received by the department after March 15, 1973, and the stationary combustion installation is not located in New York City or Nassau, Rockland or Westchester Counties, are limited to the firing of coal with 0.60 pound of sulfur per*

*million Btu gross heat content or less. If two or more emission sources are connected to a common air cleaning device and/or emission point, the total heat input for such emission point is the sum of the total heat input of all emission sources which are operated simultaneously and connected to the common air cleaning device and/or emission point; or*

(b) *Owners and/or operators of any stationary combustion installation that fires either solid fuels or oil are limited to the firing of solid fuels or oil with a sulfur content listed in the table below through June 30, 2014:*

Area	Liquid fuel (percent sulfur by weight)		Solid fuel (pounds of sulfur per million Btu gross heat content)
	Residual	Distillate*	
New York City	0.30	0.20	0.2 MAX
Nassau, Rockland and Westchester Counties	0.37	0.37	0.2 MAX
Suffolk County: Towns of Babylon, Brookhaven, Huntington, Islip, and Smith Town	1.00	1.00	0.6 MAX
Erie County: City of Lackawana and South Buffalo**	1.10	1.10	1.7 MAX and 1.4 AVG***
Niagara County and remainder of Erie County		1.50	1.7 MAX and 1.4 AVG***
Remainder of State	1.50	1.50	2.5 MAX, 1.9 AVG***, and 1.7 AVG (ANNUAL)****

\* *Except for number two heating oil as stated in Subdivision (f) of this Section.*

\*\* *South Buffalo is defined as the area in the City of Buffalo south of a line from the intersection of IR 190 and Route 5 and proceeding east along IR 190 to the city line.*

\*\*\* *Averages are computed for each emission source by dividing the total sulfur content by the total gross heat content of all solid fuel received during any consecutive three-month period.*

\*\*\*\* *Annual averages are computed for each emission source by dividing the total sulfur content by the total gross heat content of all solid fuel received during any consecutive 12-month period.*

(c) *Owners and/or operators of any stationary combustion installation that fires solid fuels are limited to the firing of solid fuel with a sulfur content listed in the table below on or after July 1, 2014:*

Area	Solid fuel (pounds of sulfur per million Btu gross heat content)
New York City	0.2 MAX
Nassau, Rockland and Westchester Counties	0.2 MAX
Suffolk County: Towns of Babylon, Brookhaven, Huntington, Islip, and Smith Town	0.6 MAX
Erie and Niagara Counties	1.7 MAX, 1.4 AVG*
Remainder of State	2.5 MAX, 1.9 AVG*, and 1.7 AVG (ANNUAL)**

\* *Averages are computed for each emission source by dividing the total sulfur content by the total gross heat content of all solid fuel received during any consecutive three-month period.*

\*\* *Annual averages are computed for each emission source by dividing the total sulfur content by the total gross heat content of all solid fuel received during any consecutive 12-month period.*

(d) *Owners and/or operators of any stationary combustion installation that fires residual oil are limited to the firing of residual oil with a sulfur content listed in the table below on or after July 1, 2014:*

Area	Residual Oil (percent sulfur by weight)
New York City	0.30
Nassau, Rockland and Westchester Counties	0.37

(e) Owners and/or operators of any stationary combustion installation that fires residual oil are limited to the purchase of residual oil with a sulfur content listed in the table below on or after July 1, 2014, and are limited to the firing of residual oil with a sulfur content listed in the table below on or after July 1, 2016:

Area	Residual Oil (percent sulfur by weight)
Suffolk County: Towns of Babylon, Brookhaven, Huntington, Islip, and Smith Town	0.50
Erie and Niagara Counties	0.50
Remainder of State	0.50

(f) Owners and/or operators of commercial, industrial, or residential emission sources that fire number two heating oil on or after July 1, 2012 are limited to the firing of number two heating oil with 0.0015 percent sulfur by weight or less.

(g) Owners and/or operators of any stationary combustion installation that fires distillate oil are limited to the purchase of distillate oil with 0.0015 percent sulfur by weight or less on or after July 1, 2014, and are limited to the firing of distillate oil with 0.0015 percent sulfur by weight or less on or after July 1, 2016.

(h) Owners and/or operators of any stationary combustion installation that fires waste oil on or after July 1, 2014 are limited to the firing of waste oil with 0.75 percent sulfur by weight or less.

**Section 225-1.3 Exceptions contingent upon fuel shortage.**

(a) Upon application by a facility owner or a fuel distributor the department may issue an order granting a temporary exception from the provisions of this Subpart where it can be shown, to the department's satisfaction, that there is an insufficient supply of conforming fuel, either:

(1) of the proper type required for firing in a particular emission source; or

(2) generally throughout an area of the State.

(b) The New York State Energy Research and Development Authority must certify that there exists an insufficient supply of fuel which conforms to the standards in this Subpart before a sulfur-in-fuel exception may be granted under this Subdivision.

(c) The department may grant a sulfur-in-fuel exception contingent upon a fuel shortage for a period not longer than 45 days.

(d) The department may grant a sulfur-in-fuel exception contingent upon a fuel shortage for a period longer than 45 days, but not longer than one year, only after a public hearing is held to gather information relevant to such an exception. The applicant for the exception must publish notice of such hearings, in a form acceptable to the department, in a newspaper of general circulation in the area for which the exception is sought. The applicant will bear the cost of publication of the notice, of the hearing transcript, and for rental of space in which the hearing is conducted.

(e) The department recognizes that, pursuant to section 117 of article 5 of the Energy Law, provisions of this Subpart may be pre-empted when the Governor declares that an energy or fuel supply emergency exists or is impending.

**Section 225-1.4 Variances.**

(a) Fuel mixtures or equivalent emission rate variances. Fuels with sulfur content greater than that allowed by this Subpart may be fired when the facility owner can demonstrate that sulfur dioxide emissions do not exceed the value for *S* calculated using the following equation:  $S = (1.1AM + 2BT)/(M + T)$  where:

*S* = Allowable sulfur dioxide emission (in pounds per million Btu)

*A* = Sulfur in oil allowed by Section 225-1.2 of this Subpart (in percent by weight)

*B* = Average sulfur in solid fuel allowed by Section 225-1.2 of this Subpart (in pounds of sulfur per million Btu gross heat content)

*M* = Percent of total heat input from liquid fuel

*T* = Percent of total heat input from solid fuel (including coal, coke, wood, wood waste, and refuse-derived fuel)

Fuel mixtures and equivalent emission rate variances only apply to processes or stationary combustion installations. Compliance will be based on the total heat input from all fuels fired, including gaseous fuels. Any process or stationary combustion installation owner who chooses to fire a fuel mixture pursuant to this Subdivision is subject to the emission and fuel monitoring requirements of Section 225-1.5 of this Subpart.

(b) Experiments variance. Upon application, the department may issue a variance allowing the sale, offering for sale, purchase and firing of fuel having a sulfur content in excess of the limits imposed by this Subpart, where such fuel would be fired to demonstrate the performance of experimental equipment and/or process(es) for reducing sulfur compounds from an emission source.

(c) Coal and coke. In New York City and Nassau, Rockland and Westchester Counties, the commissioner will permit:

(1) the sale and the continued, but not increased, purchase and use of coal and coke for installations with a maximum operating heat input equal to or less than one million Btu per hour if coal and coke has been used continuously since December 31, 1967 and the maximum sulfur content does not exceed 0.6 pound per million Btu gross heat content; or

(2) the sale, purchase and use of coal and coke for approved conversions of existing stationary combustion installations to the use of coal, and for new coal-fired stationary combustion installations, provided that the coal conversion or new stationary combustion installations meet all applicable air quality and State Environmental Quality Review requirements.

**Section 225-1.5 Emissions and fuel monitoring.**

(a) The provisions of this section apply to owners of stationary combustion installations:

(1) with a total heat input greater than 250 million Btu per hour. If two or more emission sources are exhausted through a common emission point, the total heat input for such an emission point is either the sum of the maximum operating heat inputs of all emission sources which are operated simultaneously and exhausted through the common emission point, or the maximum operating heat input of any individual emission source operated independently and connected to the common emission point, whichever is greater;

(2) which are equipped with approved sulfur dioxide control equipment; or

(3) which are subject to a sulfur dioxide equivalent emissions rate for a fuel mixture pursuant to Subdivision 225-1.4(a) of this Subpart.

(b) Instruments for continuously monitoring and recording sulfur compound emissions (expressed as sulfur dioxide) must be installed and operated at all times that the stationary combustion installation is in service. Such instruments must be operated in accordance with manufacturer's instructions, must satisfy the criteria in "performance specification 2", appendix B, part 60 of title 40 of the Code of Federal Regulations (see Table 1, Section 200.9 of this Title), and must be acceptable to the department. Exceptions to these requirements are:

(1) stationary combustion installations where gaseous fuel is the only fuel fired; or

(2) stationary combustion installations, not including any equipped with sulfur dioxide control equipment, whose fuel is subjected to representative sampling and sulfur analysis conducted in a manner approved by the department; or

(3) stationary combustion installations required to use the continuous monitoring specifications under 40 CFR part 75 (see Table 1, Section 200.9 of this Title).

(c) Measurements must be made daily of the rate of each fuel fired. The gross heat content and ash content of each fuel fired must be determined at least once each week. In the case of stationary combustion installations producing electricity for sale, the average electrical output and the hourly generation rate must also be measured.

**Section 225-1.6 Reports, sampling, and analysis.**

(a) The department will require fuel analyses, information on the quantity of fuel received, fired or sold, and results of stack sampling, stack monitoring, and other procedures to ensure compliance with the provisions of this Subpart.

(b)(1) Any person who sells oil and/or coal must retain, for at least five years, records containing the following information:

(i) fuel analyses and data on the quantities of all oil and coal received; and

(ii) the names of all purchasers, fuel analyses, and data on the quantities of all oil and coal sold.

(2) Such fuel analyses must contain, as a minimum:

(i) data on the sulfur content, ash content, specific gravity, and heating value of residual oil;

(ii) data on the sulfur content, specific gravity, and heating value of distillate oil; and

(iii) data on the sulfur content, ash content, and heating value of coal.

(c) Sampling, compositing, and analysis of fuel samples must be done in accordance with methods acceptable to the department.

(d) Facility owners or fuel distributors required to maintain and retain records pursuant to this Subpart must make such records available for inspection by the department.

(e) Data collected pursuant to this Subpart must be tabulated and summarized in a form acceptable to the department, and must be retained for at least five years. The owner of a Title V facility must furnish to the department such records and summaries, on a semiannual calendar basis, within 30 days after the end of the semiannual period. All other facility owners or distributors must submit these records and summaries upon request of the department.

(f) Facility owners subject to this Subpart must submit a written report

of the fuel sulfur content exceeding the applicable sulfur-in-fuel limitation, measured emissions exceeding the applicable sulfur-in-fuel limitation, measured emissions exceeding the applicable equivalent emission rate, and the nature and cause of such exceedances if known, for each calendar quarter, within 30 days after the end of any quarterly period in which an exceedance takes place.

**Section 225-1.7 Severability.**

Each provision of this Part shall be deemed severable, and in the event that any provision of this Part is held to be invalid, the remainder of this Part shall continue in full force and effect.

**Text of proposed rule and any required statements and analyses may be obtained from:** Michael Jennings, NYSDEC, Division of Air Resources, 625 Broadway, Albany, NY 12233-3254, (518) 402-8403, email: 225sulfur@gw.dec.state.ny.us

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

**Public comment will be received until:** December 28, 2012.

**Additional matter required by statute:** Pursuant to Article 8 of the State Environmental Quality Review Act, a Short Environmental Assessment Form, a Negative Declaration and a Coastal Assessment Form have been prepared and are on file.

### Summary of Regulatory Impact Statement

#### INTRODUCTION

The New York State Department of Environmental Conservation (DEC) is proposing to revise 6 NYCRR Subpart 225-1, "Fuel Composition and Use - Sulfur Limitations" and 6 NYCRR Part 200, "General Provisions." Subpart 225-1 imposes limits on the sulfur content of distillate oil, residual oil, and coal fired in stationary sources. The Department is proposing these changes to both implement a statutory requirement and meet our obligations to reduce air pollution. The revisions to Subpart 225-1 will be a component of the State Implementation Plan (SIP) for New York State (NYS) directed at attainment of the particulate matter less than or equal to 2.5 microns in diameter (PM-2.5) national ambient air quality standard (NAAQS), the sulfur dioxide (SO<sub>2</sub>) NAAQS and the Department's obligations under the regional haze SIP submitted to U.S. Environmental Protection Agency (EPA) on March 15, 2010. This is a requirement flowing from the State's obligations under the Clean Air Act. This is not a mandate on local governments. It applies to any entity that owns or operates a subject stationary source. This proposal will not regulate transportation fuel.

The revisions to Part 200 incorporate references to federal rules and add a definition for "waste oil". The revisions to Subpart 225-1 primarily include the lowering of the sulfur-in-fuel limits for all distillate and residual oils sold, purchased, and/or used in portable (not including non-road engines) or stationary sources in New York State. These revisions will also include the removal of "out-of-date" sulfur-in-fuel tables, expired source specific variances, and the correction of typographical errors. In addition, the Department is removing the variance for emission sources with a maximum operating heat input greater than one million Btu per hour (mmBtu/hr) heat input rate that fire coal and coke in New York City, Nassau, Rockland, and Westchester Counties.

#### STATUTORY AUTHORITY

The following Sections of the Environmental Conservation Law (ECL) allow the Department to promulgate and implement the proposed regulation: Section 1-0101, Section 3-0301, Section 19-0103, Section 19-0105, Section 19-0301, Section 19-0303, Section 19-0305, Section 19-0325, Section 71-2103, and Section 71-2105.

#### LEGISLATIVE OBJECTIVES

Article 19 of the ECL was adopted for the purpose of safeguarding the air resources of New York from pollution. To facilitate this purpose, the Legislature bestowed specific powers and duties on the Department including the power to formulate, adopt, promulgate, amend, and repeal regulations for preventing, controlling or prohibiting air pollution. This authority also specifically includes promulgating rules and regulations for preventing, controlling or prohibiting air pollution in such areas of the State as shall or may be affected by air pollution, and provisions establishing areas of the State and prescribing for such areas (1) the degree of air pollution or air contamination that may be permitted therein, and (2) the extent to which air contaminants may be emitted to the air by any air contamination source. In addition, this authority also includes the preparation of a general comprehensive plan for the control or abatement of existing air pollution and for the control or prevention of any new air pollution recognizing various requirements for different areas of the State. The legislative objectives underlying the above statutes are directed toward protection of the environment and public health. The proposed rulemaking will further the goals of the above referenced statutes by reducing air pollution, specifically SO<sub>2</sub> emissions, a criteria pollutant and a precursor to PM-2.5 which in turn is a precursor to visibility-impairing haze from the majority of oil firing stationary sources throughout New York. These reductions will reduce the health impacts of said pollutants by providing cleaner air.

#### NEEDS AND BENEFITS

Regional haze refers to the presence of light-inhibiting pollutants in the atmosphere. These particles and gases scatter or absorb light to cause a net effect referred to as "light extinction." This scattering and absorbing occurs across the sight path of an observer, thus leading to a hazy condition. Emissions of pollutants such as SO<sub>2</sub>, PM-10, and PM-2.5 are the primary contributors to visibility problems. These pollutants lend themselves to being transported great distances once they enter the atmosphere. Accordingly, sources contribute to visibility impairment in Class I areas far downwind of their locations, thereby necessitating a regional approach to solving the haze issue.

There are many environmental benefits inherent in the reductions of PM and SO<sub>2</sub> that do not explicitly relate to visibility improvement. These reductions will lead to advances in health protection as well. Although downwind rural and urban areas within NYS were not specifically targeted through the Regional Haze Rule, these areas can expect to benefit from improved air quality. In addition to experiencing improved visibility, forested areas such as the Adirondack Park will benefit from reduced PM acid deposition impacts, which are described below. These environmental impacts could also be expected to translate into economic benefits from increased public use of a cleaner and visibly healthier park.

Elevated PM levels are of concern for the New York City metropolitan area, which has been designated as non-attainment for the annual and 24-hour PM-2.5 NAAQS. PM consists of microscopic solid or liquid particles, and is the major cause of the regional haze issue. PM can be emitted directly from stationary sources, or comprised of nitrate and sulfate particles formed through reactions involving NO<sub>x</sub> and SO<sub>2</sub> in the atmosphere. These particles are small enough to be inhaled into the lungs, and can even enter the bloodstream. Ongoing scientific studies show that particulate inhalation, similarly to ozone, leads to health problems such as coughing, difficulty breathing, aggravated asthma, and a higher likelihood for other respiratory disorders. Studies have also shown that elevations in PM concentrations are associated with such cardiovascular threats as irregular heartbeat and non-fatal heart attacks. Increased PM exposure may even cause premature death in those with existing heart or lung disease.

The proposed changes to Subpart 225-1 are intended to reduce the emission of SO<sub>x</sub> that are the precursors of PM below the present levels. Existing regulations and emission control programs have been successful in the past at reducing these emissions. Regulatory efforts such as the Acid Rain program, past state and federal fuel sulfur limitations for stationary and mobile sources, and efforts like the Clean Air Interstate Rule have had a significant effect on air quality and health. The proposed sulfur-in-fuel limits in this rule are expected to further reduce monitored values of SO<sub>x</sub>, and to enable and maintain attainment of the NAAQS.

#### Stakeholder Meetings

The Department held two stakeholder meetings to discuss its proposed revisions to Subpart 225-1. The first stakeholder meeting was held on June 24, 2010 and the second on November 21, 2011. The Department solicited comments on the proposed rule from the stakeholders. Both stakeholder meetings consisted of attendees from the regulated community (oil manufacturers, oil distributors, and end users) to be affected by the proposed regulation, consultants (both technical and legal), and interested environmental groups. There were two primary concerns raised at the stakeholder meetings. The first involved timing because of the statute. Stakeholders were concerned that the Department would be unable to promulgate a regulation prior to the compliance date contained in the statute. The second also concerned compliance dates. Stakeholders were concerned about phase in of compliance dates for the remainder of distillate oil. Many subject facilities use distillate as back up fuel and fire it very infrequently. These facilities requested time to be able to use and/or blend down their reserve fuel. Based upon these comments the Department proposed a phased in compliance approach. While the July 1, 2012 compliance date for number 2 heating oil is in statute and therefore may not be changed by regulation, the regulation requires a July 1, 2014 compliance date for the purchase of complying oil and a July 1, 2016 compliance date for the firing of these oils.

#### COSTS

##### Costs to Regulated Parties and Consumers:

Stationary sources subject to the Subpart 225-1 provisions may incur increased fuel oil costs associated with this proposed regulation. There are several factors that may affect fuel oil prices. These factors include but are not limited to fuel availability, price of crude oil, production costs, storage costs, increase in taxes on oil, overall demand based on weather conditions, and natural gas availability and price. The refining process used to produce lower sulfur content oils (less than 500ppm sulfur content oils) is different from the refining process currently used to manufacture oil with a sulfur content greater than 500 ppm. There will be an initial cost to the oil manufacturers associated with conversion of the current refining process to the new refining process. Therefore, the Department anticipates that production costs will increase. However, based on all of the above

listed factors there may or may not be an increase in oil prices (there is the possibility that oil prices could decrease). Setting aside the other factors, the Department conducted a cost analysis based solely upon the increase in production costs and availability of oil to the consumer.

The Department evaluated the availability and production cost of distillate oil with sulfur-by-weight specifications of 500 ppm (low sulfur distillate oil) in 2014 and 15 ppm (ultra-low sulfur distillate oil) in 2018 for the northeast U.S. that corresponds to the MANE-VU Region. The Department based this analysis on currently available refinery studies conducted for the National Oil Heat Research Alliance (NORA) and American Petroleum Institute (API), Energy Information Agency (EIA) data, and a public health benefits study conducted by Northeast States for Coordinated Air Use Management (NESCAUM). The NORA report concludes that as the demand for low and ultra-low sulfur distillate oil increases, the sources of supply and refining capacity for low and ultra-low sulfur distillate oil will be reconfigured for greater production capability. The API report projects that sufficient supplies of low sulfur distillate oil will be available to meet the demand that will be generated from the implementation of a low sulfur distillate oil standard in 2010 for New York State. The NESCAUM report determined overall health care savings from the implementation of both low and ultra-low sulfur distillate oil standards. (Public Health Benefits of Reducing Ground-level Ozone and Fine Particle Matter in the Northeast U.S., A Benefits Mapping and Analysis Program (BENMAP) Study, NESCAUM, January 15, 2008). The Department also conducted a cost analysis based on information from this report in addition to the NORA and API reports and EIA data. Additionally, the Department considered the study conducted by the New York State Energy Research and Development Authority (NYSERDA) and Brookhaven National Laboratories (Low sulfur Home Heating Oil Demonstration Project Summary Report, Energy Research Center, Inc., and Brookhaven National Laboratories, BNL-74956-2005-IR, June 2005 (NYSERDA Report)). The NYSEDA report finds overall savings to consumers in terms of reduced heating equipment service and maintenance costs from using low sulfur distillate oil.

In addition to the above referenced report NYSEDA publishes a weekly "Heating Fuels Report". This report contains the cost difference and oil stock pile figures for both high sulfur and 15 ppm oil. NYSEDA has published this report for about 15 years. NYSEDA also published a report in January 2011 titled "Patterns and Trends - New York State Energy Profiles: 1995-2009"<sup>1</sup>. These reports show some important trends. First, the amount of number 2 heating oil used in New York State has been steadily decreasing since 2005 after its peak usage from 2000 through 2005. The report shows that the amount of number 2 heating oil used between 2005 and 2009 dropped by 40 percent. Preliminary number 2 heating oil use data from 2010 and 2011 show the trend of lower oil usage in the Northeast has continued. Second, price trends show that the difference between 15 ppm and high sulfur oil was as low as a penny per gallon prior to the shutdown of several oil refineries in the Northeast between October 2011 and April 2012. Since the shutdown of these refineries the price difference between 15 ppm and high sulfur oil has once again risen to approximately five cents per gallon.

#### Costs to State and Local Governments:

State and local governments may incur increased fuel oil costs associated with this proposed regulation because they are required by Section 19-0325 of Chapter 203 of the ECL to purchase and fire 15 ppm sulfur content number 2 heating oil. However, no new recordkeeping, reporting, or other requirements will be imposed on state and local governments based on this proposed rule-making. Based on the Department's permitting data, there are 50 State and local government facilities that have Title V permits and 75 State and local government facilities that have state facility permits (please note that some of these facilities fire both distillate and residual oil and that the facilities that fire residual oil that reside in New York City, Nassau, Rockland, and Westchester counties will not be affected by the proposed sulfur-in-fuel standards). Using the cost per gallon figures from the above reports in combination with the fuel use data and fuel use assumptions, the Department was able to estimate the cost or cost range increase for the State and local government facilities. The four State and local government facilities with Title V permits that fire residual oil will incur an average fuel cost increase of 14,000 dollars per year per facility. The 48 State and local government facilities with Title V permits that fire distillate oil will incur a fuel cost increase of between 21,000 to 24,000 dollars per year per facility. The 24 State and local government facilities with state facility permits that fire residual oil will incur an average fuel cost increase of 1,200 dollars per year per facility. The 56 State and local government facilities with state facility permits that fire distillate oil will incur a fuel cost increase of between 9,000 to 10,000 dollars per year per facility. The projected fuel cost increases will be partially offset by the gain in efficiency and lower maintenance costs that are directly attributable from the use of lower sulfur fuels.

Costs to the Regulating Agency:

The Department will face some initial administrative costs associated with the application review and permitting of the new sulfur-in-fuel limits. No additional monitoring, recordkeeping, or reporting requirements are being proposed under this rule-making. Therefore, no additional costs will be incurred by the regulating agency based on these factors.

#### LOCAL GOVERNMENT MANDATES

This is not a mandate on local governments. Local governments have no additional compliance obligations as compared to other subject entities. Also, no additional monitoring, recordkeeping, reporting, or other requirements will be imposed on local governments under this rulemaking.

#### PAPERWORK

The proposed changes to Subpart 225-1 will create no additional paperwork for the facilities subject to the requirements of this rule.

#### DUPLICATION

The proposed revisions to Subpart 225-1 do not duplicate, overlap, or conflict with any other State or federal requirements.

#### ALTERNATIVES

The Department evaluated the following alternatives:

(1) Take no action: This alternative could prevent New York State from complying with its obligations under the CAA. If the Department does not implement this regulation, it would not be able to meet its obligations to achieve attainment in the PM-2.5 non-attainment areas throughout New York State. Also, without the promulgation of Subpart 225-1, the State would not be reducing its regional haze impacts in the northeast. The reduction in sulfur-in-fuel limitations will directly result in reductions of SO<sub>2</sub>, PM-10, and PM-2.5. Reductions of these air contaminants will definitively aid New York in meeting both its attainment goals for PM-2.5 and reduce the State's regional haze impact. Therefore, the "Take no action" alternative has been rejected.

(2) Partial implementation of sulfur-in-fuel standards: The Department could revise Subpart 225-1 to only include the sulfur-in-fuel requirements of Section 19-0325 of the ECL for number 2 heating oil. These revisions would also correct any existing typographical errors and update the regulation to match the permitting nomenclature of Part 201. During the June 24, 2010 stakeholder meeting for Subpart 225-1 the oil manufacturers and distributors expressed concerns that the Department would create added burdens by only including the provisions in ECL Section 19-0325. The oil manufacturers stated that they would need to reconstruct their facilities to be able to manufacture the 15 ppm sulfur content distillate oil. They stated that the manufacturing process was different for distillate oil that has a sulfur content of less than 500 ppm than for distillate oil that has a sulfur content of greater than or equal to 500 ppm. They expressed that the reconstruction was fine as long as they could totally commit and not have to divide their manufacturing between several fuel sulfur contents (which would entail maintenance of multiple processes and equipment). The oil distributors expressed concerns that a partial implementation would require them to maintain multiple fuel oil storage tanks which could result in cross contamination problems. Therefore, based on the stakeholder concerns the "Partial implementation of sulfur-in-fuel standards" alternative has been rejected.

#### FEDERAL STANDARDS

The proposed revisions to Subpart 225-1 do not exceed any minimum federal standards. The proposed reductions will lower the standards to the point where they would be equivalent to the sulfur-in-fuel standards of both 40 CFR 60 NSPS and 40 CFR 63 National Emission Standards for Hazardous Air Pollutants.

#### COMPLIANCE SCHEDULE

The Department proposes to promulgate the revisions to Subpart 225-1 by January 2013. The provisions of this rule will take effect based on a phased approach. The initial compliance date is proposed for July 1, 2012 for emission sources that fire number 2 heating oil for residential, commercial, or industrial heating applications. The secondary compliance dates are July 1, 2014 for all remaining distillate oil fired sources and the purchase of compliant residual oil in New York State and July 1, 2016 for the firing of compliant residual oil in New York State.

<sup>1</sup> This report can be found at: [http://www.nyserda.ny.gov/~media/Files/Publications/Energy-Analysis/1995\\_2009\\_patterns\\_trends\\_rpt.ashx?sc\\_database=web](http://www.nyserda.ny.gov/~media/Files/Publications/Energy-Analysis/1995_2009_patterns_trends_rpt.ashx?sc_database=web)

#### Regulatory Flexibility Analysis

##### EFFECT OF RULE ON SMALL BUSINESSES AND LOCAL GOVERNMENTS

The Department proposes to change Subpart 225-1. The proposed rulemaking will apply statewide. Small businesses are those that are independently owned, located within New York State, and that employ 100 or fewer persons. The proposed changes to the subpart 225-1 requirements flow from the State's obligations under the federal Clean Air Act. Therefore, the proposed revisions do not constitute a mandate on local governments. The Subpart 225-1 requirements apply equally to every

stationary source that fires oil in New York State. The proposed changes to Subpart 225-1 will not affect small businesses or local governments differently from any other source subject to this rule.

#### COMPLIANCE REQUIREMENTS

The proposed rule will lower sulfur-in-fuel limits for distillate oil, residual oil, and waste oil. However, no changes will be made in the monitoring, recordkeeping, or reporting requirements in the current version of Subpart 225-1. Therefore, no new compliance requirements will be incurred by small businesses or local governments subject to the provisions of the proposed rule.

#### PROFESSIONAL SERVICES

The proposed rule will lower sulfur-in-fuel limits for distillate oil, residual oil, and waste oil. No changes will be made in the monitoring, recordkeeping, or reporting requirements in the current version of Subpart 225-1. Facilities subject to this rule are simply required to purchase compliant fuels. Therefore, the Department does not expect small businesses or local governments will need to hire additional professional services to comply with the provisions of the proposed rule.

#### COSTS

Stationary sources subject to the Subpart 225-1 provisions may incur increased fuel oil costs associated with this proposed regulation. There are several factors that may affect fuel oil prices. These factors include but are not limited to fuel availability, price of crude oil, production costs, storage costs, increase in taxes on oil, overall demand based on weather conditions, and natural gas availability and price. The refining process used to produce lower sulfur content oils (less than 500ppm sulfur content oils) is different from the refining process currently used to manufacture oil with a sulfur content greater than 500 ppm. There will be an initial cost to the oil manufacturers associated with conversion of the current refining process to the new refining process. Therefore, the Department anticipates that production costs will increase. However, based on all of the above listed factors there may or may not be an increase in oil prices (there is the possibility that oil prices could decrease). Setting aside the other factors, the Department conducted a cost analysis based solely upon the increase in production costs and availability of oil to the consumer.

Local governments may incur increased fuel oil costs associated with this proposed regulation. However, no new monitoring, recordkeeping, reporting, or other requirements will be imposed on local governments based on this proposed rule-making. Based on the Department's permitting data, there are 50 State and local government facilities that have Title V permits and 75 State and local government facilities that have state facility permits (please note that some of these facilities fire both distillate and residual oil and that the facilities that fire residual oil that reside in New York City, Nassau, Rockland, and Westchester counties will not be affected by the proposed sulfur-in-fuel standards). The four State and local government facilities with Title V permits that fire residual oil may incur an average fuel cost increase of 14,000 dollars per year per facility. The 48 State and local government facilities with Title V permits that fire distillate oil may incur a fuel cost increase of between 21,000 to 24,000 dollars per year per facility. The 24 State and local government facilities with state facility permits that fire residual oil may incur an average fuel cost increase of 1,200 dollars per year per facility. The 56 State and local government facilities with state facility permits that fire distillate oil may incur a fuel cost increase of between 9,000 to 10,000 dollars per year per facility. Any projected fuel cost increases will be partially offset by the gain in efficiency and lower maintenance costs that are directly attributable from the use of lower sulfur fuels.

#### ECONOMIC AND TECHNOLOGICAL FEASIBILITY

For distillate oil, the Department used information from the NORA, API, NESCAUM reports and EIA data to determine the costs and benefits of implementing the proposed low and ultra-low sulfur distillate oil standards including appropriate compliance dates. The average amount of distillate oil consumed in New York between 2004 and 2008 was 1.73 billion gallons per year. The majority of the distillate oil fired during this time period was considered to be high sulfur distillate oil (approximately 95 percent). Approximately 95 percent of the distillate oil used in New York State was considered, by the Department, to be high sulfur distillate oil. Therefore, the Department has calculated that New York State would achieve a SO<sub>2</sub> emission reduction of 45,591 tons per year from the implementation of the ultra-low sulfur distillate oil standard in 2014.

The cost to manufacture the projected 1.73 billion gallons per year of high sulfur distillate oil to ultra-low sulfur distillate oil is estimated to be between 173 million dollars and 197.2 million dollars. This is based on cost estimates of 10.0 to 11.4 cents per gallon for manufacturing high sulfur distillate oil to ultra-low sulfur distillate oil. This corresponds to a cost of between 3,795.00 and 4,326.00 dollars per ton of SO<sub>2</sub> emission reductions, based on the total SO<sub>2</sub> emission reductions stated above.

For residual oil, lowering the allowable sulfur content of residual oil to 0.5 percent (5,000 ppm) would affect all of New York State except for New York City, Nassau, Rockland, and Westchester counties. The aver-

age amount of residual oil consumed in New York between 2004 and 2008 was 1.39 billion gallons per year. The Department has calculated that New York State would achieve a SO<sub>2</sub> emission reduction of 52,220 tons per year from the implementation of the 0.50 sulfur content residual oil standard in 2014.

The historical average price difference from August 30, 2004 to July 27, 2007 of residual fuel oil with sulfur-by-weight contents between 0.5 and 1.0 percent was 5.05 cents per gallon. Using this estimated price difference, the total economic impact of the proposed 2014 standard for New York State consumers on the affected 696.6 million gallons per year of residual oil is 35.2 million dollars. This corresponds to 674 dollars per ton SO<sub>2</sub> removed as a result of the proposed decrease in sulfur content in residual oil.

#### MINIMIZING ADVERSE IMPACTS

The Department does not expect any particular adverse impacts on small businesses and local governments throughout New York State. Subpart 225-1 is a statewide regulation. Its requirements are the same for all facilities. The Department does not anticipate small businesses or local governments to be impacted differently than other sources subject to the proposed changes to Subpart 225-1.

#### SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION

During the drafting of Subpart 225-1, the Department held stakeholder meetings on June 24, 2010 and November 21, 2011. The meetings were held to give representatives from the oil companies, oil distributors, and end users (which included the small business and local government stakeholders), an opportunity to meet with Department staff and discuss various issues during the rulemaking process. Finally, the Department will hold public hearings on Subpart 225-1 throughout New York State and will notify small business and local government representatives of this proposed rulemaking.

#### CURE PERIOD OR AMELIORATIVE ACTION

The Department is not including a cure period in this rulemaking. The purpose of this regulation is to provide timely emissions reductions, delaying enforcement of the regulation adversely affects such emissions reductions. In addition, there is a statutory mandate under ECL 19-0325 requiring the sulfur-in-fuel limit of #2 heating oil to be 15 ppm. The statute also includes a specific compliance date of July 1, 2012.

#### Rural Area Flexibility Analysis

#### TYPES AND ESTIMATED NUMBERS OF RURAL AREAS AFFECTED

The proposed rule (6 NYCRR Subpart 225-1) is not expected to have a substantial adverse impact on rural areas in New York State. The proposed rulemaking will apply statewide and thus all stationary sources that fire oil in New York State will be equally affected.

Rural areas are defined as rural counties in New York State that have populations of less than 200,000 people, towns in non-rural counties where the population densities are less than 150 people per square mile, and villages within those towns.

#### COMPLIANCE REQUIREMENTS

The proposed rule will lower sulfur-in-fuel limits for distillate oil, residual oil, and waste oil. However, no changes will be made in the monitoring, recordkeeping, or reporting requirements in the current version of Subpart 225-1. Therefore, no new compliance requirements will be incurred by stationary sources subject to the provisions of the proposed rule.

#### COSTS

Stationary sources subject to the Subpart 225-1 provisions may incur increased fuel oil costs associated with this proposed regulation. There are several factors that may affect fuel oil prices. These factors include but are not limited to fuel availability, price of crude oil, production costs, storage costs, increase in taxes on oil, overall demand based on weather conditions, and natural gas availability and price. The refining process used to produce lower sulfur content oils (less than 500ppm sulfur content oils) is different from the refining process currently used to manufacture oil with a sulfur content greater than 500 ppm. There will be an initial cost to the oil manufacturers associated with conversion of the current refining process to the new refining process. Therefore, the Department anticipates that production costs will increase. However, based on all of the above listed factors there may or may not be an increase in oil prices (there is the possibility that oil prices could decrease). Setting aside the other factors, the Department conducted a cost analysis based solely upon the increase in production costs and availability of oil to the consumer.

#### MINIMIZING ADVERSE IMPACT

The Department does not expect any adverse impacts on rural areas. There will be positive environmental impacts from the regulation in rural areas. Rural areas should witness improved visibility with an associated decrease in airborne particulate matter and acid deposition.

Subpart 225-1 is a statewide regulation. Its requirements are the same for all facilities, and rural areas are impacted no differently than other areas in the state.

## RURAL AREA PARTICIPATION

During the drafting of Subpart 225-1, the Department held stakeholder meetings on June 24, 2010 and November 21, 2011. The meetings were held to give representatives from the oil companies, oil distributors, and end users (which include the rural-area stakeholders as well as industry), an opportunity to meet with Department staff and discuss various issues during the rulemaking process. Finally, the Department will hold public hearings on Subpart 225-1 in upstate and other rural areas and will notify interested parties of this proposed rulemaking.

**Job Impact Statement**

## NATURE OF IMPACT

The changes to Subpart 225-1 entail the lowering of the sulfur-in-fuel limits for all distillate and residual oils sold, purchased, and/or used in portable (not including non-road engines) or stationary sources in New York State which will reduce emissions of air pollution. These revisions will also include the lowering of the sulfur-in-fuel limit for waste oil, the removal of "out-of-date" sulfur-in-fuel tables, expired source specific variances, coal and coke variance for emission sources that fire coal and coke greater than one million Btu per hour in New York City, Nassau, Rockland, and Westchester Counties (based on the Department's permitting database there are no emission sources in these areas that are subject to this provision - therefore, this specific variance is no longer necessary), and the correction of typographical errors. These proposed changes to Subpart 225-1 are not anticipated to have an adverse impact on employment opportunities in the State.

## CATEGORIES AND NUMBERS OF JOBS OR EMPLOYMENT OPPORTUNITIES AFFECTED

The promulgation of Subpart 225-1 is not anticipated to have any long-term effects on the number of current jobs or future employment opportunities throughout New York State.

The reductions in visibility-impairing pollutants resulting from the implementation of Subpart 225-1 could result in a positive impact on the tourism industry, particularly for the Adirondack and Catskill Parks. Aside from the mitigation of haze in these areas and across New York State, improvements in acid deposition will be seen, keeping trees and waterways in good condition, thus allowing state parks to remain healthy and attractive places to visit. Increased tourism could create additional job opportunities throughout the State.

## REGIONS OF ADVERSE IMPACT

The proposed Subpart 225-1 is a statewide regulation. This regulation is not expected to have an adverse impact on jobs or employment opportunities in New York State. It does not impact any region or area of the state disproportionately in terms of jobs or employment opportunities.

## MINIMIZING ADVERSE IMPACT

The Department does not expect any adverse impacts on jobs in New York State based on the proposed changes to Subpart 225-1. Subpart 225-1 is a statewide regulation. Its requirements are the same for all facilities, and will not impact job opportunities in the State.

## SELF-EMPLOYMENT OPPORTUNITIES

There are no anticipated adverse impacts towards self-employment opportunities associated with the proposed Subpart 225-1 regulation.

## PROPOSED RULE MAKING HEARING(S) SCHEDULED

**Air Emissions from Surface Coating Facilities**

**I.D. No.** ENV-44-12-00016-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 200, 201 and 228 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 1-0101, 3-0301, 3-0303, 19-0103, 19-0105, 19-0107, 19-0301, 19-0302, 19-0303, 19-0305, 71-2103 and 71-2105; and Federal Clean Air Act, section 182 (42 USC section 7511a)

**Subject:** Air emissions from surface coating facilities.

**Purpose:** To reduce volatile organic air emissions from surface coating facilities.

**Public hearing(s) will be held at:** 2:00 p.m., Dec. 17, 2012 at Department of Environmental Conservation, Region 2 Office, One Hunters Point Plaza, 47-40 21<sup>st</sup> St., Rm. 834, Long Island City, NY; 2:00 p.m., Dec. 18, 2012 at Department of Environmental Conservation, Region 8 Office, Conference Rm. 6274, E. Avon-Lima Rd., (Rtes. 5 and 20), Avon, NY; and 2:00 p.m., Dec. 20, 2012 at Department of Environmental Conservation, 625 Broadway, Public Assembly Rm. 129, Albany, NY.

**Interpreter Service:** Interpreter services will be made available to hearing

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

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

**Substance of proposed rule (Full text is posted at the following State website: [www.dec.ny.gov](http://www.dec.ny.gov)):** The New York State Department of Environmental Conservation (Department) proposes to revise Parts 200, 'General Provisions,' and 201, 'Permits and Registrations'; and Subparts 228-1, 'Surface Coating Processes' and 228-2, 'Commercial and Industrial Adhesives, Sealants and Primers,' of Title 6 of the Official Compilation of Codes, Rules, and Regulations of the State of New York (6 NYCRR). The proposed changes to Subpart 228-1, and attendant revisions to Parts 200 and 201, incorporate federal Control Techniques Guidelines (CTGs) establishing Reasonably Available Control Technology (RACT) for volatile organic compounds (VOCs) emitted by surface coating processes.

Proposed revisions to Part 200 will add three references in Table 1 of Section 200.9; and update the publication date and page numbers of existing referenced documents to the 2006 Code of Federal Regulations.

Proposed revisions to Part 201 revise the criteria for a facility performing surface coating processes to qualify as an exempt activity pursuant to 6 NYCRR Part 201-3.2(c)(17). The existing provisions exempt facilities using less than 25 gallons per month of coating materials (paints) and cleaning solvents, combined. The proposed revision provides an optional exemption criterion for facilities with 1,000 pounds or less of actual facility-wide VOC usage on a 12-month rolling basis.

Proposed Section 228-1.1, 'Applicability and Exemptions', is being revised to reflect the applicability criteria specified in seven of EPA's final CTGs for specific coating processes. Consistent with the current regulation, all surface coating facilities located in the New York City metropolitan area, and the Orange County towns of Blooming Grove, Chester, Highlands, Monroe, Tuxedo, Warwick, and Woodbury, are subject to the regulation. Surface coating facilities located outside the above counties and towns have specific applicability criteria for various surface coating processes. These criteria range from a facility using 55 gallons of coating or more per year up to having a potential to emit 50 tons or more of VOCs on an annual basis. Typically, only facilities that have actual emissions of three tons per year or more are subject to the control requirements of the revised regulation. All others are subject only to Section 228-1.3, 'General Requirements'.

Proposed Section 228-1.2, 'Definitions,' sets forth several definitions specific to Subpart 228-1. This section includes many new definitions that are consistent with the federal CTGs, including several added coating types used in the updated coating processes. Unless they are inconsistent with Subpart 228-1, the definitions in Part 200 also apply.

Proposed Section 228-1.3, 'General Requirements', is a new section added to Subpart 228-1 which describes the minimum requirements applicable to all surface coating facilities. It combines provisions from the current regulations related to: opacity limit; recordkeeping; prohibition of sale or specification; and handling, storage and disposal of volatile organic compounds. It also sets forth acceptable application techniques common to many surface coating processes.

Proposed Section 228-1.4, 'Requirements for controlling VOC emissions using compliant materials' lists the maximum VOC content allowed for coatings used in surface coating processes. The proposed revisions include additional requirements as well as exceptions specific to a coating process, coating type or application requirements.

Proposed Section 228-1.5, 'Requirements for controlling VOC emissions using add on controls or coating systems' provides alternatives to complying with the VOC content limits of Section 228-1.4. Most coating processes are allowed alternative means of compliance. Under the proposed revisions, they can comply with the regulation by: 1) controlling their emissions using a capturing system followed by treatment of the VOCs; 2) using a combination of VOC content coatings compliant with Section 228-1.4 along with non-compliant ones, and with or without added controls, in a "coating system", acceptable to the Department; or 3) providing a process-specific reasonably available control technology (RACT) demonstration, subject to the satisfaction of the Department, which shows that the requirements cannot be economically or technically achieved.

Proposed Section 228-1.6, 'Reports, sampling and analysis', specifies the requirements necessary to determine and maintain compliance with the regulation. This section allows the Department to have reasonable access to subject facilities to obtain samples of any material containing VOC in order to determine compliance, and specifies the test methods used for add on control systems to show compliance with the applicable requirements.

Proposed revisions to Subpart 228-2 make clarifying changes and are

non-substantive. Also, the Department has determined Subsection 228-2.7(a)(1), the labeling provision requiring that manufacturers specify the category name, is unnecessary and is therefore removing that provision.

**Text of proposed rule and any required statements and analyses may be obtained from:** John Henkes, NYSDEC, Division of Air Resources, 625 Broadway, Albany, NY 12233-3254, (518) 402-8403, email: 228scp@gw.dec.state.ny.us

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

**Public comment will be received until:** December 28, 2012.

**Additional matter required by statute:** Pursuant to Article 8 of the State Environmental Quality Review Act, a Short Environmental Assessment Form, a Negative Declaration and a Coastal Assessment Form have been prepared and are on file.

#### Summary of Regulatory Impact Statement

##### STATUTORY AUTHORITY

The New York State (NYS) statutory authority for these regulations is found in the Environmental Conservation Law (ECL) Sections 1-0101, 3-0301, 3-0303, 19-0103, 19-0105, 19-0107, 19-0301, 19-0302, 19-0303, 19-0305, 71-2103, and 71-2105. Descriptions of these referenced ECL sections are contained in the Regulatory Impact Statement.

##### LEGISLATIVE OBJECTIVES

In enacting the Title I ozone control requirements of the 1990 CAA amendments, Congress recognized the hazards of ground-level ozone pollution and mandated that States implement stringent regulatory programs in order to meet the National Ambient Air Quality Standard (NAAQS) for ozone. The Department is undertaking this rulemaking to satisfy New York's obligations under the CAA and in a manner consistent with ECL Article 19.

Articles 1 and 3 of the ECL establish the overall State policy goal of reducing air pollution and providing clean air for the citizens of New York; and provide general authority to adopt and enforce measures to do so. In addition to the general powers and duties of the Department and the Commissioner to prevent and control air pollution found in Articles 1 and 3, Article 19 of the ECL was specifically adopted to safeguard the air quality of New York from pollution. Under Article 19, the Department is authorized to formulate, adopt, promulgate, amend and repeal regulations for preventing, controlling and prohibiting air pollution. This Department is also authorized to promulgate rules and regulations for preventing, controlling or prohibiting air pollution in such areas of the State as shall or may be affected by air pollution. In addition, this authority also includes the preparation of a general comprehensive plan for the control or abatement of existing air pollution and for the control or prevention of any new air pollution recognizing various requirements for different areas of the State.

In 1970, Congress amended the CAA "to provide for a more effective program to improve the quality of the Nation's air." The statute directed EPA to adopt National Ambient Air Quality Standards (NAAQS) and required states to develop implementation plans known as State Implementation Plans (SIPs) which prescribed the measures needed to attain the NAAQS. In 1977 the Act was amended to require states to identify areas that did not meet the NAAQS; these areas would then be designated as "nonattainment" areas. States with these "nonattainment" areas were then required to include specific requirements in their SIPs, including requirements relating to new source review, reasonably available control technology, emission inventories and projections, and contingency measures.

Congress again amended the Act in 1990 with the goal of setting more realistic deadlines while requiring reasonable progress towards attainment. The 1990 CAA amendments required states to implement stringent regulatory programs associated with one of the chemical precursors of ozone: VOCs. In particular, CAA section 172(c)(1) provides that, for certain nonattainment areas, states must revise their SIPs to include reasonably available control measures as expeditiously as possible, including emissions reductions achievable by requiring "reasonably available control technology" (RACT) for sources of VOC emissions. Under EPA's current RACT scheme, pollution controls are required for VOC emission sources listed in designated source categories under EPA's Control Techniques Guidelines (CTGs), including CTGs establishing RACT for surface coating processes.

CAA section 182(b)(2)(A) requires that, for certain nonattainment areas, states must revise their SIPs to include RACT for sources of VOC emissions covered by any CTGs issued between November 15, 1990 and the area's date of attainment. Additionally, CAA section 184(b)(1)(B) requires implementation of RACT statewide in states that are located within an Ozone Transport Region (OTR). New York is one of the several states located in the OTR required under the CAA to revise its SIP to include RACT requirements statewide for each of the source categories identified in the federal CTGs, including RACT for surface coating processes.

##### NEEDS AND BENEFITS

Adoption of the proposed revisions to Subpart 228-1 will help fulfill state and federal legislative objectives by imposing RACT controls on surface coating processes in the source categories identified in the latest federal CTGs thereby further reducing New York's VOCs emissions from surface coating processes, reducing harmful ground-level ozone pollution, and allowing the State to attain the NAAQS for ozone.

There are two types of ozone, stratospheric and ground level ozone. Ozone in the stratosphere is naturally occurring and desirable because it shields the earth from carcinogenic ultraviolet radiation. In contrast, ground level ozone, or smog, results from the mixing of VOCs and NOx on hot, sunny, summer days, and can harm humans and plants. As a result, EPA established the primary ozone NAAQS to protect public health.

Ground-level ozone severely impacts human longevity and respiratory health. 'See generally' Senate Committee on Environment and Public Health, S. Rep. No. 101-228 (1990), 'reprinted in' 1990 U.S.C.C.A.N. 3385. Long term, chronic exposure to ozone may produce accelerated aging of the lung analogous to that produced by cigarette smoke exposure. 'Id.' In 1995, EPA recognized that "[m]uch of the ozone inhaled reacts with sensitive lung tissues, irritating and inflaming the lungs, and causing a host of short-term adverse health consequences including chest pains, shortness of breath, coughing, nausea, throat irritation, and increased susceptibility to respiratory infections." 60 Fed. Reg. 4712-13 (Jan. 24, 1995). Moreover, two recent studies have shown a definitive link between short-term exposure to ozone and human mortality. 'See' 292 'Journal of the American Medical Assn.' 2372-78 (Nov. 17, 2004); 170 'Am. J. Respir. Crit. Care Med.' 1080-87 (July 28, 2004) (observing significant ozone-related deaths in the NYCMA).

Children and outdoor workers are especially at risk for damaging effects caused by ozone exposure. A child's developing respiratory system is more susceptible than an adult's. Additionally, ozone is a summertime phenomenon; Children are outside playing and exercising more often during the summer which results in greater exposure to ozone than many adults. Outdoor workers are also more susceptible to lung damage because of their increased exposure to ozone during the summer months.

In 2006, EPA recognized a number of epidemiological and controlled human exposure studies that: suggest that asthmatic individuals are at greater risk for a variety of ozone-related effects including increased respiratory symptoms, increased medication usage, increased doctor and emergency room visits, and hospital admissions; provide highly suggestive evidence that short-term ambient ozone exposure contributes to mortality; and report health effects at ozone concentrations lower than the level of the current standards, as low as 0.04 parts per million (ppm) for some highly sensitive individuals. 'See Fact Sheet: Review of National Ambient Air Quality Standards for Ozone Second Draft Staff Paper, Human Exposure and Risk Assessments and First Draft Environmental Report', U.S. Environmental Protection Agency, July 2006.

Ground level ozone also interferes with the ability of plants to produce and store food, which compromises growth, reproduction and overall plant health. By weakening sensitive vegetation, ozone makes plants more susceptible to disease, pests and environmental stresses. Ozone has been shown to reduce yields for many economically important crops (e.g., corn, kidney beans, soybeans). Also, ozone damage to long-lived species such as trees (by killing or damaging leaves) can significantly decrease the natural beauty of an area, such as the Adirondacks.

As discussed above, the proposed revisions to Subpart 228-1 will also allow the state to satisfy state and federal legislative objectives by imposing RACT to control VOC emissions from surface coating processes in New York, thus furthering the goal of attaining the federally-mandated ozone NAAQS. A discussion of CAA and regulatory needs and benefits are further detailed in the "Regulatory Impact Statement" (RIS) and other rulemaking documents.

#### COSTS

##### Costs to Regulated Parties and Consumers

According to EPA estimates, the cost to industry from the changes to Subpart 228-1 is estimated to be in the range of \$200 and \$1,758 per ton of VOC reduction. Based on an inventory of existing facilities and current requirements, no cost increase is expected for the Flat Wood Paneling, Paper Film and Foil, or Automobile and Light Duty Truck Assembly coating industries. The remaining industries have estimated cost efficiencies as follows (all in dollars per ton of VOC reduction): Metal Furniture \$200 [EPA 453/R-07-005, p.26]; Large Appliance \$500 [EPA 453/R-07-004, p.21]; Wood Finishing \$280 [EPA 453/R-96-007, pgs.6-2, 'et seq'.]; and Miscellaneous Metal and Plastic Coating \$1,758 [EPA-453/R-08-003, p.40]. These cost estimates are based on facilities using lower VOC content materials rather than more expensive control technologies to comply with the new requirements.

It is estimated that facilities switching to low VOC content coatings will have a 30 to 35 percent reduction in VOC emissions. The annual cost estimate for a facility will depend greatly on their current emissions. It may cost a miscellaneous plastics facility, currently emitting 50 tons per year of VOC, up to \$30,000 to switch to a low VOC content coating; a 50 ton per year wood finishing facility \$3,500; a 10 ton per year miscellaneous metal facility up to \$6,328; and 10 ton per year VOC emission metal furniture and large appliance facilities \$700 and \$1,750 respectively. No significant increases in costs to consumers are anticipated. There are no costs associated with the changes proposed to Subpart 228-2.

##### Costs to State and Local Governments

As discussed above, this requirement flows from the State's obligations under the CAA. This is not a mandate on local governments. It applies equally to any entity that owns or operates a subject source; applying statewide to all surface coating processes located in the State. State and local entities are not expected to be affected by the proposed revisions. There are no expected direct costs to State and local governments associated with this proposed regulation. No record keeping, reporting, or other requirements will be imposed on local governments. The authority and responsibility for implementing and administering Subpart 228-1 and Subpart 228-2 in New York resides solely with the Department. Requirements for record keeping, reporting, etc. are applicable only to the person(s) who conduct surface coating.

##### Costs to the Regulating Agency

Administrative costs to the regulating agency will not increase.

#### PAPERWORK

No additional paperwork will be imposed on the surface coating industry.

#### LOCAL GOVERNMENT MANDATES

This is not a mandate on local governments. It applies equally to any entity that owns or operates a subject source. Local entities are not expected to be affected by the proposed revisions.

#### DUPLICATION

No other regulations address the specific requirements to reduce VOC emissions from the affected industry.

#### ALTERNATIVES

The following alternatives have been evaluated to address the goals set forth above. These are:

1. Take no action. The "no action" alternative does not comply with the CAA. Failure to comply with the CAA will result in an EPA imposed Federal Implementation Plan (FIP) pursuant to CAA section 110(c), sanctions in the form of an increase in the new source review offsets ratio to 2 to 1, and the loss of Federal highway funding pursuant to CAA section 179.

2. The proposed revisions to Subpart 228-1 contain alternatives for compliance, including the compliant materials requirement, the option of using add-on controls or the utilization of a coating system, as well as a RACT variance provision. These alternative compliance provisions contained in the proposed rule are preferable because they are consistent with the federal CTGs, will help NYS achieve necessary VOC emission reductions, and will satisfy the State's obligations under the CAA.

#### FEDERAL STANDARDS

The revisions are designed to comply with the requirements outlined in the CTGs.

#### COMPLIANCE SCHEDULE

In accordance with the CTGs and the CAA, States should submit SIP revisions within one year of the date of issuance of these final CTGs. Based on the various dates of issuance of the CTGs, the Department should submit SIP revisions as soon as practicable.

#### Regulatory Flexibility Analysis

The New York State Department of Environmental Conservation (Department) proposes to revise 6 NYCRR Parts 228, 200, and 201. The proposed changes to Subpart 228-1, and attendant revisions to Parts 200 and 201, will incorporate seven Control Techniques Guidelines (CTGs) issued by the Environmental Protection Agency (EPA) between April 1996 and September 2008. These federal CTGs establish Reasonably Available Control Technology (RACT) for volatile organic compounds (VOCs) emitted by surface coating processes. Pursuant to the Clean Air Act (CAA), the Department is required to submit the Subpart 228-1 revisions to EPA for state implementation plan (SIP) review and approval. The proposed revisions to Subpart 228-2 make clarifying changes and are non-substantive.

#### EFFECTS ON SMALL BUSINESS AND LOCAL GOVERNMENTS:

The proposed revisions to Subpart 228-1 apply statewide. As detailed in the RIS, this is a requirement flowing from the State's obligations under the Clean Air Act. This is not a mandate on local governments. The proposed revisions apply to any entity that owns or operates a subject source. Facilities that engage in surface coating will become subject to Subpart 228-1 as applicable. Subject facilities located outside the New York City metropolitan area and the towns of Blooming Grove, Chester, Highlands, Monroe, Tuxedo, Warwick, and Woodbury, that emit less than three tons per year of total annual VOC process emissions will be required to comply with the following general requirements: recordkeeping; prohibition of sale; handling requirements; and opacity limits. Recordkeeping, prohibition of sale, and handling requirements currently apply to facilities in the above counties and towns and do not have any added costs associated with them. Metal Furniture, Large Appliance, Miscellaneous Metal Parts, and Automobile and Light Duty Truck Assembly facilities, which currently have applicability thresholds of 10 tons per year potential VOC emissions, will now become subject to VOC RACT requirements if they have three or more tons per year of actual VOC process emissions on a 12-month rolling total basis. Wood Finishing facilities, which currently have an applicability threshold of 50 tons per year potential VOC emissions, will now become subject to VOC RACT requirements if they have 25 or more tons per year potential VOC emissions. Miscellaneous Plastic Parts Coating facilities, which currently have an applicability threshold of 50 tons per year potential VOC emissions, will now become subject to VOC RACT requirements if they have three tons per year of actual VOC process emissions on a twelve-month rolling total basis.

#### COMPLIANCE REQUIREMENTS:

There are no specific requirements in the regulation which apply exclusively to small businesses or local governments. Local governments are not directly affected by the proposed revisions. All Surface Coating facilities which emit less than three tons per year of total annual VOC process emissions will be required to comply with the following general requirements: recordkeeping; prohibition of sale; handling requirements; and opacity limits. All facilities located in the New York City metropolitan area, and the Orange County towns of Blooming Grove, Chester, Highlands, Monroe, Tuxedo, Warwick, and Woodbury, and all other coating facilities which use more than 25

gallons of coating and cleaning materials per month, or have 1,000 pounds or more per year of actual VOC process emissions, will be required to obtain a 6 NYCRR Part 201 air permit.

#### PROFESSIONAL SERVICES:

Small businesses and local governments are not expected to need professional services to comply with the revisions to Subpart 228-1. Local governments are not directly affected by the proposed revisions. Facilities which are currently permitted and will be subject to the lower applicability criteria under revised Subpart 228-1 (estimated to be 25 facilities) may need to seek professional services to reformulate their coatings or alter their processes to come into compliance.

#### COMPLIANCE COSTS:

There are no added costs expected for small businesses or local governments which become subject to the recordkeeping, prohibition of sale, handling, and opacity requirements. Compliance costs are expected only for facilities which become subject to the new VOC RACT requirements; which are facilities that have three or more tons per year of actual VOC process emissions. The cost to industry from the changes to Subpart 228-1 is estimated to be in the range of \$200 and \$1,758 per ton of VOC reduction.

It is estimated that facilities switching to low VOC content coatings will have a 30 to 35 percent reduction in VOC emissions. The annual cost estimate for a facility will depend greatly on their current emissions. It may cost a miscellaneous plastics facility, currently emitting 50 tons per year of VOC, up to \$30,000 to switch to a low VOC content coating; a 50 ton per year wood finishing facility \$3,500; a 10 ton per year miscellaneous metal facility up to \$6,328; and 10 ton per year VOC emission metal furniture and large appliance facilities \$700 and \$1,750 respectively. There are no significant increases in costs to consumers expected. There are no added costs associated with the changes proposed to Subpart 228-2.

#### MINIMIZING ADVERSE IMPACT:

No adverse impacts to the environment or regulated industry are expected. The proposed revisions are intended to reduce VOC emissions to the environment. Local governments are not expected to be directly affected by the proposed revisions.

#### SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:

Since local governments are not expected to be directly affected by the proposed revisions, the Department did not contact local governments directly. The Department did provide advance notice of these rule revisions to the regulated community so that they would have sufficient time to take the necessary steps to come into compliance with the rule. Additionally, the Department plans on holding public hearings at various locations throughout New York State after the revisions are proposed. Small businesses will have the opportunity to attend these public hearings; and there will be a public comment period in which interested parties can submit written comments. Public participation and comment will also be available during EPA's SIP approval process.

#### ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

As noted earlier, this requirement flows from the State's obligations under the CAA. This is not a mandate on local governments. It applies equally to any entity that owns or operates a subject source. Compliant products are available for all coating and cleaning materials used and are affordable.

#### CURE PERIOD:

In accordance with NYS State Administrative Procedures Act (SAPA) Section 202-b, this rulemaking does not include a cure period because the Department is undertaking this rulemaking to comply with federal Clean Air Act requirements, requiring the incorporation of federal CTGs to establish RACT for surface coating processes for inclusion into the state implementation plan.

#### *Rural Area Flexibility Analysis*

The New York State Department of Environmental Conservation (Department) proposes to revise 6 NYCRR Parts 228, 200, and 201. The proposed changes to Subpart 228-1, and attendant revisions to Parts 200 and 201, will incorporate seven Control Techniques Guidelines (CTGs) issued by the Environmental Protection Agency

(EPA) between April 1996 and September 2008. These federal CTGs establish Reasonably Available Control Technology (RACT) for volatile organic compounds (VOCs) emitted by surface coating processes. Pursuant to the Clean Air Act (CAA), the Department is required to submit the Subpart 228-1 revisions to EPA for state implementation plan (SIP) review and approval. The proposed revisions to Subpart 228-2 make clarifying changes and are non-substantive.

#### TYPES AND ESTIMATED NUMBERS OF RURAL AREAS AFFECTED:

The proposed revisions to Subpart 228-1, attendant revisions to Parts 200 and 201, and clarifying changes to Subpart 228-2 apply statewide. All rural areas of New York State will be affected.

#### COMPLIANCE REQUIREMENTS:

There are no specific compliance requirements in this proposed rulemaking which apply exclusively to rural areas of the State. Studies have shown that the surface coating industry is distributed proportionately with population. Rural areas are not particularly affected by the revisions. Outside the New York City metropolitan area, and the Orange County towns of Blooming Grove, Chester, Highlands, Monroe, Tuxedo, Warwick, and Woodbury, all subject facilities will be required to comply with applicable recordkeeping, opacity, prohibition of sale and VOC handling requirements. Under current law, these requirements have been required at all facilities located in the above counties and towns; and are essentially unchanged since Part 228 was first promulgated in 1979. Professional services are not anticipated to be necessary to comply with the changes to Subpart 228-1. However, it is anticipated that approximately 25 larger facilities may require the utilization of professional services to change their processes to accommodate lower VOC content materials. No compliance requirements are associated with the proposed changes to Subpart 228-2.

#### COSTS:

There are no specific costs in this proposed rulemaking which apply exclusively to rural areas of the State. The cost to industry for facilities that need to change the materials or processes they use is estimated to be in the range of \$200 and \$1,758 per ton of VOC reduced. Based on an inventory of existing facilities and current requirements, no cost increase is expected for the Flat Wood Paneling, Paper Film and Foil, or Automobile and Light Duty Truck Assembly coating industries. The remaining industries have estimated cost efficiencies as follows (all in dollars per ton of VOC reduction): Metal Furniture \$200; Large Appliance \$500; Wood Furniture \$280; and Miscellaneous Metal and Plastic Coating \$1,758. The costs to comply with the new requirements result from changing processes which use lower VOC content materials, rather than more expensive control technologies.

It is estimated that facilities switching to low VOC content coatings will have a 30 to 35 percent reduction in VOC emissions. The annual cost estimate for a facility will depend greatly on their current emissions. It may cost a miscellaneous plastics facility, currently emitting 50 tons per year of VOC, up to \$30,000 to switch to a low VOC content coating; a 50 ton per year wood finishing facility \$3,500; a 10 ton per year miscellaneous metal facility up to \$6,328; and 10 ton per year VOC emission metal furniture and large appliance facilities \$700 and \$1,750 respectively. No costs are associated with the proposed changes to Subpart 228-2.

#### MINIMIZING ADVERSE IMPACT:

Changes to Subparts 228-1 and 228-2 are not anticipated to have an adverse effect on rural areas. To date, the Department is unaware of any particular adverse impacts experienced by rural areas as a result of the regulation. Rather, the rule is intended to create air quality benefits for the entire state, including rural areas, through the reduction of ozone forming pollutants.

#### RURAL AREA PARTICIPATION:

Since rural areas are not particularly affected by the revisions, the Department did not directly contact rural area facilities. However, the Department did provide advance notice of these rule revisions to the regulated community so that they would have sufficient time to take the necessary steps to come into compliance with the rule. Also, the

Department plans on holding public hearings at various locations throughout New York State after the revisions are proposed. All facilities, including those located in rural areas of the state, will have the opportunity to attend these public hearings; and there will be a public comment period in which interested parties can submit written comments. Public participation and comment will also be available during EPA's SIP approval process.

#### **Job Impact Statement**

##### **NATURE OF IMPACT:**

The New York State Department of Environmental Conservation (Department) proposes to revise 6 NYCRR Parts 228, 200, and 201. The proposed changes to Subpart 228-1, and attendant revisions to Parts 200 and 201, will incorporate seven Control Techniques Guidelines (CTGs) issued by the Environmental Protection Agency (EPA) between April 1996 and September 2008. These federal CTGs establish Reasonably Available Control Technology (RACT) for volatile organic compounds (VOCs) emitted by surface coating processes. Pursuant to the Clean Air Act (CAA), the Department is required to submit the Subpart 228-1 revisions to EPA for state implementation plan (SIP) review and approval. The proposed revisions to Subpart 228-2 make clarifying changes and are non-substantive.

##### **CATEGORIES AND NUMBERS OF JOBS OR EMPLOYMENT OPPORTUNITIES AFFECTED:**

The proposed revisions to Subpart 228-1 affect owners/operators of surface coating processes statewide. The revisions are not expected to adversely impact jobs and employment opportunities in New York State. The proposed revisions to Subpart 228-1 may affect existing surface coating processes by requiring them to lower the VOC content of the materials used in their processes. This may require minimal consultation utilization to evaluate the necessity of process modifications. In such cases, jobs and employment opportunities may increase as a result of the proposed Subpart 228-1 revisions.

##### **REGIONS OF ADVERSE IMPACT:**

There are no regions of the State where the proposed revisions to Subpart 228-1 would have a disproportionate adverse impact on jobs or employment opportunities.

##### **MINIMIZING ADVERSE IMPACT:**

The Department is providing advance notice of these rule revisions to the regulated community so that companies have sufficient time to take the necessary steps to come into compliance with Subpart 228-1. The proposed revision to Subpart 228-1 also includes time for subject sources to come into compliance.

##### **SELF-EMPLOYMENT OPPORTUNITIES:**

None that the Department is aware of at this time.

## **PROPOSED RULE MAKING HEARING(S) SCHEDULED**

### **Uniform Procedures for Processing Permit Applications Submitted to the Department**

**I.D. No.** ENV-44-12-00017-P

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

**Proposed Action:** Amendment of Part 621 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 1-0101, 3-0301, 3-0303, 19-0103, 19-0105, 19-0301, 19-0302, 19-0303, 19-0305, 19-0306, 19-0311, 70-0107, 70-0109, 71-2103 and 71-2105

**Subject:** Uniform procedures for processing permit applications submitted to the Department.

**Purpose:** To ensure permit applications are handled uniformly.

**Public hearing(s) will be held at:** 2:00 p.m., Dec. 17, 2012 at Department of Environmental Conservation, Region 2 Office, One Hunters Point Plaza, 47-40 21<sup>st</sup> St., Rm. 834, Long Island City, NY; 2:00 p.m., Dec. 18, 2012 at Department of Environmental Conservation, Region 8 Office Conference Room, 6274 E. Avon-Lima Rd. (Rtes. 5 and 20), Avon, NY; and 2:00 p.m., Dec. 20, 2012 at Department of Environmental Conservation, 625 Broadway, Public Assembly Rm. 129, Albany, NY.

**Interpreter Service:** Interpreter services will be made available to hearing

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

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

**Text of proposed rule:** Existing Sections 621.1 through 621.3 are unchanged.

Section 621.4 is amended as follows:

(g) Air Pollution Control, permits under Parts 201, 203, 215 and 231 of this Title, article 19 of the ECL:

(3) Permit term: The maximum permit term for permits identified in this subdivision:

(i) Five years (5) for Title V and Title IV facility permits.

(ii) An indefinite term for state facility permits, *except for new or modified state facility permits, which shall receive a permit term not to exceed ten years as provided for in Subdivision 201-5.3(a) of this Title.*

Existing Sections 621.5 through 621.19 are unchanged.

**Text of proposed rule and any required statements and analyses may be obtained from:** Mark Lanzafame, NYSDEC, Division of Air Resources, 625 Broadway, Albany, NY 12233-3254, (518) 402-8403, email: 621upair@gw.dec.state.ny.us

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

**Public comment will be received until:** December 28, 2012.

**Additional matter required by statute:** Pursuant to Article 8 of the State Environmental Quality Review Act, a Short Environmental Assessment Form, a Negative Declaration and a Coastal Assessment Form have been prepared and are on file.

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

#### **Regulatory Impact Statement**

The New York State Department of Environmental Conservation (Department) is proposing to amend its Uniform Procedures found in Title 6 of Official Compilation of Codes, Rules and Regulation of the State of New York (6 NYCRR) Part 621. In a concurrent rulemaking, the Department is proposing to amend Part 201 in order to, in part, limit the term of new and modified state facility permits to no more than 10 years. Under the existing Part 201, state facility permits are issued for an indefinite permit term. The term of certain air permits issued by the Department is also mentioned within Part 621. This proposal will amend Part 621 to make it consistent with the proposed revisions to Part 201.

##### **1. STATUTORY AUTHORITY**

The statutory authority for these regulations is found in Sections 1-0101, 3-0301, 3-0303, 19-0103, 19-0105, 19-0301, 19-0302, 19-0303, 19-0305, 19-0306, 19-0311, 70-0107, 70-0109, 71-2103, and 71-2105 of the Environmental Conservation Law (ECL).

Section 1-0101. This section outlines the policy declaration for the Department as it relates to the protection of New York State's environment and natural resources including the control of "air pollution, in order to enhance the health, safety and welfare of the people of the State and their overall economic and social well being." Section 1-0101 further states that it is the policy of the State to coordinate its environmental plans, functions, powers, and programs with those of the federal government and other regions to manage air resources such that the State may fulfill its responsibility as trustee of the environment for present and future generations. This section also provides that it is the policy of the State to foster, promote, create, and maintain an environment where man and nature thrive in harmony by providing that care is taken with air resources shared between states.

Section 3-0301. This section states that it is the responsibility of the Department to carry out the environmental policy of the State. In order to carry out that mandate, Section 3-0301(1)(a) gives the Commissioner the authority to "[c]oordinate and develop policies, planning and programs related to the environment of the State and regions thereof..." Section 3-0301(1)(b) instructs the Commissioner to promote and coordinate management of, among other things, air resources "to assure their protection, enhancement, provision, allocation and balanced utilization consistent with the environmental policy of the State and take into account the cumulative impact upon all such resources in making any determination in connection with any license, order, permit, certification or other similar action or promulgating any rule or regulation, standard or criterion." ECL Section 3-0301(1)(i) charges the Commissioner with promoting and protecting the air resources of New York State, including providing for the prevention and abatement of air pollution.

Section 3-0301(2)(a) gives the Commissioner the authority to adopt rules and regulations in order to implement the provisions of the ECL. Section 3-0301(2)(g) allows the Commissioner to enter and inspect air pollution sources and verify compliance. Section 3-0301(2)(m) grants the

Commissioner the authority to “adopt such rules, regulations, and procedures as may be necessary, convenient, or desirable to effectuate the purposes of this chapter.”

Section 3-0303. This section requires that the Department formulate, and periodically revise, a statewide environmental plan for the management and protection of the environment and natural resources of the State. The Department must conduct public hearings, cooperate with other departments, agencies and government officials, and any other interested parties, and obtain any necessary assistance and data from any department, division, board, bureau, commission or other agency of a state or political subdivision or any public authority when formulating or modifying the statewide environmental plan.

Section 19-0103. This section provides a declaration of the State’s policy regarding air pollution. “It is declared to be the policy of the State of New York to maintain a reasonable degree of purity of the air resources of the State...and to that end to require the use of all available practical and reasonable methods to prevent and control air pollution.”

Section 19-0105. This section defines the purpose of Article 19 of the ECL, “to safeguard resources of the State from pollution” consistent with the policy stated in Section 19-0103 and in accordance with other provisions of Article 19.

Section 19-0301(1)(a). This section states that the Department has the power to “[f]ormulate, adopt and promulgate, amend and repeal codes and rules and regulations for preventing, controlling or prohibiting air pollution in such areas of the State as shall or may be affected by air pollution...” Section 19-0301(1)(b) further states that the Department has the power to “[i]nclude in any such codes and rules and regulations provisions establishing areas of the State and prescribing for such areas (1) the degree of air pollution or air contamination that may be permitted therein, (2) the extent to which air contaminants may be emitted to the air by any air contamination source...”

Section 19-0301(2)(a) states that it is the duty and responsibility of the Department to prepare and develop a comprehensive plan for the control or abatement of existing air pollution and for the control or prevention of any new air pollution that recognizes various requirements for different areas of the State.

Section 19-0302. This section states that permit applications, renewals, modifications, suspensions and revocations are governed by rules and regulations adopted by the Department, and that permits issued may not include performance, emission or control standards more stringent than any standard established by the Act or EPA unless such standards are authorized by rules or regulations.

Section 19-0303. This section states that a code, rule or regulation or any amendments or repeal thereof will not be adopted until after a public hearing is held and may not become effective until filed with the Secretary of State. The Department may also recognize differences between the State’s air quality areas in its rulemaking activities. In addition, this section outlines procedures for adopting any code, rule or regulation that contains a requirement that is more stringent than the Act or regulations issued pursuant to the Act by the EPA.

Section 19-0305. This section authorizes the Department to enforce codes, rules and regulations promulgated in accordance with Article 19 of the ECL. In addition, Section 19-0305(2)(j) authorizes the Department to consider the approval or disapproval of permit applications for the installation of air contamination sources and air emission control equipment. Section 19-0305(2)(j) further authorizes the Department to inspect such installations for compliance with the submitted plans and specifications.

Section 19-0311(1). This section requires that the Department “establish an operating permit program for sources subject to Title V of the Act.” This section also outlines the various requirements that the permit program must satisfy, including the specific emission sources that are subject to the program.

Section 19-0311(2)(a). This section states that the Department shall “review and revise, as necessary to be consistent with the Act and other applicable federal and state laws, existing regulations to provide for adequate, streamlined and reasonable procedures for processing permit applications, for public notice and participation, including offering an opportunity for public comment and hearing, and for expeditious review of permit actions, including applications, renewals and revisions.”

Section 70-0107. This section charges the Department with developing and promulgating rules and regulations that ensure the efficient and expeditious implementation of the ECL. Further, this section states that such regulations shall include, but not be limited to, the uniform procedures used by the Department.

Section 70-0109. This section outlines acceptable time periods for Department action on permit applications.

Section 71-2103. This section outlines the penalties for violating any section of the ECL or any code, rule, or regulation promulgated pursuant thereto. This section also discusses the methods that the State may use to collect such penalties.

Section 71-2105. This section describes the penalties associated with any criminal violations of the ECL or any code, rule, or regulation promulgated pursuant thereto.

## 2. LEGISLATIVE OBJECTIVES

The ECL charges the Department with developing and implementing rules and regulations that establish clear and concise uniform procedures to be used in the processing of permit applications. To that end, the Department is proposing to amend Part to make it consistent with the concurrently proposed revisions to Part 201, in order to eliminate any potential confusion, questions or delays.

## 3. NEEDS AND BENEFITS

### Need for revisions to Part 621

The Department’s concurrently proposed amendments to Part 201 will create more definite time frames in certain portions of Part 201. Specifically, the maximum permit term for air state facility permits will now differ from Part 621. This proposal will amend the language in Part 621 to remove that difference and make Part 621 consistent with the revisions to Part 201 being concurrently proposed, thereby avoiding any unnecessary questions and delays.

### Benefits of revisions to Part 621

Making the language in Parts 621 and 201 consistent will remove any potential confusion for those entities with state facility permits, and those wishing to submit an application for a state facility permit to the Department. Further, the proposed change will clarify any ambiguity regarding the maximum term of that permit when it is issued.

Under the existing Part 201, air state facility permits are currently issued for an indefinite period of time. While this approach has worked well in the past, recent increases in the number of new federal standards and regulations, as well as in proposed modifications to existing permitted minor facilities, has highlighted the need for a more regular review of permitted minor facilities. Accordingly, the Department is concurrently proposing to amend its existing Part 201 to include a more definite term limit for state facility permits. Specifically, the Department is proposing to establish a maximum term limit for new and modified state facility permits of 10 years. This 10 year limit was chosen to avoid confusion with the statutory deadlines for Title V permit renewal, and to mitigate any burden this change may impose on both the regulated community and Department staff. This process will provide the Department’s staff with control over the flow of renewal applications for state facility permits. Existing air state facility permits will remain in effect until the new permit has been issued.

## 4. COSTS

There are no cost increases associated with this proposed change.

## 5. PAPERWORK

The proposed revision to Part 621 will not cause any increase in paperwork for regulated entities or the Department.

## 6. LOCAL GOVERNMENT MANDATES

The proposed revision to Part 621 does not create any local government mandates.

## 7. DUPLICATION

The proposal is not intended to duplicate any state or federal regulations or statutes.

## 8. ALTERNATIVES

The only alternative to this proposal is to take no action. Taking no action will allow an inconsistency to remain in effect between Parts 201 and 621, resulting in confusion and unnecessary delays for Department staff and the regulated community.

## 9. FEDERAL STANDARDS

The proposed revision to Part 621 is in compliance with all federal standards.

## 10. COMPLIANCE SCHEDULE

The proposed revisions do not result in the establishment of any compliance schedules.

## Regulatory Flexibility Analysis

The New York State Department of Environmental Conservation (Department) is proposing to amend its Uniform Procedures found in Title 6 of Official Compilation of Codes, Rules and Regulation of the State of New York (6 NYCRR) Part 621. In a concurrent rulemaking, the Department is proposing to amend Part 201 in order to, in part, limit the term of new and modified state facility permits to no more than 10 years. Under the existing Part 201, state facility permits are issued for an indefinite permit term. The term of certain air permits issued by the Department is also mentioned within Part 621. This proposal will amend Part 621 to make it consistent with the proposed revisions to Part 201.

### EFFECTS ON SMALL BUSINESS AND LOCAL GOVERNMENTS

The revision to Part 621 is not expected to directly affect small businesses and local governments. Small businesses and local governments are currently required to comply with the requirements of both Parts 201 and 621 when submitting permit applications to the Department. There will be no change to this requirement as a result of this proposal.

**COMPLIANCE REQUIREMENTS**

Small businesses and local governments that own or operate a non-exempt stationary emission source are currently required to complete and file an appropriate permit application, consistent with the provisions of Parts 201 and 621, for the construction and operation of that facility. This requirement will not change as a result of these proposed revisions.

**PROFESSIONAL SERVICES**

Small businesses and local governments are able to comply with the requirements of Part 621 without contracting with any professional services. In some cases however, small businesses and local governments may choose to hire a private consulting firm to assist them with meeting their obligations under Part 621. The decision to employ a consulting firm is voluntary, and any associated costs are incurred at the discretion of the affected facility.

**COMPLIANCE COSTS**

There are no cost increases associated with this proposed change.

**MINIMIZING ADVERSE IMPACTS**

The proposed revision to Part 621 is not expected to have an adverse impact on small businesses and local governments. New and existing facilities are already required to comply with Parts 201 and 621, and the scope of those regulations will not change as a result of the proposed revision.

In order to assist small businesses with environmental compliance, the Department provides free and confidential support through the Small Business Environmental Assistance Program (SBEAP), administered by the New York State Environmental Facilities Corporation. Interested facility owners and operators can contact SBEAP staff for free and confidential assistance filing permit and registration applications, as well as for advice and strategies for maintaining compliance with environmental regulations. This program provides small businesses with a cost saving option while ensuring that they are in compliance with the requirements of Part 201.

**SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION**

Prior to this proposal, the Department solicited the input of potentially affected parties through a series of stakeholder meetings and outreach activities held as part of the rulemaking process for the concurrently proposed changes to Part 201. A fact sheet detailing draft changes being considered for Part 201 was distributed to potentially affected parties via the Business Council, and all feedback received was carefully considered. This proposal seeks only to make the language in these provisions consistent. In addition, interested parties will have the opportunity to review and comment on the Department's proposal as part of the formal rulemaking process.

**ECONOMIC AND TECHNOLOGICAL FEASIBILITY**

Part 621 does not contain any technological requirements for affected facilities. In addition, the Department does not expect any change in the economic feasibility of Part 621 as a result of these revisions.

**CURE PERIOD**

The proposed revisions to Part 621 do not require the imposition of a cure period because there are no changes to any existing violations or penalties, and no new violations or penalties are established.

**Rural Area Flexibility Analysis**

The New York State Department of Environmental Conservation (Department) is proposing to amend its Uniform Procedures found in Title 6 of Official Compilation of Codes, Rules and Regulation of the State of New York (6 NYCRR) Part 621. In a concurrent rulemaking, the Department is proposing to amend Part 201 in order to, in part, limit the term of new and modified state facility permits to no more than 10 years. Under the existing Part 201, state facility permits are issued for an indefinite permit term. The term of certain air permits issued by the Department is also mentioned within Part 621. This proposal will amend Part 621 to make it consistent with the proposed revisions to Part 201.

**TYPES AND ESTIMATED NUMBER OF RURAL AREAS AFFECTED**

Part 621 applies to the owner or operator of any entity submitting a permit application to the Department. Affected entities range in scale from small industries with a handful of emission sources, to large scale industries with hundreds of emission sources. Affected entities are located in communities throughout the state, including many rural areas. The owner or operator of such an entity is already required to comply with the uniform procedures described in the existing Part 621. This proposal seeks simply to make the language in Part 621 consistent with the language in the Department's concurrently proposed revisions to Part 201. Accordingly, no adverse impacts on rural areas are anticipated due to this rulemaking.

**COMPLIANCE REQUIREMENTS**

The owner or operator of an entity submitting a permit application to the Department is already required to comply with Parts 201 and 621. There are no changes to these requirements as a result of this proposal.

**COSTS**

There are no cost increases associated with this proposed change.

**MINIMIZING ADVERSE IMPACT**

The Department does not anticipate any adverse impacts to rural areas as a result of this proposal.

**RURAL AREA PARTICIPATION**

Prior to this proposal, the Department solicited the input of potentially affected parties through a series of stakeholder meetings and outreach activities held as part of the rulemaking process for the proposed changes to Part 201. A fact sheet detailing draft changes being considered for Part 201 was also distributed to potentially affected parties via the New York State Business Council. Any feedback received was carefully considered by the Department as part of the Part 201 rulemaking process. This proposal seeks only to make the wording in Part 621 consistent with the proposed Part 201. In addition, interested parties will have the opportunity to review and comment on the Department's proposal as part of the formal rulemaking process.

**Job Impact Statement**

The New York State Department of Environmental Conservation (Department) is proposing to amend its Uniform Procedures found in Title 6 of Official Compilation of Codes, Rules and Regulation of the State of New York (6 NYCRR) Part 621. In a concurrent rulemaking, the Department is proposing to amend Part 201 in order to, in part, limit the term of new and modified state facility permits to no more than 10 years. Under the existing Part 201, state facility permits are issued for an indefinite permit term. The term of certain air permits issued by the Department is also mentioned within Part 621. This proposal will amend Part 621 to make it consistent with the proposed revisions to Part 201.

**NATURE OF IMPACT**

The proposed revisions to Part 621 are not expected to have any measurable impact on jobs or employment opportunities in the state.

**CATEGORIES AND NUMBERS OF JOBS OR EMPLOYMENT OPPORTUNITIES AFFECTED**

The proposed revisions to Part 621 are not expected to have any measurable impact on jobs or employment opportunities in the state.

**REGIONS OF ADVERSE IMPACT**

The proposed revisions to Part 621 are not expected to have any adverse impact on jobs or employment opportunities in the state. Accordingly, there are no regions of the state where there is expected to be a disproportionate or adverse impact.

**MINIMIZING ADVERSE IMPACT**

The revisions to Part 621 are not expected to have an adverse impact on jobs or employment opportunities.

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## Department of Financial Services

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**EMERGENCY  
RULE MAKING**

**Excess Line Placements Governing Standards**

**I.D. No.** DFS-44-12-00001-E

**Filing No.** 1004

**Filing Date:** 2012-10-10

**Effective Date:** 2012-10-10

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

**Action taken:** Amendment of Part 27 (Regulation 41) of Title 11 NYCRR.

**Statutory authority:** Insurance Law, arts. 21 and 59, sections 301, 316, 1213, 2101, 2104, 2105, 2110, 2116, 2117, 2118, 2121, 2122, 2130, 3103, 5907, 5909, 5911 and 9102; and Financial Services Law, sections 202 and 302; L. 1997, ch. 225; L. 2002, ch. 587; and L. 2011, ch. 61

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

**Specific reasons underlying the finding of necessity:** This regulation governs the placement of excess line insurance. Article 21 of the Insurance Law and Regulation 41 enable consumers who are unable to obtain insurance from authorized insurers to obtain coverage from unauthorized insurers (known as "excess line insurers") if the unauthorized insurers are "eligible," and an excess line broker places the insurance.

On July 21, 2010, President Obama signed into law the Nonadmitted and Reinsurance Reform Act of 2010 ("NRRRA"), which prohibits any state, other than the insured's home state, from requiring a premium tax payment for nonadmitted insurance. The NRRRA also subjects the placement of nonadmitted insurance solely to the statutory and regulatory

requirements of the insured's home state, and provides that only an insured's home state may require an excess line broker to be licensed to sell, solicit, or negotiate nonadmitted insurance with respect to such insured. On March 31, 2011, Governor Andrew M. Cuomo signed into law Chapter 61 of the Laws of 2011, Part I of which amended the Insurance Law to implement the provisions of the NRRRA.

The sections of Part I of Chapter 61 that amend the Insurance Law to bring New York into conformance with the NRRRA took effect on July 21, 2011, which is when the NRRRA took effect. The regulation was previously promulgated on an emergency basis on July 22, 2011, October 19, 2011, January 16, 2012, April 16, 2012 and July 13, 2012.

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

**Subject:** Excess Line Placements Governing Standards.

**Purpose:** To implement chapter 61 of the Laws of 2011, conforming to the federal Nonadmitted and Reinsurance Reform Act of 2010.

**Substance of emergency rule:** On July 21, 2010, President Obama signed into law the federal Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), which contains the Nonadmitted and Reinsurance Reform Act of 2010 ("NRRRA"). The NRRRA prohibits any state, other than the home state of an insured, from requiring a premium tax payment for excess (or "surplus") line insurance. The NRRRA also subjects the placement of excess line insurance solely to the statutory and regulatory requirements of the insured's home state, and declares that only an insured's home state may require an excess line broker to be licensed to sell, solicit, or negotiate excess line insurance with respect to such insured.

In addition, the NRRRA provides that an excess line broker seeking to procure or place excess line insurance for an exempt commercial purchaser ("ECP") need not satisfy any state requirement to make a due diligence search to determine whether the full amount or type of insurance sought by the ECP may be obtained from admitted insurers if: (1) the broker procuring or placing the excess line insurance has disclosed to the ECP that the insurance may be available from the admitted market, which may provide greater protection with more regulatory oversight; and (2) the ECP has subsequently requested in writing that the broker procure the insurance from or place the insurance with an excess line insurer.

On March 31, 2011, Governor Andrew M. Cuomo signed into law Chapter 61 of the Laws of 2011, Part I of which amends the Insurance Law to conform to the NRRRA.

Insurance Regulation 41 (11 NYCRR Part 27) consists of 24 sections and one appendix addressing the regulation of excess line insurance placements.

The Department of Financial Services ("Department") amended Section 27.0 to discuss the NRRRA and Chapter 61 of the Laws of 2011.

The Department amended Section 27.1 to delete language in the definition of "eligible" and to add three new defined terms: "exempt commercial purchaser," "insured's home state," and "United States."

Section 27.2 is not amended.

The Department amended Section 27.3 to provide an exception for an ECP consistent with Insurance Law Section 2118(b)(3)(F) and to clarify that the requirements set forth in this section apply when the insured's home state is New York.

The Department amended Section 27.4 to clarify that the requirements set forth in this section apply when the insured's home state is New York.

The Department amended Section 27.5 to: (1) clarify that the requirements set forth in this section apply when the insured's home state is New York; (2) with regard to an ECP, require an excess line broker or the producing broker to affirm in part A or part C of the affidavit that the ECP was specifically advised in writing, prior to placement, that the insurance may or may not be available from the authorized market that may provide greater protection with more regulatory oversight; (3) require an excess line broker to identify the insured's home state in part A of the affidavit; and (4) clarify that the premium tax is to be allocated in accordance with Section 27.9 of Insurance Regulation 41 for insurance contracts that have an effective date prior to July 21, 2011.

The Department amended Section 27.6 to clarify that the requirements set forth in this section apply when the insured's home state is New York.

Section 27.7 is not amended.

The Department amended Section 27.8 to: (1) require a licensed excess line broker to electronically file an annual premium tax statement, unless the Superintendent of Financial Services (the "Superintendent") grants the broker an exemption pursuant to Section 27.23 of Insurance Regulation 41; (2) acknowledge that payment of the premium tax may be made electronically; and (3) change a reference to "Superintendent of Insurance" to "Superintendent of Financial Services."

The Department amended Section 27.9 to clarify how an excess line broker must calculate the taxable portion of the premium for: (1) insurance contracts that have an effective date prior to July 21, 2011; and (2) insurance contracts that have an effective date on or after July 21, 2011

and that cover property or risks located both inside and outside the United States.

The Department amended Sections 27.10, 27.11, and 27.12 to clarify that the requirements set forth in this section apply when the insured's home state is New York.

The Department amended Section 27.13 to clarify that the requirements set forth in this section apply when the insured's home state is New York and to require an excess line broker to obtain, review, and retain certain trust fund information if the excess line insurer seeks an exemption from Insurance Law Section 1213. The Department also amended Section 27.13 to require an excess line insurer to file electronically with the Superintendent a current listing that sets forth certain individual policy details.

The Department amended Section 27.14 to state that in order to be exempt from Insurance Law Section 1213 pursuant to Section 27.16 of Insurance Regulation 41, an excess line insurer must establish and maintain a trust fund, and to permit an actuary who is a fellow of the Casualty Actuarial Society (FCAS) or a fellow in the Society of Actuaries (FSA) to make certain audits and certifications (in addition to a certified public accountant), with regard to the trust fund.

Section 27.15 is not amended.

The Department amended Section 27.16 to state that an excess line insurer will be subject to Insurance Law Section 1213 unless the contract of insurance is effectuated in accordance with Insurance Law Section 2105 and Insurance Regulation 41 and the insurer maintains a trust fund in accordance with Sections 27.14 and 27.15 of Insurance Regulation 41, in addition to other current requirements.

The Department amended Sections 27.17, 27.18, 27.19, 27.20, and 27.21 to clarify that the requirements set forth in this section apply when the insured's home state is New York.

Section 27.22 is not amended.

The Department repealed current Section 27.23 and added a new Section 27.23 titled, "Exemptions from electronic filing and submission requirements."

Section 27.24 is not amended.

The Department amended the excess line premium tax allocation schedule set forth in appendix four to apply to insurance contracts that have an effective date prior to July 21, 2011.

The Department added a new appendix five, which sets forth an excess line premium tax allocation schedule to apply to insurance contracts that have an effective date on or after July 21, 2011 and that cover property and risks located both inside and outside the United States.

**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 7, 2013.

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

#### **Regulatory Impact Statement**

1. Statutory authority: The Superintendent's authority for the promulgation of the Fourteenth Amendment to Insurance Regulation 41 (11 NYCRR Part 27) derives from Sections 301, 316, 1213, 2101, 2104, 2105, 2110, 2116, 2117, 2118, 2121, 2122, 2130, 9102, and Article 21 of the Insurance Law, Sections 202 and 302 of the Financial Services Law, Chapter 225 of the Laws of 1997, Chapter 587 of the Laws of 2002, and Chapter 61 of the Laws of 2011.

The federal Nonadmitted and Reinsurance Reform Act of 2010 (the "NRRRA") significantly changes the paradigm for excess line insurance placements in the United States. Chapter 61 of the Laws of 2011 amends the Insurance Law and the Tax Law to conform to the NRRRA. The NRRRA and Chapter 61 have been impacting excess line placements since their effective date of July 21, 2011.

Section 301 of the Insurance Law and Sections 202 and 302 of the Financial Services Law authorize the Superintendent of Financial Services (the "Superintendent") to prescribe regulations interpreting the provisions of the Insurance Law, and effectuate any power granted to the Superintendent under the Insurance Law. Section 316 authorizes the Superintendent to promulgate regulations to require an insurer or other person or entity making a filing or submission with the Superintendent to submit the filing or submission to the Superintendent by electronic means, provided that the insurer or other person or entity affected thereby may submit a request to the Superintendent for an exemption from the electronic filing requirement upon a demonstration of undue hardship, impracticability, or good cause, subject to the approval of the Superintendent.

Section 1213 provides the manner by which substituted service on an unauthorized insurer may be made in any proceeding against it on an insurance contract issued in New York. Substituted service may be made on the Superintendent in the manner prescribed in Section 1213.

Article 21 sets forth the duties and obligations of insurance brokers and excess line brokers. Section 2101 sets forth relevant definitions. Section 2104 governs the licensing of insurance brokers. Section 2105 sets forth licensing requirements for excess line brokers. Section 2110 provides grounds for the Superintendent to discipline licensees by revoking or suspending licenses or, pursuant to Section 2127, imposing a monetary penalty in lieu of revocation or suspension. Section 2116 permits payment of commissions to brokers and prohibits compensation to unlicensed persons. Section 2117 prohibits the aiding of an unauthorized insurer, with exceptions. Section 2118 sets forth the duties of excess line brokers, with regard to the placement of insurance with eligible foreign and alien excess line insurers, including the responsibility to ascertain and verify the financial condition of an unauthorized insurer before placing business with that insurer. Section 2121 provides that brokers have an agency relationship with insurers for the collection of premiums. Section 2122 imposes limitations on advertising by producers. Section 2130 establishes the Excess Line Association of New York ("ELANY").

Section 9102 establishes rules regarding the allocation of direct premiums taxable in New York, where insurance covers risks located both in and out of New York.

2. Legislative objectives: Generally, unauthorized insurers may not do an insurance business in New York. In permitting a limited exception for licensed excess line brokers to procure insurance policies in New York from excess line insurers, the Legislature established statutory requirements to protect persons seeking insurance in New York. The NRRRA significantly changes the paradigm for excess (or "surplus") line insurance placements in the United States. The NRRRA prohibits any state, other than the home state of an insured, from requiring a premium tax payment for excess line insurance. Further, the NRRRA subjects the placement of excess line insurance solely to the statutory and regulatory requirements of the insured's home state and declares that only an insured's home state may require an excess line broker to be licensed to sell, solicit, or negotiate excess line insurance with respect to such insured. In addition, the NRRRA establishes uniform eligibility standards for excess line insurers. A state may not impose additional eligibility conditions.

Under the new NRRRA paradigm, an excess line broker now must ascertain an insured's home state before placing any property/casualty excess line business. Thus, if the insured's home state is not New York, even though the insured goes to the broker's office in New York, the excess line broker must be licensed in the insured's home state in order for the broker to procure the excess line coverage for that insured. Conversely, a person who is approached by an insured outside of New York must be licensed as an excess line broker in New York in order to procure excess line coverage for an insured whose home state is New York.

On March 31, 2011, Governor Andrew M. Cuomo signed into law Chapter 61 of the Laws of 2011, Part I of which amends the Insurance Law to conform to the NRRRA. The NRRRA and Chapter 61 took effect on July 21, 2011 and have been impacting excess line placements since that date.

3. Needs and benefits: Insurance Regulation 41 governs the placement of excess line insurance. The purpose of the excess line law is to enable consumers who are unable to obtain insurance from authorized insurers to obtain coverage from eligible excess line insurers. This regulation implements the provisions and purposes of Chapter 61 of the Laws of 2011, which amended the Insurance Law to conform to the NRRRA. The NRRRA and Chapter 61 took effect on July 21, 2011 and have been impacting excess line placements since that date.

Section 27.14 of Insurance Regulation 41 currently prohibits an excess line broker from placing coverage with an excess line insurer unless the insurer has established and maintained a trust fund. However, the new NRRRA eligibility requirements do not include a trust fund with respect to foreign insurers (alien insurers, however, do have to maintain a trust fund that satisfies the International Insurers Department ("IID") of the National Association of Insurance Commissioners ("NAIC")). As such, New York is no longer requiring a trust fund of foreign insurers for eligibility.

Currently, Insurance Law Section 1213(e) exempts excess line insurers writing excess line insurance in New York from the requirements of Section 1213, such as the requirement that an insurer deposit with the clerk of the court cash or securities or a bond with good and sufficient sureties, in an amount to be fixed by the court sufficient to secure payments of any final judgment that may be rendered by the court, with the clerk of the court before filing any pleading in any proceeding against it, so long as the excess line insurance contract designates the Superintendent for service of process and, in material part, the policy is effectuated in accordance with Section 2105, the section that applies to excess line brokers. In a memorandum to the governor, dated March 30, 1949, recommending favorable executive action on the bill, the Superintendent of Insurance wrote that it was "our understanding that this subsection was inserted as the result of representations made by the representatives of Lloyds of London because the contracts of insurance customarily [written] by the underwriters and

placed through licensees of this Department, contain a provision whereby the underwriters consent to be sued in the courts of this state and they maintain a trust fund in New York of a very sizable amount, which is available for the payment of any judgment which may be secured in an action involving one of their contracts of insurance."

When the Superintendent of Insurance first promulgated Insurance Regulation 41, effective October 1, 1962, pursuant to his broad power to make regulations, he codified in the regulation the longstanding practice regarding the trust fund, and established minimum provisions and requirements, thus providing a reasonable alternative for unauthorized insurers that regularly engage in the sale of insurance through the excess line market. While the specific provisions have been amended a number of times over the years, every iteration of Insurance Regulation 41 has called for a trust fund as a means of providing alternative security that the insurer would have resources to pay judgments against the insurer.

Although the NRRRA apparently precludes New York from requiring a foreign insurer to maintain a trust fund to be eligible in New York, or a trust fund for an alien insurer that deviates from the IID requirements, New York policyholders need to be protected when claims arise. As a result, the Department is amending Section 27.16 of Insurance Regulation 41 to provide that an excess line insurer will be subject to Insurance Law Section 1213's requirements unless the contract of insurance is effectuated in accordance with Insurance Law Section 2105, the Superintendent is designated as agent for service of process, and the insurer maintains a trust fund in accordance with Sections 27.14 and 27.15 of Insurance Regulation 41 (in addition to other requirements currently set forth in Section 27.16). Further, the Department is amending Section 27.14 of Insurance Regulation 41 to state that in order to be exempt from Insurance Law Section 1213 pursuant to Section 27.16 of Insurance Regulation 41, an excess line insurer must establish and maintain a trust fund. Insurance Law Section 316 authorizes the Superintendent to promulgate regulations to require an insurer or other person or entity making a filing or submission with the Superintendent to submit the filing or submission to the Superintendent by electronic means, provided that the insurer or other person or entity affected thereby may submit a request to the Superintendent for an exemption from the electronic filing requirement upon a demonstration of undue hardship, impracticability, or good cause, subject to the approval of the Superintendent.

The Department amended Section 27.8(a) of Insurance Regulation 41 to require excess line brokers to file annual premium tax statements electronically, and amended Section 27.13 to require excess line brokers to file electronically a listing that sets forth certain individual policy details. In addition, the Department added a new Section 27.13 to Insurance Regulation 41 to allow excess line brokers to apply for a "hardship" exemption to the electronic filing or submission requirement.

4. Costs: The rule is not expected to impose costs on excess line brokers, and it merely conforms the requirements regarding placement of coverage with excess line insurers to the requirements in Chapter 61 of the Laws of 2011, which amended the Insurance Law to conform to the NRRRA. Although the amended regulation will require excess line brokers to file annual premium tax statements and a listing that sets forth certain individual policy details electronically, most brokers already do business electronically. In fact ELANY already requires documents to be filed electronically. Moreover, the regulation also provides a method whereby excess line brokers may apply for an exemption from the electronic filing or submission requirement.

With regard to the trust fund amendment, on the one hand, excess line insurers may incur costs if they choose to establish and maintain a trust fund in order to be exempt from Insurance Law Section 1213. On the other hand, it should be significantly less expensive to establish and maintain a trust fund rather than comply with Insurance Law Section 1213. This is a business decision that each insurer will need to make. The trust fund, if established and maintained, will be for the purpose of protecting all United States policyholders.

Costs to the Department of Financial Services also should be minimal, as existing personnel are available to review any modified filings necessitated by the regulations. In fact, filing forms electronically may produce a cost savings for the Department of Financial Services. These rules impose no compliance costs on any state or local governments.

5. Local government mandates: These rules do not impose any program, service, duty or responsibility upon a city, town, village, school district or fire district.

6. Paperwork: The regulation imposes no new reporting requirements on regulated parties.

7. Duplication: The regulation will not duplicate any existing state or federal rule, but rather implement and conform to the federal requirements.

8. Alternatives: The Department discussed the changes related to trust funds and Insurance Law Section 1213 with counsel at the NAIC and with ELANY.

9. Federal standards: This regulation will implement the provisions and

purposes of Chapter 61 of the Laws of 2011, which amends the Insurance Law to conform to the NRRRA.

10. Compliance schedule: Pursuant to Chapter 61 of the Laws of 2011, this regulation will impact excess line insurance placements effective on and after July 21, 2011.

#### **Regulatory Flexibility Analysis**

This rule is directed at excess line brokers and excess line insurers.

Excess line brokers are considered to be small businesses as defined in section 102(8) of the State Administrative Procedure Act. The rule is not expected to have an adverse impact on these small businesses because it merely conforms the requirements regarding placement of coverage with excess line insurers to Chapter 61 of the Laws of 2011, which amended the Insurance Law to conform to the federal Nonadmitted and Reinsurance Reform Act of 2010.

The rule will require excess line brokers to file annual premium tax statements electronically, and to file electronically a listing that sets forth certain individual policy details. However, the excess line broker may submit a request to the Superintendent for an exemption from the electronic filing requirement upon a demonstration of undue hardship, impracticability, or good cause, subject to the approval of the Superintendent.

Further, the Department of Financial Services has monitored Annual Statements of excess line insurers subject to this rule, and believes that none of them fall within the definition of "small business," because there are none that are both independently owned and have fewer than one hundred employees.

The Department of Financial Services finds that this rule will not impose any adverse economic impact on small businesses and will not impose any reporting, recordkeeping or other compliance requirements on small businesses.

The rule does not impose any impacts, including any adverse impacts, or reporting, recordkeeping, or other compliance requirements on any local governments.

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

The Department of Financial Services ("Department") finds that this rule does not impose any additional burden on persons located in rural areas, and the Department finds that it will not have an adverse impact on rural areas. This rule applies uniformly to regulated parties that do business in both rural and non-rural areas of New York State.

#### **Job Impact Statement**

The Department of Financial Services finds that this rule should have no impact on jobs and employment opportunities. The rule conforms the requirements regarding placement of coverage with excess line insurers to Chapter 61 of the Laws of 2011, which amended the Insurance Law to conform to the federal Nonadmitted and Reinsurance Reform Act of 2010. The rule also makes an excess line insurer subject to Insurance Law Section 1213, unless it chooses to establish and maintain a trust fund in New York for the benefit of New York policyholders.

covered executive, covered provider, executive compensation, Office, program services, program services expenses, related organization, reporting period, State-authorized payments, and State funds.

Section 1002.2 Limits on Administrative Expenses. Contains limits on the use of State funds or State-authorized payments for administrative expenses.

The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria.

The restriction will apply to covered providers receiving State funds or State-authorized payments from county or local governments, rather than directly from a State agency, pursuant to specified criteria.

The revised regulation addresses how the restriction will apply in the event that a covered provider has multiple sources of State funds or State-authorized payments.

Section 1002.3 Limits on Executive Compensation. Contains restrictions on executive compensation provided to covered executives.

The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria.

The restriction will apply to covered providers receiving State funds or State-authorized payments from county or local governments, rather than directly from a State agency, pursuant to specified criteria.

The revised rule addresses the application of this limit if the covered provider has multiple sources of State funds or State-authorized payments.

Section 1002.4 Waivers. Processes are established for covered providers to seek waivers of the limit on administrative expenses and the limits on executive compensation.

Section 1002.5 Reporting by Covered Providers. Covered providers are required to report information on an annual basis.

Section 1002.6 Penalties. A process is established for the imposition of penalties in the event of non-compliance with the limit on administrative expenses or the limits on executive compensation.

A copy of the full text of the regulatory proposal is available on the Department of Health website ([www.health.ny.gov](http://www.health.ny.gov)).

**Revised rule compared with proposed rule:** Substantial revisions were made in sections 1002.1, 1002.2, 1002.3, 1002.4, 1002.5 and 1002.6.

**Text of revised 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](mailto:regsqna@health.state.ny.us)

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

**Public comment will be received until:** 30 days after publication of this notice.

#### **Revised Regulatory Impact Statement**

Statutory Authority:

The authority for the promulgation of these regulations is contained section 363-a(2) of the Social Services law and in sections 201(1)(o), 201(1)(p), 206(3) and 206(6) of the Public Health Law.

Legislative Objectives:

This rule furthers the proper use of funds in furtherance of the Department's oversight of the various programs and procurements for which it pays, or authorizes payment.

Needs and Benefits:

The New York State Department of Health is proposing to adopt the following regulation because the State of New York directly or indirectly funds with taxpayer dollars a large number of tax exempt organizations and for-profit entities that provide critical services to New Yorkers in need and the goal is to ensure that taxpayers' dollars are used properly, efficiently, and effectively to improve the lives of New Yorkers. In certain instances, providers of services that receive State funds or State-authorized payments have used such funds to pay for excessive administrative costs or inflated compensation for their senior executives, rather than devoting a greater proportion of such funds to providing direct care or services to their clients. Such abuses involving public funds harm both the people of New York who are paying for such services, and those persons who must depend upon such services to be available and well-funded. These regulations, which are required by Executive Order No. 38, will ensure that State funds or State-authorized payments paid by this agency to providers are not used to support excessive compensation or unnecessary administrative costs.

Costs:

The costs of implementing this rule to affected providers is anticipated to be minimal as most, if not all, of the information that

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## Department of Health

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

#### **Limits on Executive Compensation and Administrative Expenses in Agency Procurements**

**I.D. No.** HLT-22-12-00012-RP

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

**Proposed Action:** Addition of Part 1002 to Title 10 NYCRR.

**Statutory authority:** Social Services Law, section 363-a(2); and Public Health Law, sections 201(1)(o), (p), 206(3) and (6)

**Subject:** Limits on Executive Compensation and Administrative Expenses in Agency Procurements.

**Purpose:** Ensure state funds and state authorized payments are expended in the most efficient manner and appropriate use of funds.

**Substance of revised rule:** The revised rule would add a new Part 1002 to NYCRR titled Limits on Administrative Expenses and Executive Compensation.

Section 1002.1 Contains definitions for purposes of this Part, including definitions for administrative expenses, covered operating expenses,

must be reported by such providers is already gathered or reported for other purposes. The costs to the agency of such implementation is expected to be very limited as well, and efforts to ensure efficient centralization of certain aspects of such implementation are underway.

#### Paperwork/Reporting Requirements:

The proposed regulatory amendments will require limited additional information to be reported to the agency by providers receiving State funds or State-authorized payments. To the extent feasible, such reporting shall be made electronically to avoid unnecessary paperwork costs.

#### Local Government Mandates:

The proposed regulatory amendments do not anticipate any additional mandates.

#### Duplication:

This proposed rule does not duplicate, overlap, or conflict with any State or federal statute or rule. However, the proposed rule seeks to minimize the reporting requirements faced by providers by building upon those requirements in the federal internal revenue code that require certain tax-exempt organizations to report information concerning their executive compensation and administrative costs.

#### Alternatives:

Executive Order No. 38 requires the adoption of this proposed regulation.

#### Federal Standards:

These amendments do not conflict with federal standards.

#### Compliance Schedule:

This rule will become effective upon adoption; the implementation date establishing the limits on administrative expenses and executive compensation will be April 1, 2013.

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

Changes made to the last published rule do not necessitate revision to the previously published Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement.

#### **Assessment of Public Comment**

A Notice of Proposed Rule Making was published in the State Register on May 30, 2012.

All comments received were reviewed and evaluated. Many of the concerns expressed in the comments have been addressed by revisions to the various sections of the proposed regulation. Suggestions from others were determined to be contrary to the goals of the proposed rulemaking.

A number of comments objected generally to the underlying concept of the regulations, stating that the proposed regulation is overly broad in its authority and burdensome in its requirements. The department believes that the proposed limitations in the regulation further the legitimate goal of ensuring that public funds are properly expended and the use of such funds is properly monitored.

Clarification was requested concerning certain defined terms in the proposed regulation, in particular with respect to their intended scope. In response, and taking into account suggestions submitted, changes were made to the definitions of the following terms: administrative expenses, covered provider, covered executive, executive compensation, program services expenses, related entity, State-authorized payments and State funds.

Some commenters stated that the proposed limits on administrative expenses were burdensome and unnecessary, because they would interfere with existing contracts, because they were possibly duplicative of existing state and federal rules, or they will not enhance the protections already provided by restrictions from State reimbursement rates. Clarification was requested as to what will constitute administrative and program expenses. The proposed regulation has been revised to incorporate an allocation methodology for these two expenses.

There were a wide range of comments and suggestions on the definition of "executive compensation." They covered such topics as: (a) general concerns about application of the definition, (b) exclusions, (c) limitations and application of the definition, and (d) suggestions about surveys and their use. A summary of the comments and suggestions follows:

(a) General concerns regarding the regulation include that it: is too broad since it regulates use of funding sources not emanating from the state; is unrealistic, problematic and intrusive to operations; will adversely affect candidate pools, incumbents, service delivery and the ability of providers to meet the challenges and changes in the health care system; is intrusive to the for-profit sector where executive compensation is a private

matter; is faulty in that it will institutionalize abuses through comparability data; and is duplicative as executive compensation is already controlled at the State and federal levels through rate setting, IRS rules and reporting, and the Not-For-Profit Corporation Law. Other comments stated that the regulation would encroach on the State Attorney General's regulation and enforcement; is arbitrary in its establishment of the thresholds of \$500,000 and 30%; was exclusive of larger corporations; and inappropriately used a percentile standard that will gradually diminish compensation levels and lead to the existence of two levels of compensation. Commenters also suggested that covered providers subject to penalty should be allowed to submit documentation in advance of penalty review.

(b) Other comments focused on exclusions for not-for-profits and for not-for-profit long term care and senior services providers and an elimination of the 75th percentile threshold.

(c) Still other letters related to limitations and application of the definition of "executive compensation." They suggested that executive compensation rules should only be applied to non-State funds or to State and State-authorized funds. The applicability of the rules with regard to contributions of other non-covered entities should be clarified. Also, letters received argued that the period covered by the limits on executive compensation should not begin on January 1, 2013, the executive compensation limits should be revisited periodically to adjust for changes, and the role of executives in the assurance of program services should be recognized.

(d) Commenters recommended several approaches to determining reasonable compensation, such as the use of recognized surveys or independent commissioned surveys or identification and recognition of specific compensation surveys to establish comparisons. It was suggested that surveys should allow for regional and geographic variations. Further, commenters suggested that the regulation also should address instances where a board or governing body does not exist.

The regulation was revised to address the comments on: the period to be covered by the limits on executive compensation, an annual review of the \$199,000 cap and the adjustment thereof, the consideration of the availability of a governing body as alternate to the covered provider's board of directors, the submission of contemporaneous (but not prospective) documentation for penalty review, the recognition of supervisory services of executives as program services, the allocation methodology for reporting administrative and program service costs, the recognition of specific clinical and program personnel as providers of program services, and a method for subcontractors to be advised of the receipt of State or State-authorized funds from a covered provider.

The regulation was not revised to limit the rule to non-State funds, to exclude for-profits from being covered by the regulations, or to alter the 75th percentile threshold because these revisions would compromise the goal of the regulation. Eliminating the executive compensation requirements would eviscerate one of the key objectives of the executive order: limiting the extent of such compensation paid by covered providers that rely to a significant degree upon public funds for their program and administrative services funding. The department is proposing to adopt this regulation because the State of New York directly or indirectly funds with taxpayer dollars a large number of tax exempt organizations and for-profit entities that provide critical services to New Yorkers in need, and the goal is to ensure that taxpayer dollars are used properly, efficiently and effectively to improve the lives of New Yorkers. In certain instances, service providers that receive State funds or State-authorized payments have used such funds to pay for excessive administrative costs or inflated compensation for their senior executives, rather than devoting a greater proportion of such funds to providing direct care or services to their clients. Such abuses involving public funds harm both the people of New York who are paying for such services and those persons who must depend upon such services to be available and well-funded. These regulations provide a benchmark to ensure that State funds or State-authorized payments paid by this agency to providers are not used to support excessive compensation or unnecessary administrative costs. In part because of the funding of resources, their restriction is necessary to accomplish these objectives.

Some comments stated that the proposed waiver process is overly complex and lacking objective criteria. The revised regulation provides greater flexibility in the filing of a waiver application and also has pushed back the implementation date.

Comments received also criticized the proposed reporting requirements suggesting that they require providing information related to administrative and program expenses in a manner inconsistent with other current reporting obligations. The regulation has been amended to conform some of the requirements to those with which many covered providers must already comply, including provisions incorporating the definitions applicable with non-profits under the IRS Code.

Other submissions asked when penalties for excess compensation

would be assessed, what the type of penalties would be imposed, and about the level of severity. Commenters also requested details on the criteria for making penalty determination.

Changes have been made to the Penalties section in the revised text, including extending the time for submissions, a corrective action plan (CAP) and a request for an administrative appeal to 30 calendar days.

The full Assessment of Comments is available on the department website at [www.health.ny.gov](http://www.health.ny.gov)

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## Division of Housing and Community Renewal

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

#### Limits on State-Funded Administrative Costs and Executive Compensation

**I.D. No.** HCR-22-12-00018-RP

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

**Proposed Action:** Addition of Part 2658 to Title 9 NYCRR.

**Statutory authority:** Executive Order No. 38, dated January 18, 2012, as continued by Executive Order No. 43, dated April 13, 2012; and Public Housing Law, section 19

**Subject:** Limits on state-funded administrative costs and executive compensation.

**Purpose:** To ensure that State funds are not used to support excessive compensation or unnecessary administrative costs.

**Substance of revised rule:** The revised rule would add a new Part 2658 to 9 NYCRR titled Limits on Administrative Expenses and Executive Compensation.

Section 2658.1: Provides the background and intent of the revised rule, which is to implement Executive Order No. 38, issued by Governor Andrew Cuomo on January 18, 2012.

Section 2658.2: Sets forth the statutory authority for the promulgation of the rule by the New York State Division of Housing and Community Renewal (hereinafter the "Office").

Section 2658.3: Contains definitions for purposes of this Part, including definitions for administrative expenses, covered operating expenses, covered executive, covered provider, executive compensation, Office, program services, program services expenses, related organization, reporting period, State-authorized payments, and State funds.

Section 2658.4: Limits on Administrative Expenses. Contains limits on the use of State funds or State-authorized payments for administrative expenses.

The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria.

The restriction will apply to covered providers receiving State funds or State-authorized payments from county or local governments, rather than directly from a State agency, pursuant to specified criteria.

The revised regulation addresses how the restriction will apply in the event that a covered provider has multiple sources of State funds or State-authorized payments.

Section 2658.5: Limits on Executive Compensation. Contains restrictions on executive compensation provided to covered executives.

The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria.

The restriction will apply to covered providers receiving State funds or State-authorized payments from county or local governments, rather than directly from a State agency, pursuant to specified criteria.

The revised rule addresses the application of this limit if the covered provider has multiple sources of State funds or State-authorized payments.

Section 2658.6: Waivers. Processes are established for covered providers to seek waivers of the limit on administrative expenses and the limits on executive compensation.

Section 2658.7: Reporting by Covered Providers. Covered providers are required to report information on an annual basis.

Section 2658.8: Penalties. A process is established for the imposition of penalties in the event of non-compliance with the limit on administrative expenses or the limits on executive compensation.

A copy of the full text of the regulatory proposal is available on [www.nyshcr.org](http://www.nyshcr.org).

**Revised rule compared with proposed rule:** Substantial revisions were made in sections 2658.3, 2658.4, 2658.5, 2658.6 and 2658.8.

**Text of revised proposed rule and any required statements and analyses may be obtained from** Brian P. McCartney, Division of Housing and Community Renewal, 38-40 State Street, Albany, NY 12207, (518) 473-1007, email: [bmccartney@nyshcr.org](mailto:bmccartney@nyshcr.org)

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

**Public comment will be received until:** 30 days after publication of this notice.

#### Revised Regulatory Impact Statement

Statutory Authority: Executive Order No. 38, dated January 18, 2012, as continued by Executive Order No. 43, dated April 13, 2012; N.Y. Public Housing Law, section 19.

Legislative Objectives: To limit administrative expenses and executive compensation of providers of program services in order to meet the State's ongoing obligation to ensure the proper use of taxpayer dollars and the most effective provision of such services to the public.

Needs and Benefits: The Division of Housing and Community Renewal is proposing to adopt the following regulation because the State of New York directly or indirectly funds with taxpayer dollars a large number of tax exempt organizations and for-profit entities that provide critical services to New Yorkers in need, and the goal is to ensure that taxpayers' dollars are used properly, efficiently, and effectively to improve the lives of New Yorkers. In certain instances, providers of services that receive State funds or State-authorized payments have used such funds to pay for excessive administrative costs or inflated compensation for their senior executives, rather than devoting a greater proportion of such funds to providing direct care or services to their clients. Such abuses involving public funds harm both the people of New York who are paying for such services, and those persons who must depend upon such services to be available and well-funded. These regulations, which are required by Executive Orders No. 38 and 43, will ensure that State funds or State-authorized payments paid by this agency to providers are not used to support excessive compensation or unnecessary administrative costs.

Costs: The costs of implementing this rule to affected providers is anticipated to be minimal since most, if not all, of the information that must be reported by such providers is already gathered or reported for other purposes. The agency cost of such implementation is expected to be very limited as well, and efforts to ensure efficient centralization of certain aspects of such implementation are underway.

Local Government Mandates: The proposed regulation does not anticipate any additional mandates.

Paperwork/Reporting Requirements: The proposed regulation will require limited additional information to be reported to the agency by providers receiving State funds or State-authorized payments. To the extent feasible, such reporting shall be made electronically in order to avoid unnecessary paperwork costs.

Duplication: This proposed rule does not duplicate, overlap, or conflict with any State or federal statute or rule. However, the proposed rule seeks to minimize the reporting requirements faced by providers by building upon those requirements in the federal internal revenue code that require certain tax-exempt organizations to report information concerning their executive compensation and administrative costs.

Alternatives: Executive Orders No. 38 and No. 43 require the adoption of this proposed regulation.

Federal Standards: This proposed regulation does not conflict with federal standards.

Compliance Schedule: This rule will become effective upon adoption. The implementation date establishing the limits on administrative expenses and executive compensation will be April 1, 2013.

#### Revised Regulatory Flexibility Analysis

A Revised Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this notice because the changes to the proposed rule will not impose any adverse economic impact on small businesses, nor will it impose new reporting, recordkeeping or other compliance requirements on small businesses or local governments.

#### Revised Rural Area Flexibility Analysis

A Revised Rural Area Flexibility Analysis is not being submitted with this notice because the changes to the proposed rule will not impose any adverse economic impact on rural areas.

#### Revised Job Impact Statement

A Revised Job Impact Statement is not being submitted with this notice because it is evident from the subject matter of the regulation that it will have no impact on jobs and employment opportunities.

#### Assessment of Public Comment

A Notice of Proposed Rule Making was published in the State Register on May 30, 2012.

All comments received were reviewed and evaluated. Many of the concerns expressed in the comments have been addressed by revisions to the various sections of the proposed regulation. Suggestions from others were determined to be contrary to the goals of the proposed rulemaking.

A number of comments objected generally to the underlying concept of the regulations, stating that the proposed regulation is overly broad in its authority and burdensome in its requirements. The New York State Division of Housing and Community Renewal believes that the proposed limitations in the regulation further the legitimate goal of ensuring that public funds are properly expended and the use of such funds is properly monitored.

Clarification was requested concerning certain defined terms in the proposed regulation, in particular with respect to their intended scope. In response, and taking into account suggestions submitted, changes were made to the definitions of the following terms: administrative expenses, covered provider, covered executive, executive compensation, program services expenses, related entity, State-authorized payments and State funds.

Some commenters stated that the proposed limits on administrative expenses were burdensome and unnecessary, because they would interfere with existing contracts, because they were possibly duplicative of existing state and federal rules, or they will not enhance the protections already provided by restrictions from State reimbursement rates. Clarification was requested as to what will constitute administrative and program expenses. The proposed regulation has been revised to incorporate an allocation methodology for these two expenses.

There were a wide range of comments and suggestions on the definition of "executive compensation." They covered such topics as: (a) general concerns about application of the definition, (b) exclusions, (c) limitations and application of the definition, and (d) suggestions about surveys and their use. A summary of the comments and suggestions follows:

(a) General concerns regarding the regulation include that it: is too broad since it regulates use of funding sources not emanating from the state; is unrealistic, problematic and intrusive to operations; will adversely affect candidate pools, incumbents, service delivery and the ability of providers to meet the challenges and changes in the health care system; is intrusive to the for-profit sector where executive compensation is a private matter; is faulty in that it will institutionalize abuses through comparability data; and is duplicative as executive compensation is already controlled at the State and federal levels through rate setting, IRS rules and reporting, and the Not-For-Profit Corporation Law. Other comments stated that the regulation would encroach on the State Attorney General's regulation and enforcement; is arbitrary in its establishment of the thresholds of \$500,000 and 30%; was exclusive of larger corporations; and inappropriately used a percentile standard that will gradually diminish compensation levels and lead to the existence of two levels of compensation. Commenters also suggested that covered providers subject to penalty should be allowed to submit documentation in advance of penalty review.

(b) Other comments focused on exclusions for not-for-profits and for not-for-profit long term care and senior services providers and an elimination of the 75th percentile threshold.

(c) Still other letters related to limitations and application of the definition of "executive compensation." They suggested that executive compensation rules should only be applied to non-State funds or to State and State-authorized funds. The applicability of the rules with regard to contributions of other non-covered entities should be clarified. Also, letters received argued that the period covered by the limits on executive compensation should not begin on January 1, 2013, the executive compensation limits should be revisited periodically to adjust for changes, and the role of executives in the assurance of program services should be recognized.

(d) Commenters recommended several approaches to determining reasonable compensation, such as the use of recognized surveys or independent commissioned surveys or identification and recognition of specific compensation surveys to establish comparisons. It was suggested that surveys should allow for regional and geographic variations. Further, commenters suggested that the regulation also should address instances where a board or governing body does not exist.

The regulation was revised to address the comments on: the period to be covered by the limits on executive compensation, an annual review of the \$199,000 cap and the adjustment thereof, the consideration of the availability of a governing body as alternate to the covered provider's board of directors, the submission of contemporaneous (but not prospective) documentation for penalty review, the recognition of supervisory services of executives as program services, the allocation methodology for reporting administrative and program service costs, the recognition of specific clinical and program personnel as providers of program services, and a method for subcontractors to be advised of the receipt of State or State-authorized funds from a covered provider.

The regulation was not revised to limit the rule to non-State funds, to exclude for-profits from being covered by the regulations, or to alter the 75th percentile threshold because these revisions would compromise the goal of the regulation. Eliminating the executive compensation requirements would eviscerate one of the key objectives of the executive order: limiting the extent of such compensation paid by covered providers that rely to a significant degree upon public funds for their program and administrative services funding. The New York State Division of Housing and Community Renewal is proposing to adopt this regulation because the State of New York directly or indirectly funds with taxpayer dollars a large number of tax exempt organizations and for-profit entities that provide critical services to New Yorkers in need, and the goal is to ensure that taxpayer dollars are used properly, efficiently and effectively to improve the lives of New Yorkers. In certain instances, service providers that receive State funds or State-authorized payments have used such funds to pay for excessive administrative costs or inflated compensation for their senior executives, rather than devoting a greater proportion of such funds to providing direct care or services to their clients. Such abuses involving public funds harm both the people of New York who are paying for such services and those persons who must depend upon such services to be available and well-funded. These regulations provide a benchmark to ensure that State funds or State-authorized payments paid by this agency to providers are not used to support excessive compensation or unnecessary administrative costs. In part because of the funding of resources, their restriction is necessary to accomplish these objectives.

Some comments stated that the proposed waiver process is overly complex and lacking objective criteria. The revised regulation provides greater flexibility in the filing of a waiver application and also has pushed back the implementation date.

Comments received also criticized the proposed reporting requirements suggesting that they require providing information related to administrative and program expenses in a manner inconsistent with other current reporting obligations. The regulation has been amended to conform some of the requirements to those with which many covered providers must already comply, including provisions incorporating the definitions applicable with non-profits under the IRS Code.

Other submissions asked when penalties for excess compensation would be assessed, what the type of penalties would be imposed, and about the level of severity. Commenters also requested details on the criteria for making penalty determination. Changes have been made to the Penalties section in the revised text, including extending the time for submissions, a corrective action plan (CAP) and a request for an administrative appeal to 30 calendar days.

The full Assessment of Comments is available on the New York State Division of Housing and Community Renewal website at [www.nyschr.org](http://www.nyschr.org)

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## Office of Mental Health

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### NOTICE OF ADOPTION

#### Rights of Patients

**I.D. No.** OMH-20-12-00003-A

**Filing No.** 1032

**Filing Date:** 2012-10-15

**Effective Date:** 2012-10-31

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

**Action taken:** Amendment of Part 527 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.07 and 7.09; Correction Law, section 401

**Subject:** Rights of Patients.

**Purpose:** Extend rights in Part 527 to inmates receiving services at DOCCS regional medical units/residential crisis treatment programs.

**Text of final rule:** 1. Paragraph (1) of subdivision (a) of section 527.1 of Title 14 NYCRR is amended as follows:

(1) Except as otherwise indicated by the specific context, and with the exception of sections 527.4 and 527.6, this Part shall apply to all psychiatric hospitals operated by the Office of Mental Health, all residential treatment facilities for children and youth, and to all psychiatric hospital services required to have an operating certificate from the Office of Mental Health, and provided further that section 527.8 of this Part shall also apply to all secure treatment facilities operated by the Office of Mental Health as

defined in section 10.03 of the Mental Hygiene Law. *Only section 527.8(c)(5) of this Part shall apply to regional medical units operated by the Department of Corrections and Community Supervision at which the Office of Mental Health provides outpatient psychiatric treatment, and to correctional facilities operated by the Department of Corrections and Community Supervision at which the Office of Mental Health operates a residential crisis treatment program, except that section 527.8(c)(5) shall not be applicable under circumstances in which it is inconsistent with the Correction Law or Department of Corrections and Community Supervision regulations.*

2. Subdivision (b) of section 527.1 of Title 14 NYCRR is amended as follows:

(b) The intent of this Part is to define the rights of patients receiving treatment at psychiatric hospitals and to extend certain rights provided in section 527.8 of this Part to persons confined or committed to secure treatment facilities operated by the Office of Mental Health as defined in section 10.03 of the Mental Hygiene Law. *Only section 527.8(c)(5) of this Part shall apply to the regional medical units operated by the Department of Corrections and Community Supervision at which the Office of Mental Health provides outpatient psychiatric treatment, and to correctional facilities operated by the Department of Corrections and Community Supervision at which the Office of Mental Health operates a residential crisis treatment program, except that section 527.8(c)(5) shall not be applicable under circumstances in which it is inconsistent with the Correction Law and Department of Corrections and Community Supervision regulations.*

3. A new subdivision (g) is added to section 527.2 of Title 14 NYCRR and subdivisions (g) and (h) are relettered as (h) and (i) as follows:

(g) *Section 401 of the Correction Law provides that the Office of Mental Health and the Department of Corrections and Community Supervision shall be jointly responsible for the administration and operation of programs for the care and treatment of inmates with mental illness who are in need of psychiatric services but who do not require hospitalization for the treatment of mental illness.*

[(g)] (h) Article 29-C of the Public Health Law establishes the right of competent adults to appoint an agent to make health care decisions in the event they lose decisionmaking capacity. Article 29-C further empowers the Office of Mental Health to establish regulations regarding the creation and use of health care proxies in mental health facilities.

[(h)] (i) The Omnibus Budget Reconciliation Act of 1990 (Public Law 101-508, sections 4206 and 4751) requires that institutional providers participating in the Medicare or Medical Assistance programs inform patients about their rights, under State law, to express their preferences regarding health care decisions.

4. A new paragraph (8) is added to subdivision (a) of section 527.8 of Title 14 NYCRR as follows:

(8) *Inmate patient means a person committed to the custody of the Department of Corrections and Community Supervision who is an outpatient of Central New York Psychiatric Center at the regional medical units operated by the Department of Corrections and Community Supervision at which the Office of Mental Health provides outpatient psychiatric treatment, and at correctional facilities operated by the Department of Corrections and Community Supervision at which the Office of Mental Health operates a residential crisis treatment program.*

5. A new paragraph (5) is added to subdivision (c) of section 527.8 of Title 14 NYCRR and the existing paragraph (5) is amended and renumbered as paragraph (6) as follows:

(5) *Inmate Patients.*

(i) *Except in emergency circumstances as provided in paragraph (1) of this subdivision, an inmate patient may not be given a psychotropic medication over his or her objection without court authorization.*

(ii) *Prior to requesting court authorization to administer psychotropic medication to an objecting inmate patient, the clinical director, or his or her designee, of Central New York Psychiatric Center, must determine that the administration of psychotropic medication is in the inmate patient's best interests and that the inmate patient lacks capacity to make a reasoned decision concerning administration of such medication. In making such determination, the clinical director, or his or her designee, shall ensure compliance with the procedures described below. In the interest of prompt resolution of conflicts regarding administration of psychotropic medication over objection, each of the evaluations of an inmate patient described below should be completed within 24 hours.*

(a) *Evaluation by treating physician. Upon an inmate patient's objection to the proposed administration of psychotropic medication, the treating physician shall formally evaluate whether the administration of psychotropic medication is in the inmate patient's best interests, in light of all relevant circumstances including the risks, benefits and alternatives to the inmate patient of the administration of psychotropic medication, and the nature of the inmate patient's objection thereto, and whether the inmate patient has the capacity to make a reasoned decision concerning*

*the administration of such medication. If the physician finds that administration of psychotropic medication is in the inmate patient's best interests and the inmate patient lacks capacity to make a reasoned decision concerning administration of such medication, he or she shall personally inform the inmate patient of his or her determination. If the inmate patient continues to object to the proposed psychotropic medication, the physician shall forward his or her evaluation and findings to the clinical director with a request for further review. He or she shall also notify in writing the inmate patient, Mental Hygiene Legal Service, and any other representative of the inmate patient of his or her determination and request, if any, for further review.*

(b) *Review by the clinical director or his or her designee.*

(1) *Upon receipt of the treating physician's request for further review, the clinical director shall appoint a physician to evaluate whether the proposed administration of psychotropic medication is in the inmate patient's best interests, and whether the inmate patient has the capacity to make a reasoned decision concerning treatment. The reviewing physician may be any physician of suitable expertise relative to the proposed administration of psychotropic medication and may be an employee of the facility, including the clinical director, or independent of the facility. In performing his or her evaluation, such physician shall review the inmate patient's record and personally examine the inmate patient. If the reviewing physician's determination is administration of psychotropic medication over objection is appropriate, he or she shall personally inform the inmate patient of his determination.*

(2) *If there is a substantial discrepancy between the opinions of the treating physician and reviewing physician regarding the inmate patient's capacity or whether administration of psychotropic medication is in the inmate patient's best interests, the clinical director may, at his or her option, appoint a third physician to conduct an evaluation pursuant to this subparagraph.*

(3) *If, after completion of the evaluation by the reviewing physician (or physicians), the inmate patient continues to object to the proposed administration of psychotropic medication, the clinical director shall make a determination on behalf of the facility whether the inmate patient has capacity to make a reasoned decision concerning the administration of psychotropic medication and whether such medication is in the inmate patient's best interests. If the clinical director finds that the inmate patient has capacity to make a reasoned decision concerning the administration of psychotropic medication or that such medication would not be in the inmate patient's best interests, he or she shall uphold the inmate patient's objections and so notify the inmate patient, Mental Hygiene Legal Service, and any other representative of the inmate patient. If the clinical director's determination is that the inmate patient lacks capacity, and psychotropic medication over objection is in the inmate patient's best interests, he or she may apply for court authorization of administration of psychotropic medication, and so notify the inmate patient, Mental Hygiene Legal Service, and any other representative of the inmate patient.*

[(5)](6) *Nothing in this subdivision shall prevent a treating physician, treatment team, or others involved in the patient's or inmate patient's care from continuing to explain the proposed treatment to the patient or inmate patient as described in subdivision (a) of this section[,] and to seek his or her voluntary agreement thereto[;]. Further, the facility [to] shall ensure that any such efforts are made in a clinically appropriate manner. A patient or inmate patient may at any time withdraw his or her objection to the proposed treatment, and the treating physician may at any time substitute another professionally acceptable course of treatment to which the patient or inmate patient does not object. Upon the withdrawal of the patient's or inmate patient's objection or his or her agreement to a substituted course of treatment, the physician shall immediately notify by telephone Mental Hygiene Legal Service and the patient's or inmate patient's attorney, if any. Unless the patient or inmate patient, Mental Hygiene Legal Service or the patient's or inmate patient's attorney [renew] renews the objection, treatment may be commenced 24 hours after notice has been provided. If the Mental Hygiene Legal Service or the patient's or inmate patient's attorney [agree] agrees, treatment may be commenced immediately. Notwithstanding a patient's or inmate patient's withdrawal of his or her objection to a proposed treatment, nothing in this paragraph shall diminish or supersede the need for obtaining informed consent for the proposed treatment when so required under section 27.9 of this Title or under other provisions of law.*

**Final rule as compared with last published rule:** Nonsubstantive changes were made in section 527.1(a) and (b).

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

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

A revised Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement is not submitted

with this notice because the change being made to the final version of the rule making is non-substantive. The change merely serves to improve readability. The meaning of the statement that is being changed remains the same.

#### **Assessment of Public Comment**

The agency received four letters of comment pertaining to the amendments to 14 NYCRR Part 527. The comments are addressed below.

**Issue:** Commenters suggested that the proposed regulation would permit court ordered medication outside of a psychiatric hospital when removal to a hospital is the preferable option where intensive treatment and medication education can be done.

**Response:** The agency does not agree that removal to a hospital for an application for court ordered medication is always preferable. There are situations and reasons that either prevent removal to a hospital or where continued treatment in the prison setting are best for a patient. This regulation would provide more options for successful treatment. This regulation would only be considered when court ordered medication while in the prison setting or Residential Medical Unit (RMU) is in the best interests of the patient, and clinically necessary.

As an example, this regulation was initially proposed when there was a patient in the RMU who had a serious mental illness and was refusing both medicine for a heart condition and psychotropic medication. Central New York Psychiatric Center (CNYPC) was unable to admit the patient to the hospital because of his unstable medical condition. If this regulation had been in place, a court order could have been pursued for psychotropic medication. If psychiatric stability had been reached, the hope was that he would be able to understand the need for the heart medication.

The agency does not agree that intensive treatment and medication education cannot be provided in the correctional facility. The proposed regulations only allow an application for court ordered psychotropic medication (COPM) when the patient is at a correctional facility that has a Residential Crisis Treatment Program (RCTP) or RMU. The correctional facilities that house a RCTP are mental health service level 1 or 2 facilities which contain satellite units. Such units have an extensive mental health presence, including a treating psychiatrist in collaboration with Office of Mental Health (Office) nursing staff, that will provide treatment and medication education both prior to application for COPM and after the court order has been received. The units currently provide such treatment and education to patients subject to active treatment over objection orders or COPMs. Additionally, such requirements will be written into the Corrections Based Operations Manual. If the patient is in the RMU, the Office will also provide treatment and medication education as necessary. This will also be stated in the Corrections Based Operations Manual.

**Issue:** Commenters indicated that the non-emergency admission procedures under Section 402 of the Correction Law were underutilized.

**Response:** The Office does not agree. In recent years, the agency has pursued a number of commitments utilizing section 402(1) of the Correction Law. The majority of applications were unworkable due to the amount of time the application took (4 to 6 months) and the inability of the local county courts to find a psychiatric examiner who was willing to go to a correctional facility to conduct an evaluation. In these instances, the application for commitment under 402(1) was never completed. Due to the time delay, in many instances the patient further decompensated to the point of meeting the emergency criteria under 402(9). Waiting until a patient has deteriorated to this extent is not in the best interest of the patient. There is evidence that not all patients are able to return to their prior level of stability once decompensation, or multiple decompensations, has occurred, even if treatment is eventually provided. These psychiatric decompensations also increase the risk of dangerousness and, therefore, increase the potential for injury to the patient and/or others.

Furthermore, Section 402 of the Correction Law recognizes that, under certain circumstances, it is preferable to treat an inmate patient at a correctional facility, rather than hospitalizing a patient at CNYPC. A commitment occurs under Section 402 CL only after "alternate forms of care and treatment available during such confinement in such correctional facility that might be adequate to provide for such inmate's needs without requiring hospitalization" should be considered. (402 (1) Correction Law.) However, the Office will continue to consider using 402(1) where commitment to a psychiatric hospital is clinically indicated.

**Issue:** Commenters expressed concern that the regulations do not specify where the patient will be housed in the correctional facility when receiving court ordered medication and recommended that the patient not be placed in a Special Housing Unit or Keep Lock when receiving medication.

**Response:** The Office will address this concern in the Corrections Based Organization Manual. As part of the procedure, the manual will require that CNYPC recommend to the Department of Corrections and Community Supervision (DOCCS) that each of these patients be placed in a Residential Mental Health Treatment Unit if there is a court order for

psychotropic medication obtained. If there are no disciplinary sanctions, CNYPC will recommend that the patient be placed in the Intermediate Care Program.

**Issue:** A commentator recommended that the regulations should include the provision that an inmate patient should be placed in the RCTP prior to administering a court order for medication and should include a specified period of monitoring for side effects. The commentator also recommended transfer to CNYPC if the patient is unable to be moved to the RCTP dormitory within four days after administering the medication.

**Response:** The agency does not agree that a patient should be placed in the RCTP prior to administration of court ordered medication. Successful administration and monitoring for side effects can occur within the correctional facility due to the mental health staff available. Currently, mental health staff provide such administration and monitoring for side effects for patients who voluntarily take medication and for those who have active court orders for psychiatric medication obtained while hospitalized at CNYPC. If at any time it is in the patient's best interest to place him or her in the RCTP, that will be done. Additionally, if it is clinically indicated and the patient meets the criteria for admission to CNYPC, he or she will be admitted.

**Issue:** Commenter discussed what the roles of DOCCS and the Office will be in administering the court ordered medication and where the patient will be physically in the correctional facility when the medication is given.

**Response:** The administration of court ordered medication will be conducted pursuant to Section 3.10 of the Corrections Based Manual. CNYPC and DOCCS have administered court ordered medication frequently since they have been administering COPMs that have been obtained while the patient was at CNYPC. The current procedure will be utilized.

**Issue:** One commentator asked about protocols for monitoring side effects.

**Response:** These protocols are currently in place. The satellite units in the prisons currently monitor all patients for side effects after taking medication. The medication monitoring is analogous to the monitoring at CNYPC. There are many patients in the prison system who voluntarily take psychiatric medication and are carefully monitored for side effects.

**Issue:** One commenter discussed that a physical exam of the patient is conducted upon admission to CNYPC and at that time if there are contraindications of specific medications, they would be identified.

**Response:** If there are contraindications concerning a specific medication, the treatment team at the correctional facility would be aware of it. The patient will be well known to the treatment team and to the clinician and if there was a need for a physical examination, the Office would refer the patient to DOCCS medical. In fact, all of the Level 1 and 2 facilities have bi-monthly Joint Medical meetings to discuss patients with comorbid psychiatric and medical issues. This includes a discussion of patients on various psychotropic medications.

**Issue:** Commenters indicated that the hospital will have individual treatment plans and clinical supports and counseling.

**Response:** Satellite units have treatment plans and clinical supports analogous to inpatient hospitalization at CNYPC.

**Issue:** Commenter recommended specific regulations governing minimum staffing requirements and procedures for monitoring side effects.

**Response:** The agency believes that the current staff at the satellite units is able to handle the requirements necessary for administering court ordered medication. As mentioned earlier in this assessment, the satellite unit currently monitors side effects of medication and active court orders for psychotropic medications. If it becomes necessary to specify any of these requirements, it will be done in the CBO Manual.

**Issue:** Commenters recommended that an independent physician provide the second review which will allow consideration of alternative treatment.

**Response:** The agency does not agree that this is necessary. The second review will be done by a physician who is not part of the treatment team. Such physician will follow Section 402(1) and consider alternative treatment as required by law.

**Issue:** One commentator asked if there will be new standards enunciated for CNYPC inpatient referrals.

**Response:** The agency does not anticipate that there will be any change in CNYPC inpatient referrals. If a patient meets the criteria for inpatient admission and it is in the patient's best interest, he or she will be admitted to CNYPC.

**Issue:** One commentator requested that if an inmate patient does elect to take the medication voluntarily, it be recognized and documented in the clinical record.

**Response:** CNYPC currently does recognize when a patient voluntarily takes his or her medication and it is currently documented in the clinical record. The procedure for administration of a COPM in the CBO Manual, 3.10, also discusses giving the patient the opportunity to take his or her medication voluntarily prior to administering involuntarily.

**Issue:** Two commentators were concerned that medication will be used for a disciplinary purpose or to drug an inmate patient into compliance with a situational problem.

**Response:** The Office does not medicate patients due to disciplinary problems or to comply with a problem at a correctional facility. A patient is medicated if it is clinically indicated and is in the best interest of the patient. There is no reason to assume that because of the amendments to these regulations that this will change. CNYPC will continue to provide treatment as clinically indicated.

**Issue:** One commentator indicated that court ordered medication should not be part of normal treatment but only when other treatments fail.

**Response:** Court ordered medications are for patients who have decompensated due to noncompliance with treatment and after a finding by the court that the proposed treatment is narrowly tailored to give substantive effect to the patient's liberty interest, taking into consideration all relevant circumstances, including the patient's best interests, the benefits to be gained from the treatment, the adverse side effects associated with the treatment and any less intrusive alternative treatment. This should not be confused with routine treatment.

**Conclusion:** The Office does acknowledge the concerns raised by the commenters and will only be seeking court ordered medication over objection under one or more of the following three circumstances: (1) when the patient is medically unable to be committed to CNYPC; (2) when the patient previously had a COPM which has expired; or (3) when the patient is in the RCTP for a clinically appropriate period of time, does not meet the emergency criteria for commitment to CNYPC and would benefit from medication. These conditions will be set forth in the CBO Manual. Additionally, any application for a COPM shall be consistent with *Rivers v. Katz* and, therefore, Office clinicians will have concluded that the proposed treatment is narrowly tailored to give substantive effect to the patient's liberty interest, taking into consideration all relevant circumstances, including the patient's best interests, the benefits to be gained from the treatment, the adverse side effects associated with the treatment and any less intrusive alternative treatment.

## NOTICE OF ADOPTION

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

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

**Filing No.** 1033

**Filing Date:** 2012-10-15

**Effective Date:** 2012-10-31

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

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

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

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

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

**Text or summary was published** in the August 22, 2012 issue of the Register, I.D. No. OMH-34-12-00003-EP.

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

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

#### Assessment of Public Comment

The agency received no public comment.

## REVISED RULE MAKING NO HEARING(S) SCHEDULED

### Limits on Administrative Expenses and Executive Compensation

**I.D. No.** OMH-22-12-00019-RP

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

**Proposed Action:** Amendment of Part 513 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.09, 7.15(a), (b), 31.04, 31.05(a), 41.03, 41.15, 41.18, 41.44, 43.02; and Executive Order No. 38

**Subject:** Limits on Administrative Expenses and Executive Compensation.

**Purpose:** To implement Executive Order No. 38 to limit administrative expenses and executive compensation of providers of services.

**Substance of revised rule:** The State of New York directly or indirectly funds with taxpayer dollars a large number of tax exempt organizations and for-profit entities that provide critical services to New Yorkers in need. The goal of this proposed rule is to ensure that taxpayers' dollars are used properly, efficiently, and effectively to improve the lives of New Yorkers. It is imperative that New York State and the New York State Office of Mental Health ensure that State funds and State-authorized funds are optimized for the purpose of providing services to those individuals who are in need of them. Utilizing State funds and State-authorized funds primarily for the provision of direct care and services helps to guarantee that such funds are providing the greatest benefit to persons in New York State who are in need of mental health services. These regulations, which are required by Executive Order No. 38, will ensure that State funds or State-authorized payments paid to providers of services by the New York State Office of Mental Health are used predominantly to provide direct care and services to persons in need of mental health services.

The New York State Office of Mental Health had previously proposed a new 14 NYCRR Part 513 titled Limits on Administrative Expenses and Executive Compensation. After receiving and reviewing public comment on the proposed rule, the New York State Office of Mental Health is now issuing a revised rule titled Limits on Administrative Expenses and Executive Compensation as follows:

Section 513.1 provides the background and intent of the revised rule, which is to implement Executive Order No. 38, issued by Governor Andrew Cuomo on January 18, 2012.

Section 513.2 sets forth the statutory authority for the promulgation of the rule by the Office of Mental Health (hereinafter the "Office").

Section 513.3 contains definitions for purposes of this Part, including definitions for administrative expenses, covered operating expenses, covered executive, covered provider, executive compensation, Office, program services, program services expenses, related organization, reporting period, State-authorized payments, and State funds.

Section 513.4 contains limits on the use of State funds or State-authorized payments for administrative expenses. The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria and covered providers receiving State funds or State-authorized payments from county or local governments or entities contracting on their behalf, rather than directly from a State agency, pursuant to specified criteria. The revised regulation addresses how the restriction will apply in the event that a covered provider has multiple sources of State funds or State-authorized payments.

Section 513.5 contains limits on executive compensation provided to covered executives. The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria, and covered providers receiving State funds or State-authorized payments from county or local governments or entities contracting on their behalf, rather than directly from a State agency, pursuant to specified criteria. The revised rule addresses the application of this limit if the covered provider has multiple sources of State funds or State-authorized payments.

Section 513.6 sets forth the process and criteria for covered providers to seek waivers of the limit on administrative expenses and the limits on executive compensation.

Section 513.7 specifies the annual reporting requirements for covered providers.

Section 513.8 establishes the process for the imposition of penalties in the event of non-compliance with the limit on administrative expenses or the limits on executive compensation.

The complete text of the regulatory proposal is available at: [http://www.omh.ny.gov/omhweb/policy\\_and\\_regulations/](http://www.omh.ny.gov/omhweb/policy_and_regulations/)

**Revised rule compared with proposed rule:** Substantial revisions were made in sections 513.3, 513.4, 513.5, 513.6, 513.7, 513.8 and 513.9.

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

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

**Public comment will be received until:** 30 days after publication of this notice.

#### Revised Regulatory Impact Statement

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

Section 7.15(a) of the Mental Hygiene Law charges the Commissioner with the responsibility for promoting, establishing, developing, coordinating and conducting programs and services for the benefit of persons with mental illness within the funding available for such purposes.

Section 7.15(b) of the Mental Hygiene Law provides the Commissioner with the authority to cooperate and enter into agreements with other state, local and federal departments or agencies in fulfilling his or her responsibilities.

Section 31.05(a) of the Mental Hygiene Law establishes the criteria for the issuance of an operating certificate, including that the premises, equipment, personnel, records, and program are adequate and appropriate to provide services for persons with mental illness.

Section 41.03 of the Mental Hygiene Law provides that the meaning of operating costs shall be in accordance with and subject to the regulations of the Commissioner of Mental Health.

Sections 41.15 and 41.18 of the Mental Hygiene Law provide that the Commissioner of Mental Health has the authority to approve the net operating costs of programs incurred pursuant to an approved local services plan that are eligible for state aid.

Section 41.44 provides that the Commissioner may provide state aid to local governments and to voluntary agencies within amounts available therefor and subject to regulations established by him or her.

Section 43.02 of the Mental Hygiene Law provides that the Commissioner has the power to establish standards and methods for determining rates of payment made by government agencies pursuant to Title 11 of Article 5 of the Social Services Law for services, other than inpatient services, provided by facilities, including hospitals, licensed by the Office of Mental Health.

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

Executive Order No. 38 directs the Commissioner of each Executive State Agency that provides State financial assistance or State-authorized payments to providers of services, including the Office of Mental Health, to promulgate regulations and take any other actions within the agency's authority, including amending agreements with such providers, to address the extent and nature of a provider's administrative costs and executive compensation that shall be eligible to be reimbursed with State financial assistance or State-authorized payments for operating expenses. Executive Order No. 43 extends the time for agencies to comply with Executive Order No. 38.

2. Legislative objectives: Article 7 of the Mental Hygiene Law provides that the Office of Mental Health and its Commissioner shall plan and work with local governments, voluntary agencies and all providers and consumers of mental health services in order to develop an effective, integrated, comprehensive system for the delivery of all services to persons with mental illness and to create financing procedures and mechanisms to support such a system of services to ensure that persons with mental illness in need of services received appropriate care and treatment.

This regulation serves to comply with Executive Order No. 38 and furthers the legislative policy of providing high quality mental health services to individuals with mental illness in a cost-effective manner.

3. Needs and benefits: The Office of Mental Health is proposing to adopt the following regulation because the State of New York directly or indirectly funds with taxpayer dollars a large number of tax exempt organizations and for-profit entities that provide critical services to New Yorkers in need. The goal of this regulation is to ensure that taxpayers' dollars are used properly, efficiently, and effectively to improve the lives of New Yorkers. In certain instances, providers of services that receive State funds or State-authorized payments have used such funds to pay for excessive administrative costs or inflated compensation for their senior executives, rather than devoting a greater proportion of such funds to providing direct care or services to their clients. Such abuses involving public funds harm both the people of New York who are paying for such services, and those persons who must depend upon such services to be available and well-funded. These regulations, which are required by Executive Order No. 38, will ensure that State funds or State-authorized payments paid by this agency to providers are not used to support excessive compensation or unnecessary administrative costs.

#### 4. Costs:

(a) cost to State government: The costs to State government are expected to be very limited, and efforts to ensure efficient centralization of certain aspects of such implementation are underway.

(b) cost to local government: There are no costs anticipated to local government.

(c) cost to regulated parties: The costs to regulated parties are anticipated to be minimal as most, if not all, of the information that must be reported by such providers is already gathered or reported for other purposes.

5. Local government mandates: These regulatory amendments will not

result in any additional imposition of duties or responsibilities upon county, city, town, village, school or fire districts.

6. Paperwork: The proposed regulatory amendments will require limited additional information to be reported to the agency by providers receiving State funds or State-authorized payments. To the extent feasible, such reporting shall be made electronically to avoid unnecessary paperwork costs.

7. Duplication: The proposed rule does not duplicate, overlap or conflict with any State or Federal statute or rule. However, the proposed rule seeks to minimize the reporting requirements faced by providers by building upon those requirements in the Federal Internal Revenue Code that require certain tax-exempt organizations to report information concerning their executive compensation and administrative costs.

8. Alternatives: No alternatives were considered. Executive Order No. 38 requires the adoption of this proposed regulation.

9. Federal standards: The regulatory amendments do not conflict with Federal standards.

10. Compliance schedule: The rule will become effective upon adoption. The implementation date establishing the limits on administrative expenses and executive compensation will be April 1, 2013.

#### **Revised Regulatory Flexibility Analysis**

A Revised Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this notice because the changes to the proposed rule will not impose any adverse economic impact on small businesses, nor will it impose new reporting, record keeping or other compliance requirements on small businesses or local governments.

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

A Revised Rural Area Flexibility Analysis is not being submitted with this notice because the changes to the proposed rule will not impose any adverse economic impact on rural areas.

#### **Revised Job Impact Statement**

A Revised Job Impact Statement is not being submitted with this notice because it is evident from the subject matter of the regulation that it will have no impact on jobs and employment opportunities.

#### **Assessment of Public Comment**

A Notice of Proposed Rule Making was published in the State Register on May 30, 2012.

All comments received were reviewed and evaluated. Many of the concerns expressed in the comments have been addressed by revisions to the various sections of the proposed regulation. Suggestions from others were determined to be contrary to the goals of the proposed rulemaking.

A number of comments objected generally to the underlying concept of the regulations, stating that the proposed regulation is overly broad in its authority and burdensome in its requirements. The Office of Mental Health believes that the proposed limitations in the regulation further the legitimate goal of ensuring that public funds are properly expended and the use of such funds is properly monitored.

Clarification was requested concerning certain defined terms in the proposed regulation, in particular with respect to their intended scope. In response, and taking into account suggestions submitted, changes were made to the definitions of the following terms: administrative expenses, covered provider, covered executive, executive compensation, program services expenses, related entity, State-authorized payments and State funds.

Some commenters stated that the proposed limits on administrative expenses were burdensome and unnecessary, because they would interfere with existing contracts, because they were possibly duplicative of existing state and federal rules, or they will not enhance the protections already provided by restrictions from State reimbursement rates. Clarification was requested as to what will constitute administrative and program expenses. The proposed regulation has been revised to incorporate an allocation methodology for these two expenses.

There were a wide range of comments and suggestions on the definition of "executive compensation." They covered such topics as: (a) general concerns about application of the definition, (b) exclusions, (c) limitations and application of the definition, and (d) suggestions about surveys and their use. A summary of the comments and suggestions follows:

(a) General concerns regarding the regulation include that it: is too broad since it regulates use of funding sources not emanating from the state; is unrealistic, problematic and intrusive to operations; will adversely affect candidate pools, incumbents, service delivery and the ability of providers to meet the challenges and changes in the health care system; is intrusive to the for-profit sector where executive compensation is a private matter; is faulty in that it will institutionalize abuses through comparability data; and is duplicative as executive compensation is already controlled at the State and federal levels through rate setting, IRS rules and reporting, and the Not-For-Profit Corporation Law. Other comments stated that the regulation would encroach on the State Attorney General's regulation and

enforcement; is arbitrary in its establishment of the thresholds of \$500,000 and 30%; was exclusive of larger corporations; and inappropriately used a percentile standard that will gradually diminish compensation levels and lead to the existence of two levels of compensation. Commenters also suggested that covered providers subject to penalty should be allowed to submit documentation in advance of penalty review.

(b) Other comments focused on exclusions for not-for-profits and for not-for-profit long term care and senior services providers and an elimination of the 75th percentile threshold.

(c) Still other letters related to limitations and application of the definition of "executive compensation." They suggested that executive compensation rules should only be applied to non-State funds or to State and State-authorized funds. The applicability of the rules with regard to contributions of other non-covered entities should be clarified. Also, letters received argued that the period covered by the limits on executive compensation should not begin on January 1, 2013, the executive compensation limits should be revisited periodically to adjust for changes, and the role of executives in the assurance of program services should be recognized.

(d) Commenters recommended several approaches to determining reasonable compensation, such as the use of recognized surveys or independent commissioned surveys or identification and recognition of specific compensation surveys to establish comparisons. It was suggested that surveys should allow for regional and geographic variations. Further, commenters suggested that the regulation also should address instances where a board or governing body does not exist.

The regulation was revised to address the comments on: the period to be covered by the limits on executive compensation, an annual review of the \$199,000 cap and the adjustment thereof, the consideration of the availability of a governing body as alternate to the covered provider's board of directors, the submission of contemporaneous (but not prospective) documentation for penalty review, the recognition of supervisory services of executives as program services, the allocation methodology for reporting administrative and program service costs, the recognition of specific clinical and program personnel as providers of program services, and a method for subcontractors to be advised of the receipt of State or State-authorized funds from a covered provider.

The regulation was not revised to limit the rule to non-State funds, to exclude for-profits from being covered by the regulations, or to alter the 75th percentile threshold because these revisions would compromise the goal of the regulation. Eliminating the executive compensation requirements would eviscerate one of the key objectives of the executive order: limiting the extent of such compensation paid by covered providers that rely to a significant degree upon public funds for their program and administrative services funding. The Office of Mental Health is proposing to adopt this regulation because the State of New York directly or indirectly funds with taxpayer dollars a large number of tax exempt organizations and for-profit entities that provide critical services to New Yorkers in need, and the goal is to ensure that taxpayer dollars are used properly, efficiently and effectively to improve the lives of New Yorkers. In certain instances, service providers that receive State funds or State-authorized payments have used such funds to pay for excessive administrative costs or inflated compensation for their senior executives, rather than devoting a greater proportion of such funds to providing direct care or services to their clients. Such abuses involving public funds harm both the people of New York who are paying for such services and those persons who must depend upon such services to be available and well-funded. These regulations provide a benchmark to ensure that State funds or State-authorized payments paid by this agency to providers are not used to support excessive compensation or unnecessary administrative costs. In part because of the funding of resources, their restriction is necessary to accomplish these objectives.

Some comments stated that the proposed waiver process is overly complex and lacking objective criteria. The revised regulation provides greater flexibility in the filing of a waiver application and also has pushed back the implementation date.

Comments received also criticized the proposed reporting requirements suggesting that they require providing information related to administrative and program expenses in a manner inconsistent with other current reporting obligations. The regulation has been amended to conform some of the requirements to those with which many covered providers must already comply, including provisions incorporating the definitions applicable with non-profits under the IRS Code.

Other submissions asked when penalties for excess compensation would be assessed, what the type of penalties would be imposed, and about the level of severity. Commenters also requested details on the criteria for making penalty determination.

Changes have been made to the Penalties section in the revised text, including extending the time for submissions, a corrective action plan (CAP) and a request for an administrative appeal to 30 calendar days.

The full Assessment of Comments is available on the Office of Mental Health website at: [http://www.omh.ny.gov/omhweb/policy\\_and\\_regulations/](http://www.omh.ny.gov/omhweb/policy_and_regulations/)

## Department of Motor Vehicles

### NOTICE OF WITHDRAWAL

#### Dangerous Repeat DWI Offenders

I.D. No. MTV-41-12-00011-W

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

**Action taken:** Notice of proposed rule making, I.D. No. MTV-41-12-00011-P, has been withdrawn from consideration. The notice of proposed rule making was published in the *State Register* on October 10, 2012.

**Subject:** Dangerous Repeat DWI Offenders.

**Reason(s) for withdrawal of the proposed rule:** Regulation incorrectly submitted.

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

#### Dangerous Repeat DWI Offenders

I.D. No. MTV-44-12-00002-P

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

**Proposed Action:** Addition of Part 132 to Title 15 NYCRR.

**Statutory authority:** Vehicle and Traffic Law, sections 215(a), 510(3)(a) and (d)

**Subject:** Dangerous Repeat DWI Offenders.

**Purpose:** Establish hearings for persons with repeat alcohol related offenses and other serious traffic offenses.

**Text of proposed rule:** PART 132

#### *Dangerous Repeat Alcohol or Drug Offenders*

##### *132.1. Definitions. For the purposes of this Part:*

(a) *Alcohol- or drug-related driving conviction or incident means a conviction of a violation of section 1192 of the Vehicle and Traffic Law, a finding of a violation of section 1192-a of the Vehicle and Traffic Law, a conviction of an offense under the Penal Law for which a violation of section 1192 of the Vehicle and Traffic Law is an essential element, or a finding of refusal to submit to a chemical test under section 1194 of the Vehicle and Traffic Law, not arising out of the same incident.*

##### *(b) Dangerous repeat alcohol or drug offender means:*

(1) *any driver who, within his or her lifetime, has five or more alcohol- or drug-related driving convictions or incidents in any combination; or*

(2) *any driver who, within the 25 years preceding the date of commission of a high-point driving violation, has three or four alcohol- or drug-related driving convictions or incidents in any combination and, in addition, has one or more serious driving offenses within the 25 years preceding the date of the commission of a high-point driving violation.*

(c) *High-point driving violation means any violation for which five or more points are assessed on a violator's driving record pursuant to Section 131.3 of this subchapter.*

(d) *Serious driving offense means (i) a fatal accident; (ii) a driving-related Penal Law conviction; (iii) conviction of two or more high-point driving violations, other than the violation that forms the basis for the record review under Section 132.2 of this Part; or (iv) 20 or more points from any violations, other than the violation that forms the basis for the record review under Section 132.2 of this Part.*

##### *132.2. Lifetime record review.*

*Upon receipt of notice of a driver's conviction for a high-point driving violation, the Commissioner shall conduct a review of the lifetime driving record of the person convicted. If such review indicates that the person convicted is a dangerous repeat alcohol or drug offender, the Commissioner shall issue a proposed revocation of such person's driver license. Such person shall be advised of the right to request a hearing before an*

administrative law judge, prior to such proposed revocation taking effect. The provisions of Part 127 of this Chapter shall be applicable to any such hearing.

132.3. Hearings.

The sole purpose of a hearing scheduled pursuant to this Part is to determine whether there exist unusual, extenuating and compelling circumstances to warrant a finding that the revocation proposed by the Commissioner should not take effect. In making such a determination, the administrative law judge shall take into account a driver's entire driving record. Unless the administrative law judge finds that such unusual, extenuating and compelling circumstances exist, the judge shall issue an order confirming the revocation proposed by the Commissioner.

**Text of proposed rule and any required statements and analyses may be obtained from:** Monica Staats, Department of Motor Vehicles, 6 Empire State Plaza, Rm. 522A, Albany, NY 12228, (518) 474-0871, email: monica.staats@dmv.ny.gov

**Data, views or arguments may be submitted to:** Ida L. Traschen, Department of Motor Vehicles, 6 Empire State Plaza, Rm. 522A, Albany, NY 12228, (518) 474-0871

**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: Vehicle and Traffic Law (VTL) section 215(a) provides that the Commissioner of Motor Vehicles may enact rules and regulations that regulate and control the exercise of the powers of the Department. VTL section 510(3)(a) authorizes the Commissioner to permissively suspend or revoke a driver license upon a conviction of any violation of the VTL. VTL section 510(3)(d) authorizes the Commissioner to suspend or revoke a license if the holder of such license commits habitual and persistent violations of the VTL or any local ordinance, rule or regulation made by local authorities in relation to traffic.

2. Legislative objectives: VTL section 510(3)(a) and section 510(3)(d) authorize the Commissioner to suspend or revoke a driver's license for, respectively, a conviction of any violation of such law or for persistent violations of such law. The purpose of these provisions is to protect the motoring public by authorizing the suspension or revocation of a driver's license where the holder's prior record of driving violations indicates that such person may pose an unacceptable highway safety risk.

In accordance with the legislative objective of enhancing highway safety, this regulation would set forth specific circumstances under which the Commissioner would exercise her existing authority, after an opportunity to be heard, to impose appropriate sanctions against dangerous repeat alcohol or drug offenders in the interest of public safety.

3. Needs and benefits: This regulation establishes the parameters under which the Department of Motor Vehicles would exercise its existing authority to remove dangerous repeat alcohol or drug offenders from our highways. This regulation defines a dangerous repeat alcohol or drug offender as a person who has multiple alcohol- or drug-related convictions on his or her lifetime driving record and/or a combination of serious driving offenses (reckless driving, passing a stopped school bus, for example) in combination with other serious offenses and/or fatal accidents. If a person is convicted of a high-point violation, the Commissioner will conduct a review of the motorist's lifetime record to assess if such person is a dangerous repeat alcohol or drug offender. If the review finds he or she is such an offender, his or her driver's license may be taken away after an opportunity to be heard before an Administrative Law Judge.

This regulation strikes an appropriate and necessary balance between the due process needs of the motorist and the protection of all highway users by clearly establishing the grounds under which the Commissioner may revoke the licenses of persons who have multiple serious alcohol- or drug-related offenses on their driving record. Importantly, this regulation puts motorists on notice of the potential consequences of the commission and/or conviction of the any of the offenses/incidents set forth in this proposed rule.

4. There are no costs associated with this proposal to the State or local governments.

5. Local government mandates: The proposal does not impose any mandates on local governments.

6. Paperwork: The proposal does not impose any additional paper requirements on the Department.

7. Duplication: This proposal does not duplicate, overlap or conflict with any relevant rule or legal requirement of the State and federal governments.

8. Alternatives: A no action alternative was not considered.

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

10. Compliance schedule: Compliance is immediate.

**Regulatory Flexibility Analysis**

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not attached because this rule will not have a disproportionate impact on small businesses or local governments, nor will it impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on small businesses or local governments.

**Rural Area Flexibility Analysis**

A RAFA is not attached because this rule will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on public or private entities in rural areas.

**Job Impact Statement**

A Job Impact Statement is not submitted with this rulemaking, because it will not have any impact on job creation or development in New York State.

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## Office for People with Developmental Disabilities

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### ERRATUM

A Notice of Revised Rule Making, I.D. No. PDD-52-11-00020-RP, pertaining to Person-Centered Behavioral Intervention, published in the October 17, 2012 issue of the *State Register* contained a typo in the substance of the rule. Following is the corrected substance of the revised rule:

**Substance of revised rule:** The revised proposed regulations establish new requirements concerning behavioral interventions in the OPWDD system. OPWDD is proposing the addition of a new 14 NYCRR Section 633.16, which contains comprehensive requirements for supports and interventions related to challenging behavior. These new requirements will help agencies provide high quality services, and will protect the rights and welfare of individuals receiving services.

The new Section 633.16 contains a number of provisions to protect the health, safety and rights of individuals who engage in challenging behaviors. Among the provisions of Section 633.16 are the following:

- Aversive conditioning is prohibited.
- Agencies must conduct a functional behavioral assessment to obtain relevant information for effective intervention planning before a behavior support plan is developed to address challenging behavior. Specific components must be addressed or included in the functional behavioral assessment.
- Behavior support plans must be developed that are specific to each person who exhibits challenging behavior. These plans specify the interventions that may be used. The regulations establish a number of components that must be included in the plan. Among the specific required components of behavior support plans is the inclusion of a hierarchy of behavioral approaches, strategies, and supports to address the behavior(s) requiring intervention, with the preferred methods being positive approaches, strategies and supports.
- Additional safeguards are established for plans that contain "restrictive/intrusive interventions" or limitations on a person's rights." "Restrictive/intrusive interventions" are defined in the regulation and include specific behavioral interventions such as "intermediate" and "restrictive" physical intervention techniques (hands-on techniques), use of "time-out," use of mechanical restraining devices, and use of medication to modify or control challenging behavior.
- Safeguards and protections related to restrictive/intrusive interventions and limitations on a person's rights include:
  - Additional components must be included in the person's behavior support plan. Plans must be developed or supervised by a licensed psychologist, licensed clinical social worker, or behavioral intervention specialist (either Level 1 or 2, with the appropriate supervision outlined in the regulation). Those providers who demonstrate sustained hardship in recruiting employees or contractors who meet the specified qualifications, may apply to OPWDD for a waiver.
  - Plans must be reviewed and sanctioned before implementation by a behavior plan review /human rights committee. Required membership and procedures for these committees are established. (The requirement for committee review does not apply to monitoring plans that include medication to treat a co-occurring diagnosed psychiatric condition. The

regulations describe standards for determining what constitutes a “co-occurring diagnosed psychiatric disorder”).

- Informed consent is required for the use of restrictive/intrusive interventions and for the use of psychotropic medications. Procedures are established to determine whether the person receiving services is capable of providing informed consent. If an individual is not capable of providing informed consent, procedures are established for obtaining informed consent from designated surrogate decision makers (e.g. actively involved parents and actively involved family members). In the event that no other surrogate is reasonably available and willing, consent can be sought from the Willowbrook Consumer Advisory Board or an informed consent committee. Required membership and procedures are established for the informed consent committee. Consent can also be obtained from a court.

- Procedures are established for objecting to interventions in behavior support plans, and addressing a lack of informed consent. Procedures are also established concerning refusal by the individual receiving services to take medication.

- Requirements are included for training of staff, family care providers and respite substitute providers.

- Additional safeguards are established for the use of physical intervention techniques (hands-on techniques). Physical intervention techniques are categorized as protective, intermediate or restrictive. Among these safeguards are requirements for training and certification in the use of the techniques.

- Additional safeguards are established for the limitations on a person’s rights.

- Additional safeguards are established for the use of “time-out.” “Time-out” includes both exclusionary time-out (placing a person in a specific time-out room), and non-exclusionary time-out (removing the positively reinforcing environment from the individual.) Environmental requirements are established for time-out rooms.

- Additional safeguards are established for the use of mechanical restraining devices.

- Additional safeguards are established for the use of medication to modify or control challenging behavior, and/or to treat a diagnosed co-occurring psychiatric disorder. Safeguards include monitoring plans to be completed when medication is used to treat co-occurring diagnosed psychiatric conditions.

- The new Section 633.16 references existing requirements in Section 633.17(a)(18) concerning medication regimen reviews. Results of these reviews must be provided to prescribers and the program planning team.

- The regulations specify that restrictive/intrusive interventions cannot be used in an emergency, except for intermediate and restrictive physical intervention techniques and the use of medication. Limitations on a person’s rights can also be used in an emergency.

- Provisions are established for phasing-in the requirements. Requirements for new behavior support plans (and associated informed consent) are applied 60 days after the regulation becomes effective, and requirements for existing plans (and associated informed consent) are applied a year after that. This will enable agencies to apply the new development standards to existing behavior support plans during regularly scheduled reviews.

The regulation also amends 14NYCRR Section 681.13, which contains requirements applicable to behavior management in ICF/DD facilities. The provisions of this section address many of the same issues that are addressed in Section 633.16. The amendments to Section 681.13 phase out the requirements of that section in conjunction with the phase-in of the requirements of the new Section 633.16. Once Section 633.16 is fully phased in, Section 681.13 will no longer be effective. Outdated and duplicative requirements in Part 81 are deleted.

14NYCRR Part 624 is amended so that new definitions of categories of abuse become effective once Section 633.16 is fully phased in. These new definitions conform to Section 633.16 so that if interventions are used which are not in accordance with the requirements of the new section, their use is considered to be abuse (unless actions were taken that were necessary to address an immediate risk to the health or safety of the person or others). Definitions in the glossary of Part 624 are also changed to conform to the new definitions in Section 633.16.

14NYCRR Part 633 is amended to enhance protections related to limiting the rights of a person receiving services and to conform to protections related to limitation of rights in the new Section 633.16. Definitions in Section 633.99 are also changed to conform to the new definitions used in Section 633.16.

## REVISED RULE MAKING HEARING(S) SCHEDULED

### Limits on Administrative Expenses and Executive Compensation

I.D. No. PDD-22-12-00020-RP

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

**Proposed Action:** Addition of Part 645 to Title 14 NYCRR.

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

**Subject:** Limits on administrative expenses and executive compensation.

**Purpose:** To curb abuses in executive comp. and administrative expenses and ensure that taxpayer dollars are used to help persons in need.

**Substance of revised rule:** The proposed regulations add a new Part 645 to 14 NYCRR, titled Limits on Administrative Expenses and Executive Compensation.

Section 645.1 contains definitions for purposes of this Part, including definitions for administrative expenses, covered operating expenses, covered executive, covered provider, executive compensation, program services, program services expenses, related organization, reporting period, State-authorized payments, and State funds.

Section 645.2. Limits on Administrative Expenses. Contains limits on the use of State funds or State-authorized payments for administrative expenses.

The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria.

The restriction will apply to covered providers receiving State funds or State-authorized payments from county or local governments, rather than directly from a State agency, pursuant to specified criteria.

The revised regulation addresses how the restriction will apply in the event that a covered provider has multiple sources of State funds or State-authorized payments.

Section 645.3. Limits on Executive Compensation. Contains restrictions on executive compensation provided to covered executives.

The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria.

The restriction will apply to covered providers receiving State funds or State-authorized payments from county or local governments, rather than directly from a State agency, pursuant to specified criteria.

The revised rule addresses the application of this limit if the covered provider has multiple sources of State funds or State-authorized payments.

Section 645.4. Waivers. Processes are established for covered providers to seek waivers of the limit on administrative expenses and the limits on executive compensation.

Section 645.5. Reporting.

Covered providers are required to report information on an annual basis.

Section 645.6. Penalties.

A process is established for the imposition of penalties in the event of non-compliance with the limit on administrative expenses or the limits on executive compensation.

A copy of the full text of the regulatory proposal is available on the OPWDD website at [www.opwdd.ny.gov](http://www.opwdd.ny.gov).

**Public hearing(s) will be held at:** 3:00 p.m., Dec. 17, 2012 at Office for People with Developmental Disabilities, Counsel’s Office Conference Rm., 44 Holland Ave., Albany, NY; and 10:30 a.m., Dec. 19, 2012 at Office for People with Developmental Disabilities, Counsel’s Office Conference Rm., 44 Holland Ave., Albany, NY.

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

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

**Revised rule compared with proposed rule:** Substantial revisions were made in Part 645.

**Text of revised proposed rule and any required statements and analyses may be obtained from** Barbara Brundage, Director, Regulatory Affairs Unit, Office for People With Developmental Disabilities, 44 Holland Ave., 3rd Floor, Albany, NY 12229, (518) 474-1830, email: [barbara.brundage@opwdd.ny.gov](mailto:barbara.brundage@opwdd.ny.gov)

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

**Public comment will be received until:** December 24, 2012.

**Additional matter required by statute:** Pursuant to the requirements of the State Environmental Quality Review Act, OPWDD, as lead agency, has

determined that the action described herein will have no effect on the environment, and an E.I.S. is not needed.

#### **Revised Regulatory Impact Statement**

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 concerning 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 establish limits on administrative expenses and executive compensation.

3. Needs and benefits: In January of this year, Governor Cuomo issued Executive Order 38, which directed each Executive State agency that provides State financial assistance or State-authorized payments to providers of services to promulgate regulations to address the extent and nature of a provider's administrative expenses and executive compensation that are eligible to be reimbursed with State financial assistance or State-authorized payments for operating expenses.

State Government in New York directly or indirectly funds, or authorizes reimbursements with taxpayer dollars, to a large number of tax exempt organizations and for-profit entities that provide critical services to New Yorkers in need. State Government in New York also has an ongoing obligation to ensure that taxpayers' dollars are used properly, efficiently and effectively to improve the lives of New Yorkers and our communities.

In certain instances, providers of services that receive State funds or State-authorized payments have used such funds to pay for excessive administrative expenses and outsized compensation for their senior executives, rather than devoting a greater proportion of such funds to providing direct care or services to individuals. Such abuses involving public funds harm both the people of New York who are paying for such services, and those persons who must depend upon such services to be available and well-funded.

These regulations are being proposed to curb such abuses in executive compensation and administrative costs and ensure that taxpayer dollars are used first and foremost to help New Yorkers in need.

4. Costs:  
a. Costs to the Agency and to the State and its local governments: The amendments do not make any changes in the overall amount of State funds and State-authorized payments which are provided to private agencies. Therefore, no changes are expected in costs to OPWDD, New York State or local governments.

b. Costs to private regulated parties: There will be no overall changes in the level of State funds or State-authorized payments received by agencies. In certain instances providers of services that receive State funds or State-authorized payments which currently use such funds to pay for excessive administrative expenses and outsized compensation for their senior executives will be required to redirect the expenditure of funds to the programs that serve individuals with developmental disabilities.

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 proposed amendments require covered providers to submit a new form to OPWDD on an annual basis in order to submit data necessary for OPWDD to monitor compliance with the requirements and for New York State to assess the impact of the requirements on the use of public funds to support excessive executive compensation and administrative costs among providers. Providers that pay executive over \$199,000 will have to document that they meet the 75th percentile and governing body review criteria set forth in regulation. Paperwork will also be needed in the event that the provider seeks a waiver for the limit on executive compensation or the limit on administrative costs.

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 was required to propose these regulations pursuant to Executive Order 38 and did not consider any alternatives.

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: The rule will become effective upon adoption. The implementation date establishing the limits on administrative expenses and executive compensation will be April 1, 2013.

#### **Revised Regulatory Flexibility Analysis**

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this notice because the proposed rule

will not impose any adverse economic impact on small businesses, nor will it impose new reporting, recordkeeping or other compliance requirements on small businesses or local governments.

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

A Rural Area Flexibility Analysis is not being submitted with this notice because the proposed rule will not impose any adverse economic impact on rural areas.

#### **Revised Job Impact Statement**

A Job Impact Statement is not being submitted with this notice because it is evident from the subject matter of the regulation that it will have no impact on jobs and employment opportunities.

#### **Assessment of Public Comment**

A Notice of Proposed Rule Making was published in the State Register on May 30, 2012.

All comments received were reviewed and evaluated. Many of the concerns expressed in the comments have been addressed by revisions to the various sections of the proposed regulation. Suggestions from others were determined to be contrary to the goals of the proposed rulemaking.

A number of comments objected generally to the underlying concept of the regulations, stating that the proposed regulation is overly broad in its authority and burdensome in its requirements. OPWDD believes that the proposed limitations in the regulation further the legitimate goal of ensuring that public funds are properly expended and the use of such funds is properly monitored.

Clarification was requested concerning certain defined terms in the proposed regulation, in particular with respect to their intended scope. In response, and taking into account suggestions submitted, changes were made to the definitions of the following terms: administrative expenses, covered provider, covered executive, executive compensation, program services expenses, related entity, State-authorized payments and State funds.

Some commenters stated that the proposed limits on administrative expenses were burdensome and unnecessary, because they would interfere with existing contracts, because they were possibly duplicative of existing state and federal rules, or they will not enhance the protections already provided by restrictions from State reimbursement rates.

Clarification was requested as to what will constitute administrative and program expenses. The proposed regulation has been revised to incorporate an allocation methodology for these two expenses.

There were a wide range of comments and suggestions on the definition of "executive compensation." They covered such topics as: (a) general concerns about application of the definition, (b) exclusions, (c) limitations and application of the definition, and (d) suggestions about surveys and their use. A summary of the comments and suggestions follows:

(a) General concerns regarding the regulation include that it: is too broad since it regulates use of funding sources not emanating from the state; is unrealistic, problematic and intrusive to operations; will adversely affect candidate pools, incumbents, service delivery and the ability of providers to meet the challenges and changes in the health care system; is intrusive to the for-profit sector where executive compensation is a private matter; is faulty in that it will institutionalize abuses through comparability data; and is duplicative as executive compensation is already controlled at the State and federal levels through rate setting, IRS rules and reporting, and the Not-For-Profit Corporation Law. Other comments stated that the regulation would encroach on the State Attorney General's regulation and enforcement; is arbitrary in its establishment of the thresholds of \$500,000 and 30%; was exclusive of larger corporations; and inappropriately used a percentile standard that will gradually diminish compensation levels and lead to the existence of two levels of compensation. Commenters also suggested that covered providers subject to penalty should be allowed to submit documentation in advance of penalty review;

(b) Other comments focused on exclusions for not-for-profits and for not-for-profit long term care and senior services providers and an elimination of the 75th percentile threshold.

(c) Still other letters related to limitations and application of the definition of "executive compensation." They suggested that executive compensation rules should only be applied to non-State funds or to State and State-authorized funds. The applicability of the rules with regard to contributions of other non-covered entities should be clarified. Also, letters received argued that the period covered by the limits on executive compensation should not begin on January 1, 2013, the executive compensation limits should be revisited periodically to adjust for changes, and the role of executives in the assurance of program services should be recognized.

(d) Commenters recommended several approaches to determining reasonable compensation, such as the use of recognized surveys or independent commissioned surveys or identification and recognition of specific

compensation surveys to establish comparisons. It was suggested that surveys should allow for regional and geographic variations. Further, commenters suggested that the regulation also should address instances where a board or governing body does not exist.

The regulation was revised to address the comments on: the period to be covered by the limits on executive compensation, an annual review of the \$199,000 cap and the adjustment thereof, the consideration of the availability of a governing body as alternate to the covered provider's board of directors, the submission of contemporaneous (but not prospective) documentation for penalty review, the recognition of supervisory services of executives as program services, the allocation methodology for reporting administrative and program service costs, the recognition of specific clinical and program personnel as providers of program services, and a method for subcontractors to be advised of the receipt of State or State-authorized funds from a covered provider.

The regulation was not revised to limit the rule to non-State funds, to exclude for-profits from being covered by the regulations, or to alter the 75th percentile threshold because these revisions would compromise the goal of the regulation. Eliminating the executive compensation requirements would eviscerate one of the key objectives of the executive order: limiting the extent of such compensation paid by covered providers that rely to a significant degree upon public funds for their program and administrative services funding. OPWDD is proposing to adopt this regulation because the State of New York directly or indirectly funds with taxpayer dollars a large number of tax exempt organizations and for-profit entities that provide critical services to New Yorkers in need, and the goal is to ensure that taxpayer dollars are used properly, efficiently and effectively to improve the lives of New Yorkers. In certain instances, service providers that receive State funds or State-authorized payments have used such funds to pay for excessive administrative costs or inflated compensation for their senior executives, rather than devoting a greater proportion of such funds to providing direct care or services to their clients. Such abuses involving public funds harm both the people of New York who are paying for such services and those persons who must depend upon such services to be available and well-funded. These regulations provide a benchmark to ensure that State funds or State-authorized payments paid by this agency to providers are not used to support excessive compensation or unnecessary administrative costs. In part because of the funding of resources, their restriction is necessary to accomplish these objectives.

Some comments stated that the proposed waiver process is overly complex and lacking objective criteria. The revised regulation provides greater flexibility in the filing of a waiver application and also has pushed back the implementation date.

Comments received also criticized the proposed reporting requirements suggesting that they require providing information related to administrative and program expenses in a manner inconsistent with other current reporting obligations. The regulation has been amended to conform some of the requirements to those with which many covered providers must already comply, including provisions incorporating the definitions applicable with non-profits under the IRS Code.

Other submissions asked when penalties for excess compensation would be assessed, what the type of penalties would be imposed, and about the level of severity. Commenters also requested details on the criteria for making penalty determination. Changes have been made to the Penalties section in the revised text, including extending the time for submissions, a corrective action plan (CAP) and a request for an administrative appeal to 30 calendar days.

The full Assessment of Comments is available on the OPWDD website at [www.opwdd.ny.gov](http://www.opwdd.ny.gov)

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## Public Service Commission

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

#### Renewable Portfolio Standard Structure and Fund Allocation to Further Support On-Site Wind Development

I.D. No. PSC-44-12-00005-P

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

**Proposed Action:** The Commission is considering a petition by Distributed Wind Energy Association and Sustainable Energy Developments, Inc.

requesting changes to the Renewable Portfolio Standard as it relates to on-site wind development.

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

**Subject:** Renewable Portfolio Standard structure and fund allocation to further support on-site wind development.

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

**Substance of proposed rule:** The Commission is considering whether to adopt, modify, or reject, in whole or in part, the request of the Distributed Wind Energy Association (DWEA) and Sustainable Energy Developments, Inc. (SED) to change the Renewable Portfolio Standard (RPS) as it relates to on-site wind development. In particular, the Commission is considering the parties' petition "To Offer Programmatic Suggestions to the Customer-sited Tier of the Renewable Portfolio Standard" dated October 2, 2012.

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

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

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

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

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

(03-E-0188SP34)

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

#### Tariff Regarding Remote Net Metering of Micro-Hydro Electric Generation for Farm and Non-Residential Customers

I.D. No. PSC-44-12-00006-P

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

**Proposed Action:** The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by Consolidated Edison Company of New York, Inc for the remote net metering of micro-hydro electric generation for farm and non-residential customers.

**Statutory authority:** Public Service Law, section 66-j

**Subject:** Tariff regarding remote net metering of micro-hydro electric generation for farm and non-residential customers.

**Purpose:** To provide for remote net metering of micro-hydroelectric generation for farm and non-residential customers.

**Substance of proposed rule:** The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by Consolidated Edison Company of New York, Inc. to effectuate amendments to Public Service Law (PSL) Section 66-j resulting from Chapter 318 of the Laws of 2012, which became effective on August 1, 2012. The amendments provide for the remote net metering of micro-hydro electric generation by farm and non-residential customers. The New York State Standard Interconnection Requirements (SIR) document will also be modified. The filing has an effective date of February 1, 2013. The Commission may apply aspects of its decision here to the requirements for tariffs of 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](mailto: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](mailto:secretary@dps.ny.gov)

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

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

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

(12-E-0394SP1)

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

**Tariff Regarding Remote Net Metering of Micro-Hydro Electric Generation for Farm and Non-Residential Customers**

I.D. No. PSC-44-12-00007-P

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

**Proposed Action:** The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by Central Hudson Gas and Electric Corporation for the remote net metering of micro-hydro electric generation for farm and non-residential customers.

**Statutory authority:** Public Service Law, section 66-j

**Subject:** Tariff regarding remote net metering of micro-hydro electric generation for farm and non-residential customers.

**Purpose:** To provide for remote net metering of micro-hydroelectric generation for farm and non-residential customers.

**Substance of proposed rule:** The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by Central Hudson Gas and Electric Corporation to effectuate amendments to Public Service Law (PSL) Section 66-j resulting from Chapter 318 of the Laws of 2012, which became effective on August 1, 2012. The amendments provide for the remote net metering of micro-hydro electric generation by farm and non-residential customers. The New York State Standard Interconnection Requirements (SIR) document will also be modified. The filing has an effective date of February 1, 2013. The Commission may apply aspects of its decision here to the requirements for tariffs of 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. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530, email: secretary@dps.ny.gov

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

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

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

(12-E-0393SP1)

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

**Tariff Regarding Remote Net Metering of Micro-Hydro Electric Generation for Farm and Non-Residential Customers**

I.D. No. PSC-44-12-00008-P

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

**Proposed Action:** The Commission is considering approving, modifying or rejecting, in whole or in part, a tariff filing by Niagara Mohawk Power Corp d/b/a National Grid for the remote net metering of micro-hydro electric generation for farm and non-residential customers.

**Statutory authority:** Public Service Law, section 66-j

**Subject:** Tariff regarding remote net metering of micro-hydro electric generation for farm and non-residential customers.

**Purpose:** To provide for net metering of micro-hydroelectric generation for farm and non-residential customers.

**Substance of proposed rule:** The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by the Niagara Mohawk Power Corporation d/b/a National Grid to effectuate amendments to Public Service Law (PSL) Section 66-j resulting from Chapter 318 of the Laws of 2012, which became effective on August 1, 2012. The amendments provide for the remote net metering of micro-hydro electric

generation by farm and non-residential customers. The New York State Standard Interconnection Requirements (SIR) document will also be modified. The filing has an effective date of February 1, 2013. The Commission may apply aspects of its decision here to the requirements for tariffs of 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. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530, email: secretary@dps.ny.gov

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

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

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

(12-E-0396SP1)

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

**Tariff Regarding Remote Net Metering of Micro-Hydro Electric Generation for Farm and Non-Residential Customers**

I.D. No. PSC-44-12-00009-P

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

**Proposed Action:** The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by the New York State Electric and Gas Corp for the remote net metering of micro-hydro electric generation for farm and non-residential customers.

**Statutory authority:** Public Service Law, section 66-j

**Subject:** Tariff regarding remote net metering of micro-hydro electric generation for farm and non-residential customers.

**Purpose:** To provide for remote net metering of micro-hydroelectric generation for farm and non-residential customers.

**Substance of proposed rule:** The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by the New York State Electric and Gas Corporation to effectuate amendments to Public Service Law (PSL) Section 66-j resulting from Chapter 318 of the Laws of 2012, which became effective on August 1, 2012. The amendments provide for the remote net metering of micro-hydro electric generation by farm and non-residential customers. The New York State Standard Interconnection Requirements (SIR) document will also be modified. The filing has an effective date of February 1, 2013. The Commission may apply aspects of its decision here to the requirements for tariffs of 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. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530, email: secretary@dps.ny.gov

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

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

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

(12-E-0395SP1)

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

**Tariff Regarding Remote Net Metering of Micro-Hydro Electric Generation for Farm and Non-Residential Customers**

**I.D. No.** PSC-44-12-00010-P

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

**Proposed Action:** The Commission is considering approving, modifying or rejecting, in whole or in part, a tariff filing by Rochester Gas & Electric Corporation for the remote net metering of micro-hydro electric generation for farm and non-residential customers.

**Statutory authority:** Public Service Law, section 66-j

**Subject:** Tariff regarding remote net metering of micro-hydro electric generation for farm and non-residential customers.

**Purpose:** To provide for remote net metering of micro-hydroelectric generation for farm and non-residential customers.

**Substance of proposed rule:** The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by the Rochester Gas and Electric Corporation to effectuate amendments to Public Service Law (PSL) Section 66-j resulting from Chapter 318 of the Laws of 2012, which became effective on August 1, 2012. The amendments provide for the remote net metering of micro-hydro electric generation by farm and non-residential customers. The New York State Standard Interconnection Requirements (SIR) document will also be modified. The filing has an effective date of February 1, 2013. The Commission may apply aspects of its decision here to the requirements for tariffs of 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](mailto:leann.ayer@dps.ny.gov)

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

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

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

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

(12-E-0397SP1)

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

**Tariff Regarding Remote Net Metering of Micro-Hydro Electric Generation for Farm and Non-Residential Customers**

**I.D. No.** PSC-44-12-00011-P

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

**Proposed Action:** The Commission is considering approving, modifying or rejecting, in whole or in part, a tariff filing by Orange and Rockland Utilities, Inc. for the remote net metering of micro-hydro electric generation for farm and non-residential customers.

**Statutory authority:** Public Service Law, section 66-j

**Subject:** Tariff regarding remote net metering of micro-hydro electric generation for farm and non-residential customers.

**Purpose:** To provide for remote net metering of micro-hydroelectric generation for farm and non-residential customers.

**Substance of proposed rule:** The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by Orange and Rockland Utilities Inc. to effectuate amendments to Public Service Law (PSL) Section 66-j resulting from Chapter 318 of the Laws of 2012, which became effective on August 1, 2012. The amendments provide for the remote net metering of micro-hydro electric generation by farm and non-residential customers. The New York State Standard Interconnection Requirements (SIR) document will also be modified. The filing has an ef-

fective date of February 1, 2013. The Commission may apply aspects of its decision here to the requirements for tariffs of 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](mailto:leann.ayer@dps.ny.gov)

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

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

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

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

(12-E-0398SP1)

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

**Petition for the Submetering of Electricity**

**I.D. No.** PSC-44-12-00012-P

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

**Proposed Action:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by CityStation East, LLC to submeter electricity at 1520 6th Avenue, Troy, New York.

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

**Subject:** Petition for the submetering of electricity.

**Purpose:** To consider the request of CityStation East, LLC to submeter electricity at 1520 6th Avenue, Troy, New York.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by CityStation East, LLC to submeter electricity at 1520 6th Street, Troy, New York, located in the territory of Niagara Mohawk Power Corporation d/b/a National Grid.

*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](mailto:leann.ayer@dps.ny.gov)

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

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

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

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

(12-E-0446SP1)

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## Racing and Wagering Board

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**EMERGENCY  
RULE MAKING**

**The Ability of a New Owner of a Claimed Horse to Void the Claim**

**I.D. No.** RWB-44-12-00013-E

**Filing No.** 1038

**Filing Date:** 2012-10-16

**Effective Date:** 2012-10-19

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

**Action taken:** Amendment of section 4038.5(a) of Title 9 NYCRR.

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

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

**Specific reasons underlying the finding of necessity:** The Board has determined that immediate adoption of this rule is necessary for the preservation of the public safety and general welfare and that compliance with the requirements of subdivision 1 of Section 202 of the State Administrative Procedure Act would be contrary to the public interest.

Between November 2011 and March 2012, 21 thoroughbred horses in New York State died or were euthanized while racing at Aqueduct Race Track. Their deaths prompted a comprehensive analysis of the circumstances and possible causes for the deaths of these horses by the New York State Task Force on Racehorse Health and Safety. One common aspect in these races was the fact that the horse that broke down was involved in a claiming race. This rule is necessary to remove an incentive that a trainer or owner may have for entering an unsound horse in claiming race for the purpose of racing and potentially transferring a horse without proper regard to the horse's well-being and the integrity of racing. The Board previously adopted an amendment to Section 4038.5 that allowed for a claim to be voided if the horse died during the race or was euthanized on the racetrack. The Task Force recommended this amendment be adopted on an emergency basis to more adequately remove any incentive for racing unsound claiming horses.

Given the danger of a horse breaking down, and the safety threat presented to both the horse and the jockeys in close proximity, this rule is necessary to protect the safety of human and equine athletes. Thoroughbred horses travel over the racetrack at an average speed of approximately 40 miles per hour, sometimes exceeding that average as they sprint to the finish or sprint to gain positional advantage. An unsound horse racing on short rest may be forced to race beyond its limits and result in a fatal breakdown, oftentimes in a sudden or uncontrollable breakdown.

This rule is also necessary to protect the general welfare of the horse racing industry and the thousands of jobs that are created through it. Public confidence in both the process of racing and in pari-mutuel wagering system is necessary for the sport to survive, and with it the jobs and revenue generated in support of government. Claiming races play an essential part of thoroughbred racing and pari-mutuel wagering. This rule is necessary to ensure integrity in the claiming process, and in turn ensure that the when a horse steps onto a race track, it is doing so for the purpose of winning and not merely to foster a transaction.

**Subject:** The ability of a new owner of a claimed horse to void the claim.

**Purpose:** To remove the incentive to horse owners to race substandard horses in a claiming race.

**Text of emergency rule:** Under subdivision (a) of Section 4038.5 of Title 9 NYCRR, Item (iii) is added and Item (i) is amended to read as follows:

- i. the claim is voidable at the discretion of the new owner pursuant to the conditions stated in section [4038.18] 4038.19 of this subchapter unless the age or sex of such horse has been misrepresented, and subject to the provisions of subdivision (b) of this section; and
- ii. a claim shall be void for any horse that dies during a race or is euthanized on the track following a race[.]; and
- iii. a claim is voidable at the discretion of the new owner, for a period of one hour after the race is made official, for any horse that is vanned off the track after the race.

**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 13, 2013.

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

#### **Regulatory Impact Statement**

1. Statutory authority and legislative objectives of such authority: The Board is authorized to promulgate this rule pursuant to Racing Pari-Mutuel Wagering and Breeding Law section 101(1). Under section 101, the Board has general jurisdiction over all horse racing activities and all pari-mutuel thoroughbred racing activities.

2. Legislative objectives: To enable the New York State Racing and Wagering Board to preserve the integrity of pari-mutuel racing, while generating reasonable revenue for the support of government.

3. Needs and benefits: This rulemaking is necessary to assure integrity, safety and public confidence in claiming races by removing incentives to use the claiming race process as a means of racing and transferring unsound horses. This rulemaking removes the incentive to enter an unsound horse in a claiming race with the intended goal of protecting both the health and safety of the equine and human athlete.

A claiming horse is, in effect, offered for sale at a designated price within the range of the claiming race at which they are entered by their owners. The potential buyer of a horse in a claiming race must enter his claim before the race. By entering a horse in a claiming race, the owner is offering his horse for sale to another individual.

This amendment will reduce the incidence of injuries/deaths in horse races by changing the claiming rule to allow a successful claimant to void a claim when the horse is unable to walk off the track and must be transported – or vanned – off the race track. The current rule provides a regulatory mechanism by which a successful claimant may void a claim in the event that a horse dies during the race or is euthanized on the track.

Adoption of this amendment was recommended by the New York Task Force on Racehorse Health and Safety, which recently released its report of investigation concerning the death of 21 thoroughbred race horse between November 2011 and March 2012. The report stated: “The Task Force recommends that the NYSRWB Rule 4038.5 be amended to provide that a claim is voidable, at the discretion of the claimant and within one hour of the conclusion of the race, for a horse that is vanned off the track.” The report further states: “The Task Force believes the NYSRWB emergency amendment to Rule 4038 (in April 2012) represents an improvement by establishing a deterrent to the willful entry of a compromised horse, but that it should be further amended to provide that a claim is voidable by the claimant within one hour of the conclusion of the race if the horse is vanned off the track. The voiding of a claim should not require the death of a horse.”

#### 4. Costs:

(a) Costs to regulated parties for the implementation of and continuing compliance with the rule: None.

(b) Costs to the agency, the state and local governments for the implementation and continuation of the rule: None.

(c) The information, including the source(s) of such information and the methodology upon which the cost analysis is based: Board staff reviewed the cost factors and determined that the rule can be implemented using the existing system for voiding a claim, and no additional costs will be added.

(d) Where an agency finds that it cannot provide a statement of costs, a statement setting forth the agency's best estimate, which shall indicate the information and methodology upon which the estimate is based and the reason(s) why a complete cost statement cannot be provided. Not applicable.

5. Local government mandates: None. The New York State Racing and Wagering Board is the only governmental entity authorized to regulate pari-mutuel harness racing activities.

6. Paperwork: There will be no additional paperwork. The process will rely on the existing administrative forms and processes for voiding a claim.

7. Duplication: None.

8. Alternatives. Proposals include allowing the claimant to void a claim immediately after a race for no reason or giving race secretaries authority to include the above condition in claiming races. These alternatives were considered impractical.

The Board also considered a rule to required the stewards to consult with a designated veterinarian before voiding a claims for a horse that has suffered a catastrophic injury or death before it was unsaddled following its race. This alternative was rejected in favor of the proposed rule, which is a bright line threshold rather than an arguably judgmental determination.

9. Federal standards: None.

10. Compliance schedule: As an emergency rule, the amendments can be implemented immediately upon submission to the Department of State.

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

As is evident by the nature of this rulemaking, this proposal affects the voiding of claims where a horse is injured during a race and requires transportation off the track and will not have an adverse affect on jobs or small businesses. The narrow economic impact of this amendment is limited to those instances where a claim on a thoroughbred race horse is voidable if the horse is unable to walk off the race track and is transported off the track. The Board previously adopted a similar rule that allowed a claim to be voided if the horse dies on the track or is euthanized. Since that rule was adopted as an emergency rule in April 2012, there has been only one instance of a claimed horse dying on the track. The indirect economic impact of this rule is that it will discourage horse owners from entering unsound horses in claiming races. The Board believes that this limited economic impact will not adversely impact rural areas, jobs, small businesses or local governments and does not require a Regulatory Flexibility Statement, Rural Area Flexibility Statement or Job Impact Statement because it will not impose an adverse impact on rural areas, nor will it affect jobs. This amendment is intended to reduce an incentive to race an unsound horse. A Regulatory Flexibility Statement and a Rural Area Flexibility Statement are not required because the rule does not adversely

affect small business, local governments, public entities, private entities, or jobs in rural areas. There will be no impact for reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. A Jobs Impact Statement is not required because this rule amendment will not adversely impact jobs. This rulemaking does not impact upon a small business pursuant to such definition in the State Administrative Procedure Act § 102 (8) nor does it negatively affect employment. The proposal will not impose adverse economic impact on reporting, recordkeeping or other compliance requirements on small businesses in rural or urban areas nor on employment opportunities. The rule does not impose any technological changes on the industry either.

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## Department of State

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

#### Administrative Expenses and Executive Compensation of Providers of Services to New Yorkers

**I.D. No.** DOS-22-12-00017-RP

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

**Proposed Action:** Addition of Part 144 to Title 19 NYCRR.

**Statutory authority:** Executive Law, section 91

**Subject:** Administrative expenses and executive compensation of providers of services to New Yorkers.

**Purpose:** To address limits on the use of State funds/State-authorized payments for administrative expenses and executive compensation.

**Substance of revised rule:** The revised rule would add a new Part 144 to 19 NYCRR, and would be titled Limits on Administrative Expenses and Executive Compensation.

Section 144.1 provides the Background and Intent of the revised rule, which is to implement Executive Order No. 38, issued by Governor Andrew Cuomo on January 18, 2012.

Section 144.2 sets forth the Statutory Authority for the promulgation of the rule by the Department of State (hereinafter the "Department").

Section 144.3 contains Definitions for purposes of this Part, including definitions for administrative expenses, covered operating expenses, covered executive, covered provider, executive compensation, Department, program services, program services expenses, related organization, reporting period, State-authorized payments, and State funds.

Section 144.4, titled Limits on Administrative Expenses, contains limits on the use of State funds or State-authorized payments for administrative expenses.

The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria.

The restriction will apply to covered providers receiving State funds or State-authorized payments from county or local governments, rather than directly from a State agency, pursuant to specified criteria.

The revised regulation addresses how the restriction will apply in the event that a covered provider has multiple sources of State funds or State-authorized payments.

Section 144.5, titled Limits on Executive Compensation, contains restrictions on executive compensation provided to covered executives.

The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria.

The restriction will apply to covered providers receiving State funds or State-authorized payments from county or local governments, rather than directly from a State agency, pursuant to specified criteria.

The revised rule addresses the application of this limit if the covered provider has multiple sources of State funds or State-authorized payments.

Section 144.6, titled Waivers, establishes processes for covered providers to seek waivers of the limit on administrative expenses and the limits on executive compensation.

Section 144.7 pertains to Reporting by covered providers. Covered providers are required to report information on an annual basis.

Section 144.8, titled Penalties, establishes a process for the imposition of penalties in the event of non-compliance with the limit on administrative expenses or the limits on executive compensation.

A copy of the full text of the regulatory proposal is available on the Department of State's website at [www.dos.ny.gov](http://www.dos.ny.gov)

**Revised rule compared with proposed rule:** Substantial revisions were made in sections 144.3, 144.4, 144.5, 144.6 and 144.8.

**Text of revised proposed rule and any required statements and analyses may be obtained from** James Leary, Department of State, One Commerce Plaza, Albany, NY 12231, (518) 474-6740

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

**Public comment will be received until:** 30 days after publication of this notice.

#### **Revised Regulatory Impact Statement**

**Statutory Authority:** Executive Law, § 91; Executive Order No. 38; Executive Order No. 43

**Legislative Objectives:** Executive Law, § 91 authorizes the Secretary of State to promulgate rules to regulate and control the exercise of the powers of the Department of State and the performance of the duties of officers, agents and other employees thereof.

**Needs and Benefits:** The Secretary of State is proposing to adopt the following revised regulation because the State of New York directly or indirectly funds with taxpayer dollars a large number of tax-exempt organizations and for-profit entities that provide critical services to New Yorkers in need, and the goal is to ensure that taxpayers' dollars are used properly, efficiently, and effectively to improve the lives of New Yorkers. In certain instances, providers of services that receive State funds or State-authorized payments have used such funds to pay for excessive administrative expenses or inflated compensation for their senior executives, rather than devoting a greater proportion of such funds to providing direct care or services to their clients. Abuses involving such public funds harm both the people of New York, who are paying for the services, and those who must depend on such services being available and well-funded. This regulation, which is required by Executive Orders No. 38, will ensure that State funds or State-authorized payments paid by this agency to providers are not used to support excessive compensation or unnecessary administrative expenses.

**Costs:** The costs of implementing this rule to affected providers is anticipated to be minimal since most, if not all, of the information that must be reported by such providers is already gathered or reported for other purposes. The agency cost of such implementation is expected to be very limited as well, and efforts to ensure efficient centralization of certain aspects of such implementation are underway.

**Local Government Mandates:** The revised regulation does not anticipate any additional mandates.

**Paperwork/Reporting Requirements:** The revised regulation will require limited additional information to be reported to the agency by providers receiving State funds or State-authorized payments. To the extent feasible, such reporting shall be made electronically in order to avoid unnecessary paperwork costs.

**Duplication:** This revised rule does not duplicate, overlap, or conflict with any State or federal statute or rule. The regulation seeks to minimize the reporting requirements faced by providers by building upon those requirements in the federal internal revenue code that require certain tax-exempt organizations to report information concerning their executive compensation and administrative expenses.

**Alternatives:** The alternative of not proposing this regulation was considered, but Executive Order No. 38 requires its promulgation.

**Federal Standards:** This revised rule does not conflict with federal standards.

**Compliance Schedule:** The rule will become effective upon adoption. The implementation date establishing the limits on administrative expenses and executive compensation will be April 1, 2013.

#### **Revised Regulatory Flexibility Analysis**

A Revised Regulatory Flexibility Analysis for Small Businesses and Local Governments is not required with this revised rulemaking notice because changes made to the last published rule will neither impose any adverse economic impact on small businesses nor impose new reporting, recordkeeping or other compliance requirements on small businesses or local governments. The revised regulation is designed to address executive compensation and administrative expenses of program-service providers that receive State funds or State-authorized payments paid the Department of State.

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

A Revised Rural Area Flexibility Analysis is not required with this revised rulemaking notice because changes made to the last published rule will neither impose any adverse economic impact on rural areas nor impose new reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. The revised regulation is designed to address executive compensation and administrative expenses of program-service providers that receive State funds or State-authorized payments paid by the Department of State.

#### **Revised Job Impact Statement**

A Revised Job Impact Statement is not required with this revised rulemaking notice because it is evident from the subject matter of the revised

regulation that it will have no impact on jobs and employment opportunities.

#### **Assessment of Public Comment**

A Notice of Proposed Rule Making was published in the State Register on May 30, 2012.

All comments received were reviewed and evaluated. Many of the concerns expressed in the comments have been addressed by revisions to the various sections of the proposed regulation. Suggestions from others were determined to be contrary to the goals of the proposed rulemaking.

A number of comments objected generally to the underlying concept of the regulations, stating that the proposed regulation is overly broad in its authority and burdensome in its requirements. The Department of State believes that the proposed limitations in the regulation further the legitimate goal of ensuring that public funds are properly expended and the use of such funds is properly monitored.

Clarification was requested concerning certain defined terms in the proposed regulation, particularly with respect to their intended scope. In response, and taking into account suggestions submitted, changes were made to the definitions of the following terms: administrative expenses, covered provider, covered executive, executive compensation, program services expenses, related entity, State-authorized payments and State funds.

Some commenters stated that the proposed limits on administrative expenses will be burdensome and unnecessary, because they will interfere with existing contracts, because they will possibly be duplicative of existing state and federal rules, or they will not enhance the protections already provided by restrictions from State reimbursement rates. Clarification was requested as to what will constitute administrative and program expenses. The proposed regulation has been revised to incorporate an allocation methodology for these two expenses.

There were a wide range of comments and suggestions on the definition of "executive compensation." They covered such topics as: (a) general concerns about application of the definition, (b) exclusions, (c) limitations and application of the definition, and (d) suggestions about surveys and their use. A summary of the comments and suggestions follows.

(a) General concerns regarding the regulation include that it: is too broad since it regulates use of funding sources not emanating from the state; is unrealistic, problematic and intrusive to operations; will adversely affect candidate pools, incumbents, service delivery and the ability of providers to meet the challenges and changes in the health care system; is intrusive to the for-profit sector where executive compensation is a private matter; is faulty in that it will institutionalize abuses through comparability data; and is duplicative as executive compensation is already controlled at the State and federal levels through rate setting, IRS rules and reporting, and the Not-For-Profit Corporation Law. Other comments stated that the regulation would encroach on the State Attorney General's regulation and enforcement; is arbitrary in its establishment of the thresholds of \$500,000 and 30%; was exclusive of larger corporations; and inappropriately used a percentile standard that will gradually diminish compensation levels and lead to the existence of two levels of compensation. Commenters also suggested that covered providers subject to penalty should be allowed to submit documentation in advance of penalty review.

(b) Other comments focused on exclusions for not-for-profits and for not-for-profit long term care and senior services providers and an elimination of the 75th percentile threshold.

(c) Still other letters related to limitations and application of the definition of "executive compensation." They suggested that executive compensation rules should only be applied to non-State funds or to State and State-authorized funds, or the applicability of the rules with regard to contributions of other non-covered entities should be clarified. Other received letters argued that the period covered by the limits on executive compensation should not begin on January 1, 2013, the executive compensation limits should be revisited periodically to adjust for changes, and the role of executives in the assurance of program services should be recognized.

(d) Commenters recommended several approaches to determining reasonable compensation, such as the use of recognized surveys or independent commissioned surveys or identification and recognition of specific compensation surveys to establish comparisons. It was suggested that surveys should allow for regional and geographic variations. Further, commenters suggested that the regulation also should address instances where a board or governing body does not exist.

The regulation was revised to address the comments on: the period to be covered by the limits on executive compensation, an annual review of the \$199,000 cap and the adjustment thereof, the consideration of the availability of a governing body as alternate to the covered provider's board of directors, the submission of contemporaneous (but not prospective) documentation for penalty review, the recognition of supervisory services of executives as program services, the allocation methodology for reporting administrative and program service costs, the recognition of specific

clinical and program personnel as providers of program services, and a method for subcontractors to be advised of the receipt of State or State-authorized funds from a covered provider.

The regulation was not revised to limit the rule to non-State funds, to exclude for-profits from being covered by the regulations, or to alter the 75th percentile threshold because these revisions would compromise the goal of the regulation. Eliminating the executive compensation requirements would eviscerate one of the key objectives of the executive order: limiting the extent of such compensation paid by covered providers that rely to a significant degree upon public funds for their program and administrative services funding. The Department of State is proposing to adopt this regulation because the State of New York directly or indirectly funds with taxpayer dollars a large number of tax exempt organizations and for-profit entities that provide critical services to New Yorkers in need, and the goal is to ensure that taxpayer dollars are used properly, efficiently and effectively to improve the lives of New Yorkers. In certain instances, service providers that receive State funds or State-authorized payments have used such funds to pay for excessive administrative costs or inflated compensation for their senior executives, rather than devoting a greater proportion of such funds to providing direct care or services to their clients. Such abuses involving public funds harm both the people of New York who are paying for such services and those persons who must depend upon such services to be available and well-funded. These regulations provide a benchmark to ensure that State funds or State-authorized payments paid by this agency to providers are not used to support excessive compensation or unnecessary administrative costs. In part because of the funding of resources, their restriction is necessary to accomplish these objectives.

Some comments stated that the proposed waiver process is overly complex and lacking objective criteria. The revised regulation provides greater flexibility in the filing of a waiver application and also has pushed back the implementation date.

Comments received also criticized the proposed reporting requirements suggesting that they require providing information related to administrative and program expenses in a manner inconsistent with other current reporting obligations. The regulation has been amended to conform some of the requirements to those with which many covered providers must already comply, including provisions incorporating the definitions applicable with non-profits under the IRS Code.

Other submissions asked: when penalties for excess compensation would be assessed, what type of penalties would be imposed, and about the level of severity. Commenters also requested details on the criteria for making penalty determination. Changes have been made to the Penalties section in the revised text, including extending the time for submissions, a corrective action plan (CAP) and a request for an administrative appeal to 30 calendar days.

The full Assessment of Comments is available on The Department of State's website at [www.dos.ny.gov](http://www.dos.ny.gov)

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## Office of Temporary and Disability Assistance

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

#### **Limits on Administrative Expenses and Executive Compensation**

**I.D. No.** TDA-22-12-00021-RP

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

**Proposed Action:** Addition of Part 315 to Title 18 NYCRR.

**Statutory authority:** Social Services Law, section 20(3)(d)

**Subject:** Limits on administrative expenses and executive compensation.

**Purpose:** Establishes limits on the use of State funds or State-authorized payments for administrative expenses and executive compensation by covered providers.

**Substance of revised rule:** The revised rule would add a new Part 315 to 18 NYCRR titled Limits on Administrative Expenses and Executive Compensation.

Section 315.1 Provides the background and intent of the revised rule, which is to implement Executive Order No. 38, issued by Governor Andrew Cuomo on January 18, 2012.

Section 315.2 Sets forth the statutory authority for the promulgation of the rule by the Office of Temporary and Disability Assistance (hereinafter the "Office").

Section 315.3 Contains definitions for purposes of this Part, including definitions for administrative expenses, covered operating expenses, covered executive, covered provider, executive compensation, Office, program services, program services expenses, related organization, reporting period, State-authorized payments, and State funds.

Section 315.4 Limits on Administrative Expenses. Contains limits on the use of State funds or State-authorized payments for administrative expenses.

The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria.

The restriction will apply to covered providers receiving State funds or State-authorized payments from county or local governments, rather than directly from a State agency, pursuant to specified criteria.

The revised regulation addresses how the restriction will apply in the event that a covered provider has multiple sources of State funds or State-authorized payments.

Section 315.5 Limits on Executive Compensation. Contains restrictions on executive compensation provided to covered executives.

The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria.

The restriction will apply to covered providers receiving State funds or State-authorized payments from county or local governments, rather than directly from a State agency, pursuant to specified criteria.

The revised rule addresses the application of this limit if the covered provider has multiple sources of State funds or State-authorized payments.

Section 315.6 Waivers. Processes are established for covered providers to seek waivers of the limit on administrative expenses and the limit on executive compensation.

Section 315.7 Reporting by Covered Providers. Covered providers are required to report information on an annual basis.

Section 315.8 Penalties. A process is established for the imposition of penalties in the event of non-compliance with the limit on administrative expenses or the limits on executive compensation.

A copy of the full text of the regulatory proposal is available on the Office of Temporary and Disability Assistance's website at [www.otda.ny.gov/legal](http://www.otda.ny.gov/legal).

**Revised rule compared with proposed rule:** Substantial revisions were made in sections 315.3, 315.4, 315.5, 315.6, 315.7 and 315.8.

**Text of revised proposed rule and any required statements and analyses may be obtained from** Jeanine S. Behuniak, New York State Office of Temporary and Disability Assistance, 40 North Pearl Street, 16C, Albany, New York 12243-0001, (518) 474-9779, email: [Jeanine.Behuniak@otda.ny.gov](mailto:Jeanine.Behuniak@otda.ny.gov)

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

**Public comment will be received until:** 30 days after publication of this notice.

#### **Revised Regulatory Impact Statement**

##### 1. Statutory authority:

Social Services Law (SSL) § 20(3)(d) authorizes the Office of Temporary and Disability Assistance (hereinafter "agency") to promulgate regulations to carry out its powers and duties.

##### 2. Legislative objectives:

It was the intent of the Legislature in enacting SSL § 20(3)(d) that the agency establish rules, regulations and policies to carry out its powers and duties, and it was the intent of Governor Andrew Cuomo in signing Executive Orders No. 38 and No. 43 that this agency promulgate regulations to establish limits on the use of State funds or State-authorized payments for administrative costs and executive compensation by covered providers.

##### 3. Needs and benefits:

This agency is proposing to adopt the regulations because the State of New York directly or indirectly funds with taxpayer dollars a large number of tax exempt organizations and for-profit entities that provide critical services to New Yorkers in need and the goal is to ensure that taxpayers' dollars are used properly, efficiently, and effectively to improve the lives of New Yorkers. In certain instances, providers of services that receive State funds or State-authorized payments have used such funds to pay for excessive administrative costs or inflated compensation for their senior executives, rather than devoting a greater proportion of such funds to providing direct care or services to their clients. Such abuses involving public funds harm both the people of New York who are paying for such services, and those persons who must depend upon such services to be available and well-funded. These regulations, which are required by Executive Order No. 38, are intended to prevent providers from using State funds or State-authorized payments paid by this agency to support excessive compensation or unnecessary administrative costs.

##### 4. Costs:

The costs of implementing this rule to affected providers are anticipated to be minimal as most, if not all, of the information that must be reported by such providers is already gathered or reported for other purposes. The costs to this agency of such implementation are expected to be mitigated by efforts that are underway to ensure efficient centralization of certain aspects of such implementation.

##### 5. Local government mandates:

The social services districts will be required to provide minimal information to the agency concerning service providers with which the social services districts have contractual relationships. The administrative functions required by the proposed regulations will be carried out by the agency.

##### 6. Paperwork:

The proposed regulatory amendments will require limited additional information to be reported to the agency by covered providers receiving State funds or State-authorized payments. To the extent feasible, such reporting shall be made electronically to avoid unnecessary paperwork costs.

##### 7. Duplication:

This proposed rule does not duplicate, overlap, or conflict with any State or federal statute or rule. However, the proposed rule seeks to minimize the reporting requirements faced by covered providers by building upon those requirements in the federal internal revenue code that require certain tax-exempt organizations to report information concerning their executive compensation and administrative costs.

##### 8. Alternatives:

Executive Orders No. 38 and No. 43 require the adoption of this proposed rule.

##### 9. Federal standards:

This proposed rule does not conflict with federal standards.

##### 10. Compliance schedule:

The rule will become effective upon adoption. The implementation date establishing the limits on administrative expenses and executive compensation will be April 1, 2013.

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

The Office of Temporary and Disability Assistance has determined that changes made to the last published rule do not necessitate revision to the previously published Statement in Lieu of a Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement.

#### **Assessment of Public Comment**

A Notice of Proposed Rule Making was published in the State Register on May 30, 2012.

All comments received were reviewed and evaluated. Many of the concerns expressed in the comments have been addressed by revisions to the various sections of the proposed regulation. Suggestions from others were determined to be contrary to the goals of the proposed rulemaking.

A number of comments objected generally to the underlying concept of the regulations, stating that the proposed regulation is overly broad in its authority and burdensome in its requirements. The Office of Temporary and Disability Assistance (OTDA) believes that the proposed limitations in the regulation further the legitimate goal of ensuring that public funds are properly expended and the use of such funds is properly monitored.

Clarification was requested concerning certain defined terms in the proposed regulation, in particular with respect to their intended scope. In response, and taking into account suggestions submitted, changes were made to the definitions of the following terms: administrative expenses, covered provider, covered executive, executive compensation, program services expenses, related entity, State-authorized payments and State funds.

Some commenters stated that the proposed limits on administrative expenses were burdensome and unnecessary, because they would interfere with existing contracts, because they were possibly duplicative of existing state and federal rules, or they will not enhance the protections already provided by restrictions from State reimbursement rates. Clarification was requested as to what will constitute administrative and program expenses. The proposed regulation has been revised to incorporate an allocation methodology for these two expenses.

There were a wide range of comments and suggestions on the definition of "executive compensation." They covered such topics as: (a) general concerns about application of the definition, (b) exclusions, (c) limitations and application of the definition, and (d) suggestions about surveys and their use. A summary of the comments and suggestions follows:

(a) General concerns regarding the regulation include that it: is too broad since it regulates use of funding sources not emanating from the state; is unrealistic, problematic and intrusive to operations; will adversely affect candidate pools, incumbents, service delivery and the ability of providers to meet the challenges and changes in the health care system; is intrusive to the for-profit sector where executive compensation is a private

matter; is faulty in that it will institutionalize abuses through comparability data; and is duplicative as executive compensation is already controlled at the State and federal levels through rate setting, IRS rules and reporting, and the Not-For-Profit Corporation Law. Other comments stated that the regulation would encroach on the State Attorney General's regulation and enforcement; is arbitrary in its establishment of the thresholds of \$500,000 and 30%; was exclusive of larger corporations; and inappropriately used a percentile standard that will gradually diminish compensation levels and lead to the existence of two levels of compensation. Commenters also suggested that covered providers subject to penalty should be allowed to submit documentation in advance of penalty review.

(b) Other comments focused on exclusions for not-for-profits and for not-for-profit long term care and senior services providers and an elimination of the 75th percentile threshold.

(c) Still other letters related to limitations and application of the definition of "executive compensation." They suggested that executive compensation rules should only be applied to non-State funds or to State and State-authorized funds. The applicability of the rules with regard to contributions of other non-covered entities should be clarified. Also, letters received argued that the period covered by the limits on executive compensation should not begin on January 1, 2013, the executive compensation limits should be revisited periodically to adjust for changes, and the role of executives in the assurance of program services should be recognized.

(d) Commenters recommended several approaches to determining reasonable compensation, such as the use of recognized surveys or independent commissioned surveys or identification and recognition of specific compensation surveys to establish comparisons. It was suggested that surveys should allow for regional and geographic variations. Further, commenters suggested that the regulation also should address instances where a board or governing body does not exist.

The regulation was revised to address the comments on: the period to be covered by the limits on executive compensation, an annual review of the \$199,000 cap and the adjustment thereof, the consideration of the availability of a governing body as alternate to the covered provider's board of directors, the submission of contemporaneous (but not prospective) documentation for penalty review, the recognition of supervisory services of executives as program services, the allocation methodology for reporting administrative and program service costs, the recognition of specific clinical and program personnel as providers of program services, and a method for subcontractors to be advised of the receipt of State or State-authorized funds from a covered provider.

The regulation was not revised to limit the rule to non-State funds, to exclude for-profits from being covered by the regulations, or to alter the 75th percentile threshold because these revisions would compromise the goal of the regulation. Eliminating the executive compensation requirements would eviscerate one of the key objectives of the executive order: limiting the extent of such compensation paid by covered providers that rely to a significant degree upon public funds for their program and administrative services funding. OTDA is proposing to adopt this regulation because the State of New York directly or indirectly funds with taxpayer dollars a large number of tax exempt organizations and for-profit entities that provide critical services to New Yorkers in need, and the goal is to ensure that taxpayer dollars are used properly, efficiently and effectively to improve the lives of New Yorkers. In certain instances, service providers that receive State funds or State-authorized payments have used such funds to pay for excessive administrative costs or inflated compensation for their senior executives, rather than devoting a greater proportion of such funds to providing direct care or services to their clients. Such abuses involving public funds harm both the people of New York who are paying for such services and those persons who must depend upon such services to be available and well-funded. These regulations provide a benchmark to ensure that State funds or State-authorized payments paid by this agency to providers are not used to support excessive compensation or unnecessary administrative costs. In part because of the funding of resources, their restriction is necessary to accomplish these objectives.

Some comments stated that the proposed waiver process is overly complex and lacking objective criteria. The revised regulation provides greater flexibility in the filing of a waiver application and also has pushed back the implementation date.

Comments received also criticized the proposed reporting requirements suggesting that they require providing information related to administrative and program expenses in a manner inconsistent with other current reporting obligations. The regulation has been amended to conform some of the requirements to those with which many covered providers must already comply, including provisions incorporating the definitions applicable with non-profits under the IRS Code.

Other submissions asked when penalties for excess compensation

would be assessed, what the type of penalties would be imposed, and about the level of severity. Commenters also requested details on the criteria for making penalty determination. Changes have been made to the Penalties section in the revised text, including extending the time for submissions, a corrective action plan (CAP) and a request for an administrative appeal to 30 calendar days.

The full Assessment of Comments is available on the OTDA website at [www.otda.ny.gov/legal](http://www.otda.ny.gov/legal)

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## Triborough Bridge and Tunnel Authority

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### PROPOSED RULE MAKING HEARING(S) SCHEDULED

#### A Proposal to Establish a New Crossing Charge Schedule for Use of Bridges and Tunnels Operated by TBTA

**I.D. No.** TBA-44-12-00003-P

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

**Proposed Action:** Repeal of section 1021.1; and addition of new section 1021.1 to Title 21 NYCRR.

**Statutory authority:** Public Authorities Law, section 553(5)

**Subject:** A proposal to establish a new crossing charge schedule for use of bridges and tunnels operated by TBTA.

**Purpose:** A proposal to raise additional revenue.

**Public hearing(s) will be held at:** 5:00 p.m., Nov. 7, 2012 at Farmingdale State College, 2350 Broadhollow Rd., Farmingdale, NY; 5:00 p.m., Nov. 7, 2012 at Brooklyn Marriott, 333 Adams St., Brooklyn, NY; 5:00 p.m., Nov. 13, 2012 at Baruch College Performing Arts Center, 17 Lexington Ave., Manhattan, NY; 5:00 p.m., Nov. 13, 2012 at Hostos Community College, 500 Grand Concourse, Bronx, NY; 5:00 p.m., Nov. 14, 2012 at College of Staten Island, 2800 Victory Blvd., Staten Island, NY; 5:00 p.m., Nov. 14, 2012 at Hilton Garden Inn, 15 Crossroads Court, Newburgh, NY; 5:00 p.m., Nov. 15, 2012 at Yonkers Public Library, One Larkin Center, Yonkers, NY; and 5:00 p.m., Nov. 15, 2012 at Sheraton LaGuardia East Hotel, 135-20 39th Ave., Flushing, 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.

**Text of proposed rule:** See Appendix in this issue of the Register.

**Text of proposed rule and any required statements and analyses may be obtained from:** M. Margaret Terry, Esq., Triborough Bridge and Tunnel Authority, 2 Broadway, 24th Floor, New York, New York 10004, (646) 252-7619, email: [mterry@mtabt.org](mailto:mterry@mtabt.org)

**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, 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.

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## Office of Victim Services

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

#### Limits on Administrative Expenses and Executive Compensation

**I.D. No.** OVS-22-12-00009-RP

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

**Proposed Action:** Amendment of section 525.22; and addition of section 525.24 to Title 9 NYCRR.

**Statutory authority:** Executive Law, section 623(3); and Executive Order No. 38

**Subject:** Limits on administrative expenses and executive compensation.

**Purpose:** To establish limitations on administrative expenses and executive compensation for those programs funded by the Office.

**Substance of revised rule:** The revised, proposed regulations amend section 525.22 of Title 9 NYCRR and adds a new section 525.24 to Title 9 NYCRR, related to Victim Assistance Programs and Limits on Administrative Costs and Executive Compensation, respectively.

Section 525.22 is amended to state that Victim Assistance Programs receiving state funds or state-authorized payments from the Office of Victim Services (OVS or Office) pursuant to the terms of a contract or memorandum of understanding shall comply with all applicable federal and state laws and regulations and any applicable contractual or memorandum of understanding language entered into with the office. Applicable state regulations shall include, but not be limited to this section and the newly added section 525.24 of this part.

Section 525.24, subdivision (a) provides for the background and intent of the revised rule, which is to implement Executive Order No. 38, issued by Governor Andrew Cuomo on January 18, 2012.

Subdivision (b) contains definitions for purposes of this section, including definitions for administrative expenses, covered operating expenses, covered executive, covered provider, executive compensation, office, program services, program services expenses, related organization, reporting period, state-authorized payments, and state funds.

Subdivision (c) relates to limits on administrative expenses. This subdivision contains limits on the use of state funds or state-authorized payments for administrative expenses. The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria. The restriction will apply to covered providers receiving state funds or state-authorized payments from county or local governments, rather than directly from a state agency, pursuant to specified criteria. The revised regulation addresses how the restriction will apply in the event that a covered provider has multiple sources of state funds or state-authorized payments.

Subdivision (d) relates to limits on executive compensation. This subdivision contains restrictions on executive compensation provided to covered executives. The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria. The restriction will apply to covered providers receiving state funds or state-authorized payments from county or local governments, rather than directly from a state agency, pursuant to specified criteria. The revised rule addresses the application of this limit if the covered provider has multiple sources of state funds or state-authorized payments.

Subdivision (e) relates to waivers for the limit on executive compensation and the processes are established for covered providers to seek such waivers.

Subdivision (f) relates to waivers for the limit on reimbursement for administrative expenses and the processes are established for covered providers to seek such waivers.

Subdivision (g) relates to denials of waiver requests, notice to the impacted parties and the Office's reconsideration of the waiver requests.

Subdivision (h) relates to the reporting by covered providers. Covered providers are required to report information on an annual basis.

Subdivision (i) establishes a process for the imposition of penalties in the event of non-compliance with the limits on administrative expenses or the limits on executive compensation.

A copy of the full text of this regulatory proposal is available on the Office of Victim Services website: <http://www.ovs.ny.gov>

**Revised rule compared with proposed rule:** Substantial revisions were made in section 525.24.

**Text of revised proposed rule and any required statements and analyses may be obtained from** John Watson, General Counsel, Office of Victim Services, One Columbia Circle, Suite 200, Albany, New York 12203, (518) 457-8066, email: [john.watson@ovs.ny.gov](mailto:john.watson@ovs.ny.gov)

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

**Public comment will be received until:** 30 days after publication of this notice.

#### **Revised Regulatory Impact Statement**

1. Statutory authority: Subdivision 3 of section 623 of the Executive Law provides that the Office of Victim Services (OVS or Office) shall have the power and duty to adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions and purposes of Article 22 of the Executive Law. Other authorities for enacting these rules include Executive Order No. 38, enacted January 18, 2012.

2. Legislative objectives: Pursuant to Executive Order No. 38, enacted

January 18, 2012, the OVS recognizes its fiduciary duties related to any State funds or State-authorized payments made by the Office via competitive grants for the provision of services to victims of crimes and others impacted by such victimization. This section is meant to establish the minimum expectations and requirements pursuant to Executive Order No. 38.

3. Needs and benefits: The OVS is proposing to adopt the following regulation because the State of New York directly or indirectly funds with State and federal monies a large number of tax exempt organizations and for-profit entities that provide critical services to New Yorkers in need and the goal is to ensure that such funds are used properly, efficiently, and effectively to improve the lives of New Yorkers. In certain instances, providers of services that receive State funds or State-authorized payments have used such funds to pay for excessive administrative costs or inflated compensation for their senior executives, rather than devoting a greater proportion of such funds to providing direct care or services to their clients. Such abuses involving public funds harm both the people of New York who are paying for such services, and those persons who must depend upon such services to be available and well-funded. These regulations, which are required by Executive Order No. 38, will ensure that State funds or State-authorized payments paid by the Office to providers are not used to support excessive compensation or unnecessary administrative costs.

4. Costs: a. Costs to regulated parties. The costs of implementing this rule to affected providers is anticipated to be minimal as most, if not all, of the information that must be reported by such providers is already gathered or reported for other purposes. The costs to the OVS of such implementation are expected to be very limited as well, and efforts to ensure efficient centralization of certain aspects of such implementation are underway.

b. Costs to local governments. These proposed regulations do not apply to local governments and would not impose any additional costs on local governments.

c. Costs to private regulated parties. The proposed regulations would impose minimal any additional costs on private regulated parties.

5. Local government mandates: These proposed regulations do not impose any program, service duty or responsibility upon any local government.

6. Paperwork: The proposed regulatory amendments will require limited additional information to be reported to the OVS by providers receiving State funds or State-authorized payments. To the extent feasible, such reporting shall be made electronically to avoid unnecessary paperwork costs.

7. Duplication: This proposed rule does not duplicate, overlap, or conflict with any State or federal statute or rule. However, the proposed rule seeks to minimize the reporting requirements faced by providers by building upon those requirements in the federal internal revenue code that require certain tax-exempt organizations to report information concerning their executive compensation and administrative costs.

8. Alternatives: Executive Order No. 38 requires the adoption of this proposed regulation.

9. Federal standards: These amendments do not conflict with federal standards.

10. Compliance schedule: This rule will become effective when adopted and the Notice of Adoption is published in the State Register. The implementation date establishing the limits on administrative expenses and executive compensation will be April 1, 2013.

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

The Office of Victim Services has determined that changes made to the last published rule do not necessitate revision to the previously published Statement in Lieu of a Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement.

#### **Assessment of Public Comment**

A Notice of Proposed Rule Making was published in the State Register on May 30, 2012.

All comments received were reviewed and evaluated. Many of the concerns expressed in the comments have been addressed by revisions to the various sections of the proposed regulation. Suggestions from others were determined to be contrary to the goals of the proposed rulemaking.

A number of comments objected generally to the underlying concept of the regulations, stating that the proposed regulation is overly broad in its authority and burdensome in its requirements. The New York State Office of Victim Services [OVS] believes that the proposed limitations in the regulation further the legitimate goal of ensuring that public funds are properly expended and the use of such funds is properly monitored.

Clarification was requested concerning certain defined terms in the proposed regulation, in particular with respect to their intended scope. In response, and taking into account suggestions submitted, changes were made to the definitions of the following terms: administrative expenses, covered provider, covered executive, executive compensation, program services expenses, related entity, State-authorized payments and State funds.

Some commenters stated that the proposed limits on administrative expenses were burdensome and unnecessary, because they would interfere with existing contracts, because they were possibly duplicative of existing state and federal rules, or they will not enhance the protections already provided by restrictions from State reimbursement rates. Clarification was requested as to what will constitute administrative and program expenses. The proposed regulation has been revised to incorporate an allocation methodology for these two expenses.

There were a wide range of comments and suggestions on the definition of "executive compensation." They covered such topics as: (a) general concerns about application of the definition, (b) exclusions, (c) limitations and application of the definition, and (d) suggestions about surveys and their use. A summary of the comments and suggestions follows:

(a) General concerns regarding the regulation include that it: is too broad since it regulates use of funding sources not emanating from the state; is unrealistic, problematic and intrusive to operations; will adversely affect candidate pools, incumbents, service delivery and the ability of providers to meet the challenges and changes in the health care system; is intrusive to the for-profit sector where executive compensation is a private matter; is faulty in that it will institutionalize abuses through comparability data; and is duplicative as executive compensation is already controlled at the State and federal levels through rate setting, IRS rules and reporting, and the Not-For-Profit Corporation Law. Other comments stated that the regulation would encroach on the State Attorney General's regulation and enforcement; is arbitrary in its establishment of the thresholds of \$500,000 and 30%; was exclusive of larger corporations; and inappropriately used a percentile standard that will gradually diminish compensation levels and lead to the existence of two levels of compensation. Commenters also suggested that covered providers subject to penalty should be allowed to submit documentation in advance of penalty review.

(b) Other comments focused on exclusions for not-for-profits and for not-for-profit long term care and senior services providers and an elimination of the 75th percentile threshold.

(c) Still other letters related to limitations and application of the definition of "executive compensation." They suggested that executive compensation rules should only be applied to non-State funds or to State and State-authorized funds. The applicability of the rules with regard to contributions of other non-covered entities should be clarified. Also, letters received argued that the period covered by the limits on executive compensation should not begin on January 1, 2013, the executive compensation limits should be revisited periodically to adjust for changes, and the role of executives in the assurance of program services should be recognized.

(d) Commenters recommended several approaches to determining reasonable compensation, such as the use of recognized surveys or independent commissioned surveys or identification and recognition of specific compensation surveys to establish comparisons. It was suggested that surveys should allow for regional and geographic variations. Further, commenters suggested that the regulation also should address instances where a board or governing body does not exist.

The regulation was revised to address the comments on: the period to be covered by the limits on executive compensation, an annual review of the \$199,000 cap and the adjustment thereof, the consideration of the availability of a governing body as alternate to the covered provider's board of directors, the submission of contemporaneous (but not prospective) documentation for penalty review, the recognition of supervisory services of executives as program services, the allocation methodology for reporting administrative and program service costs, the recognition of specific clinical and program personnel as providers of program services, and a method for subcontractors to be advised of the receipt of State or State-authorized funds from a covered provider.

The regulation was not revised to limit the rule to non-State funds, to exclude for-profits from being covered by the regulations, or to alter the 75th percentile threshold because these revisions would compromise the goal of the regulation. Eliminating the executive compensation requirements would eviscerate one of the key objectives of the executive order: limiting the extent of such compensation paid by covered providers that rely to a significant degree upon public funds for their program and administrative services funding. OVS is proposing to adopt this regulation because the State of New York directly or indirectly funds with taxpayer dollars a large number of tax exempt organizations and for-profit entities that provide critical services to New Yorkers in need, and the goal is to ensure that taxpayer dollars are used properly, efficiently and effectively to improve the lives of New Yorkers. In certain instances, service providers that receive State funds or State-authorized payments have used such funds to pay for excessive administrative costs or inflated compensation for their senior executives, rather than devoting a greater proportion of such funds to providing direct care or services to their clients. Such abuses involving public funds harm both the people of New York who are paying

for such services and those persons who must depend upon such services to be available and well-funded. These regulations provide a benchmark to ensure that State funds or State-authorized payments paid by this agency to providers are not used to support excessive compensation or unnecessary administrative costs. In part because of the funding of resources, their restriction is necessary to accomplish these objectives.

Some comments stated that the proposed waiver process is overly complex and lacking objective criteria. The revised regulation provides greater flexibility in the filing of a waiver application and also has pushed back the implementation date.

Comments received also criticized the proposed reporting requirements suggesting that they require providing information related to administrative and program expenses in a manner inconsistent with other current reporting obligations. The regulation has been amended to conform some of the requirements to those with which many covered providers must already comply, including provisions incorporating the definitions applicable with non-profits under the IRS Code.

Other submissions asked when penalties for excess compensation would be assessed, what the type of penalties would be imposed, and about the level of severity. Commenters also requested details on the criteria for making penalty determination.

Changes have been made to the Penalties section in the revised text, including extending the time for submissions, a corrective action plan (CAP) and a request for an administrative appeal to 30 calendar days.

The full Assessment of Comments is available on the OVS website at <http://www.ovs.ny.gov>