

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.

Education Department

REVISED RULE MAKING NO HEARING(S) SCHEDULED

Special Education Impartial Hearings

I.D. No. EDU-05-12-00007-RP

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

Proposed Action: Amendment of sections 200.1 and 200.5 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 305(1), 4403(3) and 4404(1)

Subject: Special Education Impartial Hearings.

Purpose: To align State's timeline requirements for issuing impartial hearing decisions to Federal requirements; address factors leading to delays in the completion of impartial hearings; and address issues relating to the manner in which hearings are conducted.

Substance of revised rule: The State Education Department (SED) proposes to amend sections 200.1 and 200.5 of the Commissioner's Regulations. Since publication of a Notice of Revised Rule Making in the State Register on July 11, 2012, the proposed rule has been substantially revised, as set forth in the Revised Regulatory Impact Statement submitted herewith. The following is a summary of the substantive provisions of the revised proposed rule.

Certification and appointment of IHOs [new sections 200.1(x)(4)(vi) and 200.5(j)(3)(i)(c)]:

The proposed rule would require an individual certified by the Commissioner as a hearing officer to be willing and available to accept appointment to conduct impartial hearings, and would provide for the

rescinding of an impartial hearing officer (IHO)'s certification if he or she is unavailable or unwilling to accept an appointment within a two-year period of time, unless good cause is shown.

The proposed rule would also prohibit an IHO from accepting appointment as an IHO if he or she is an attorney involved in a pending due process complaint involving the same school district, or has, within a two-year period of time, served in the same district as an attorney in a due process complaint, or if he or she is an individual with special knowledge or training with respect to the problems of children with disabilities who has accompanied and advised a party from the same school district in a due process complaint.

Consolidation of multiple due process requests for the same student [new section 200.5(j)(3)(ii)(a)]:

In the interests of judicial economy and in furtherance of the student's educational interests, the revised rule would establish procedures for the consolidation of multiple due process hearing requests filed for the same student, including the factors that must be considered in determining whether to consolidate separate requests for due process.

Prehearing conferences [200.5(j)(3)(xi)]:

The revised rule would require IHOs to conduct prehearing conferences for all due process requests received on or after January 1, 2013 and to issue a prehearing order to address certain procedural matters and to identify the factual issues to be adjudicated at hearing. These requirements will provide IHOs with the tools to move the hearing forward in a smooth, orderly fashion, and to render decisions in an efficient and expeditious manner.

Withdrawals of requests for due process hearings [new section 200.5(j)(6)]:

The proposed rule would address existing concerns regarding the withdrawal and subsequent resubmission of the same or substantially similar due process complaints by establishing procedures for the withdrawal of a due process complaint and requiring a withdrawal to be made on notice to the IHO if it is made after the commencement of the hearing. In particular, the revised rule would require that a request for a withdrawal made after the commencement of the hearing must be on notice to the IHO and the parties and would be presumed to be without prejudice, provided, however, that the impartial hearing officer may issue a written decision finding that the withdrawal is with prejudice upon review of the balancing of the equities.

Extensions to the due date for rendering the impartial hearing decision [section 200.5(j)(5)]:

The proposed amendment further reinforces the importance of granting extensions for only limited purposes, while addressing the practical concerns IHOs may face in conducting a hearing when the parties attempt to engage in settlement negotiations. The amendment would expressly prohibit an IHO from soliciting extensions for purposes of his or her own scheduling conflicts; prescribe additional considerations an IHO must consider in granting an extension; prohibit an IHO from granting an extension after the record close date; and require the IHO to set forth the facts relied upon for each extension granted.

Timeline to render a decision [section 200.5(j)(5)]:

To further align the State's timeline requirements for issuing decisions with the federal requirements, the proposed amendment would clarify that:

- when a district files a due process complaint, the decision is due not later than 45 days from the day after the public agency's due process complaint is received by the other party and SED; and

- when a parent files a due process complaint notice, the decision must be rendered 45 days after the date on which one of the following conditions occurs first: (1) the parties agree in writing to waive the resolution meeting, (2) the parties agree in writing that a mediation or resolution meeting was held but no agreement could be reached, or (3) the expiration of the 30-day resolution period (unless the parties agree in writing to continue mediation at the end of the 30-day resolution period).

Overall, the proposed amendment will streamline the process for conducting hearings, which will in turn, facilitate a more efficient and expeditious hearing. This improved process will promote timely due process decisions and is likely to result in costs savings to districts.

Revised rule compared with proposed rule: Substantial revisions were made in section 200.5(j)(3), (4), (5) and (6).

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

Data, views or arguments may be submitted to: Ken Slentz, Deputy Comm. P-12 Education, State Education Department, Office of P-12 Education, State Education Building, 89 Washington Ave., Albany, NY 12234, (518) 474-3862, 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 Revised Rule Making in the State Register on July 11, 2012, the following substantial revisions were made to the proposed rule:

Proposed clause 200.5(j)(3)(ii)(a) was revised to: clarify the rules regarding appointment of an IHO when there are multiple due process hearing requests for the same parties and student with a disability; delete proposed language relating to consolidation of additional hearings; add that the IHO's decision to consolidate or deny consolidation shall be by written order; and clarify that the timeline for the issuance of a decision for consolidated complaints shall be timeline in the earliest pending due process complaint.

Proposed subparagraph 200.5(j)(3)(iii) was revised to clarify that it is the mandatory prehearing conference and not the hearing that must be convened within 14 days after one of the events specified in regulation.

Proposed subparagraph 200.5(j)(3)(xi) was revised to delete 'upon commencement of the hearing' and to add that a prehearing conference is conducted to facilitate a fair, orderly and expeditious hearing.

Proposed subclause 200.5(j)(3)(xi)(a)(4), relating to the purpose of a prehearing conference, was revised to replace "to identify the number of witnesses" to "discussing witnesses."

Proposed subclause 200.5(j)(3)(xi)(b)(5) was revised to remove the requirement that a written prehearing order identify the deadline date for final disclosure of the identification of witnesses expected to provide testimony at the hearing since this information would be provided through the requirement for final disclosure of all evidence.

Proposed clause 200.5(j)(3)(xi)(c) was revised to remove the provision that with the consent of all parties, an impartial hearing officer may, in his or her discretion, dispense with the parties' presence at a prehearing conference and rely upon alternative methods of communication regarding matters set forth in this subparagraph since section 200.5(j)(3)(xi) provides that a prehearing conference may be conducted by telephone.

Proposed clause 200.5(j)(3)(xi)(f) was renumbered (e) and revised to clarify that an IHO is prohibited from conducting a prehearing conference prior to the date in which the party has a right to a hearing, provided that an IHO may conduct a prehearing conference if necessary to meet a federal requirement.

Proposed subparagraph 200.5(j)(4)(iii) was revised to add "or amended to process complaint."

Proposed paragraph 200.5(j)(5) was revised to conform the time-

lines for the due date of the IHO's decision with federal regulations and to delete the proposed amendments that would have required the IHO to submit an unredacted copy of the IHO's decision to the Office of Special Education of the State Education Department and to require, whenever possible, copies submitted to the State Education Department shall be transmitted by secure electronic document submission or in another electronic format. This section was also revised to replace the term "re-file" with "transmit" relating to the IHO's responsibility to give the record to the school district.

Proposed clause 200.5(j)(5)(vi)(a) was revised to clarify that the reference to "any response to the complaint" means such responses as required pursuant to paragraphs 200.5(i)(4) and (5) of the Commissioner's regulations.

Proposed subparagraph 200.5(j)(6)(i) was revised to replace 'Prior to the commencement of the hearing or prehearing conference....' with 'Prior to the commencement of the hearing....'.

Proposed subparagraph 200.5(j)(6)(ii) was revised to clarify after the commencement of a hearing, the party requesting the hearing must notify the IHO and the other party of an intent to withdraw and the IHO must issue a notice of termination. Language was further revised to clarify that a withdrawal shall be deemed to be without prejudice except that the IHO may, upon notice and an opportunity for the parties to be heard, issue a decision that the withdrawal be with prejudice at the request of a party or on the IHO's own initiative.

Proposed subparagraph 200.5(j)(6)(iii) was revised to correct a cross citation to subparagraph 200.5(j)(1)(i).

Proposed subparagraph 200.5(j)(6)(iv) was revised to replace the reference to "Part" with "section".

The above revisions to the proposed rule require that the Local Government Mandates section of the previously published Regulatory Impact Statement be revised to read as follows:

LOCAL GOVERNMENT MANDATES:

The proposed rule does not impose any additional program, service, duty or responsibility upon local governments beyond those already imposed by federal and State statutes and regulations. Among other things, the proposed rule amends the procedures that must be followed by an IHO in accepting an appointment, conducting a hearing, and rendering a decision and providing the decision to the State Education Department; amends the procedures for conducting hearings to ensure they are held in a timely, efficient and expeditious manner in compliance with the federal timeline requirements, and provides IHOs with the tools to properly manage and conduct these hearings in such a manner. The rule also aligns the State's timeline requirements for issuing an impartial hearing decision with the federal requirements.

Specifically, the proposed rule ensures that individuals certified by the Commissioner as IHOs are willing and available to accept appointment to conduct impartial hearings; establishes procedures for consolidation and multiple due process hearing requests filed for the same student; requires and establishes procedures for prehearing conferences; prohibits an IHO from issuing a decision to enforce the terms of a settlement agreement or an order by an administrative officer; aligns the State's timeline for an IHO to render a decision consistent with the federal timelines; prohibits an IHO from soliciting extension requests or issuing extensions to an impartial hearing due to his or her own scheduling conflicts; amends the considerations that an IHO must make in granting a request for an extension; specifies information that must be included in the hearing record; extends the timeline by which one redacted copy of the impartial hearing decision must be provided to the State Education Department; defines and establishes procedures for transmittal of the impartial hearing record to the school district; and establishes procedures for the withdrawal of a due process complaint.

Revised Regulatory Flexibility Analysis

Since publication of a Notice of Revised Rule Making in the State Register on July 11, 2012, the proposed rule has been revised as set forth in the Revised Regulatory Impact Statement submitted herewith.

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

1. COMPLIANCE REQUIREMENTS:

The proposed rule does not impose any additional compliance requirements on local governments beyond those already required pursuant to federal and State statutes and regulations. The proposed rule relates to the procedures that must be followed by an IHO in accepting an appointment, conducting a hearing, rendering a decision, and providing the decision to the State Education Department; amends the procedures for conducting hearings to ensure they are held in a timely, efficient and expeditious manner in compliance with the federal timeline requirements, and provides IHOs with the tools to properly manage and conduct these hearings in a timely manner. The rule also aligns the State's timeline requirements for issuing an impartial hearing decision with the federal requirements.

Specifically, the proposed rule ensures that individuals certified by the Commissioner as IHOs are willing and available to accept appointment to conduct impartial hearings; establishes procedures for consolidation and multiple due process hearing requests filed for the same student; requires and establishes procedures for prehearing conferences; prohibits an IHO from issuing a decision to enforce the terms of a settlement agreement or an order by an administrative officer; aligns the State's timeline for an IHO to render a decision consistent with the federal timelines; prohibits an IHO from soliciting extension requests or issuing extensions to an impartial hearing due to his or her own scheduling conflicts; amends the considerations that an IHO must make in granting a request for an extension; specifies information that must be included in the hearing record; extends the timeline by which one redacted copy of the impartial hearing decision must be provided to the State Education Department; defines and establishes procedures for transmittal of the impartial hearing record to the school district; and establishes procedures for the withdrawal of a due process complaint.

It is anticipated that school districts will experience cost-savings as a result of these impartial hearings being conducted in a more efficient and expeditious manner, in compliance with federal and State regulations.

Revised Rural Area Flexibility Analysis

Since publication of a Notice of Revised Rule Making in the State Register on July 11, 2012, the proposed rule has been revised as set forth in the Revised Regulatory Impact Statement submitted herewith.

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

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

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

The proposed rule amends the procedures that must be followed by an Impartial Hearing Officer (IHO) in accepting an appointment, conducting a hearing, and rendering a decision and providing the decision to the State Education Department, amends the procedures for conducting hearings to ensure that they are held in a timely, efficient and expeditious manner in compliance with the federal timeline requirements, and provides IHOs with the tools to properly manage and conduct these hearings in a timely manner.

Specifically, the proposed rule ensures that individuals certified by the Commissioner as IHOs are willing and available to accept appointment to conduct impartial hearings; establishes procedures for consolidation and multiple due process hearing requests filed for the same student; requires and establishes procedures for prehearing conferences; prohibits an IHO from issuing a decision to enforce the terms of a settlement agreement or an order by an administrative officer; aligns the State's timeline for an IHO to render a decision consistent with the federal timelines; prohibits an IHO from soliciting extension requests or issuing extensions to an impartial hearing due to his or her own scheduling conflicts; amends the considerations that an IHO must make in granting a request for an extension; specifies information that must be included in the hearing record; extends the timeline by which one redacted copy of the impartial hearing decision must be provided

to the State Education Department; defines and establishes procedures for transmittal of the impartial hearing record to the school district; and establishes procedures for the withdrawal of a due process complaint.

Revised Job Impact Statement

Since publication of a Notice of Revised Rule Making in the State Register on July 11, 2012, the proposed rule has been revised as set forth in the Revised Regulatory Impact Statement submitted herewith.

The proposed rule, as so revised, amends the procedures for conducting a special education due process hearing so that the hearings will be conducted in an efficient and expeditious manner and expressly provides impartial hearing officers (IHOs) with the tools necessary to properly manage and conduct these hearings in such manner, in order to further promote compliance with the federal timeline requirements. The revised proposed rule will not have a substantial impact on jobs and employment opportunities. Because it is evident from the nature of the revised proposed rule 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 since publication of a Notice of Revised Rule Making in the State Register on July 11, 2012.

1. Certification - section 200.1(x)(4)(vi)

COMMENTS: Rescinding IHO certification unnecessary and costly; exposes IHOs to arbitrary decisions without recourse; will prevent attorneys from taking cases. Create class of inactive IHOs; allow retired status. Two years is excessive; rescind certification after one year.

DEPARTMENT RESPONSE: Rule is necessary to ensure IHOs are available and willing to serve. SED must maintain a list of IHOs adequate to meet demand for requests for hearings. When IHOs are unavailable to serve, it may cause delays in appointment. It's costly and inappropriate for SED to train and provide resources to individuals who will not provide this public service. Decisions affecting IHO certification will be made on a case-by-case basis, with opportunity for IHOs to provide good cause for unavailability and why his/her certification should not be rescinded.

COMMENT: IHOs should be salaried.

DEPARTMENT RESPONSE: Comment beyond scope of proposed amendment.

Section 200.5(j)(3)(ii) - Consolidation of Due Process Requests

COMMENT: Consolidation will reduce possibility of conflicting findings and duplicative evidence. Revised amendment allows appropriate IHO discretion; will serve both parties in having an efficient hearing by person familiar with case.

DEPARTMENT RESPONSE: Comments supportive; no response necessary.

COMMENT: If IHO decides to consolidate complaints, other party should have opportunity to object and address issues. If IHO decides complaints should proceed separately, clarify whether same IHO presides over both hearings or district appoints a new IHO for second hearing. If IHO managing first hearing cannot accept further appointments, clarify whether new IHO can consolidate both cases despite first IHO's availability to manage first hearing. Clarify which timeline applies when two cases are consolidated.

DEPARTMENT RESPONSE: Revised rule clarifies consolidation process. Other questions more appropriately addressed through guidance.

Section 200.5(j)(3)(xi) - Prehearing Conferences:

COMMENT: Support revision that conferences may not be held until after resolution period has ended.

DEPARTMENT RESPONSE: Comment supportive; no response necessary.

COMMENT: Require prehearing conference be conducted sooner than 14 days. Holding a prehearing conference during resolution period should be exception to the rule. There are instances when IHO

must conduct a limited prehearing conference during resolution period. Provide exception where a prehearing conference is necessary to resolve pendency disputes.

DEPARTMENT RESPONSE: To ensure IHOs have appropriate discretion to conduct prehearing conferences to meet federal requirements, revised 200.5(j)(xi)(e) prohibits IHOs from conducting prehearing conferences prior to date parties have a right to a hearing except as necessary to meet federal requirements.

COMMENT: Parents should have right to go directly to a hearing after expiration of resolution period without a conference.

DEPARTMENT RESPONSE: Prehearing conferences facilitate expeditious hearings, rather than delay hearing decisions.

COMMENT: Proposal gives districts a forum to intimidate and discourage parents from proceeding with a hearing or to settle the case. Mandate dialogue between parties in which district can raise questions about scope and meaning of factual issues raised and complainant can choose to respond, or not. Proposed language will invite unnecessary misinterpretation and litigation. Issues raised cannot be clarified by IHO because parties have right to define issues they wish resolved in notice. Proposed regulation will require parents to "present their case including the issues, their witness list, and evidence to a hearing officer prior to actual hearing" thereby violating the burden of proof law.

DEPARTMENT RESPONSE: Prehearing conferences will not intimidate or discourage parents from proceeding with an impartial hearing. For an unrepresented party, such a conference is an opportunity to provide parents with procedural hearing process information. Federal regulations require subject matter of hearing be limited to matters identified in complaint notice or amended complaint; party requesting hearing is not allowed to raise other issues at hearing, unless other party otherwise agrees. Managing issues is essential to effective and efficient management of hearing process. When issues are clear, parties can prepare for hearing and IHO can determine if he/she has jurisdiction over issues. Clarity of the issues may facilitate a resolution or settlement of the matter. NYS IHOs are trained on purpose and appropriate conduct of prehearing conferences. Nothing would allow or require a party to "present its case" at a prehearing conference nor does it alter the burden of proof requirements in NYS.

COMMENT: Written prehearing order is unnecessary and burdensome; no need in many cases to have a written order; can be done on the record the first day of hearing. Clarify prehearing orders should be included in the record. Clarify what happens when both parties oppose the order. Requirement to change order each time extensions are granted and changes are made is burdensome and not effective and efficient. Distinguish between "written summary of the prehearing conference" and "written prehearing order" and whether a "transcript" can substitute for a prehearing order.

DEPARTMENT RESPONSE: A prehearing order is standard legal practice; confirms the matters agreed-upon by the parties at the conference; and enables the IHO to move the hearing forward in an orderly fashion, and render decisions in an efficient and expeditious manner. Proposed rule requires parties be given opportunity to object to prehearing order. Rulings on objections are best left to discretion of IHOs to rule on a case-by-case basis. If necessary, SED may consider issuing guidance. "Transcript" is a verbatim recording of what occurred at prehearing conference for inclusion with hearing record; is distinct from "written prehearing order" which confirms and/or identifies matters resolved at prehearing conference. "Written summary" is a flexible, less formal method of documenting what occurred during conference. IHOs have discretion to decide whether a conference be transcribed or a written summary is sufficient. If written summary option is selected, IHO has discretion to include summary as part of the prehearing order, or to issue it separately.

COMMENT: Term 'prehearing' creates confusion about when and how hearing commences. Change to 'scheduling conference'.

DEPARTMENT RESPONSE: Term prehearing conference retained. Conference must be conducted before first hearing date and purpose is broader than scheduling.

COMMENT: Prehearing conferences should include court report-

ers and recording should be entered into record on first day of the hearing.

DEPARTMENT RESPONSE: Such decisions best left to IHO discretion on case-by-case basis.

COMMENT: Unclear why witness lists are not disclosed at the same time the final disclosure of all evidence intended to be offered. Having discussion with parties related to witnesses expected to testify and nature of testimony affords IHOs opportunities to gauge time needed to conduct hearings and set expectations on which needed witnesses.

DEPARTMENT RESPONSE: Revised proposed rule to confirm and/or identify deadline date for final disclosure of all evidence intended to be offered at the hearing, consistent with federal guidance, must include names of witnesses and general thrust of testimony (see 211 IDELR 166 Letter to Bell).

COMMENT: Proposed language implies IHOs have no discretion to permit participation by alternative means. Should not be conditioned on other party's consent.

DEPARTMENT RESPONSE: We agree; language has been deleted.

Timeline for Commencing the Hearing:

COMMENT: Mandate prehearing conferences as soon as possible. All IHOs trained to conduct them. Consider requiring for cases filed within 30 days of regulation effective date.

DEPARTMENT RESPONSE: Prehearing conferences cannot be mandatory until rule is adopted. Given an effective date of January 1, 2013, the rule provides sufficient notice.

Section 200.5(j)(4)(iii) - Settlement Agreements

COMMENT: IHO's should only order settlement agreements on issues raised in the complaint or amended complaint.

DEPARTMENT RESPONSE: Comment supportive; no response necessary.

COMMENT: Relevant law does not bar issuing Findings of Fact that parties entered into settlement agreement of specified content, even when agreement includes matters not in complaint. No reasonable policy justifies barring IHOs from so-ordering agreements, whether or not that agreement includes matters in the complaint. Infringes on parties' rights. Clarify whether IHOs can so order attorneys' fees. So-ordered determination is a finding of fact and a remedy, not an IHO inquiry into the merits of the settlement.

DEPARTMENT RESPONSE: Proposed rule is neither hostile to nor limits settlement agreements. Regulations provide for opportunities for parties to reach agreement, including resolution sessions and extensions to use of mediation. Each results in a written settlement agreement enforceable in court. IHO authority is limited to matters in a complaint or amended complaint; IHO may not order attorney fees.

Section 200.5(j)(5) - Submission of IHO Decisions

COMMENT: Clarify purpose of redacted copy to SED since cases are not published.

DEPARTMENT RESPONSE: SED posts redacted IHO decisions on its website and receives many Freedom of Information Law requests for such documents.

Section 200.5(j)(5) - Decision Timeline

COMMENT: Support setting reasonable timelines for submission of hearing decisions, possibly based on length of hearing.

DEPARTMENT RESPONSE: It is inconsistent with federal requirements to establish different timelines to issue and provide copies of decisions based on hearing length.

COMMENT: Conditioning timeline from when the IHO "receives" the waiver or agreement that no agreement can be reached is inconsistent with IDEA; timeline starts day after date each was entered.

DEPARTMENT RESPONSE: Revised rule conforms to IDEA.

COMMENT: Permit parties to request extensions to obtain transcripts, write and submit memoranda, review record and write decision based on record.

DEPARTMENT RESPONSE: Nothing in proposed rule would prohibit parties from requesting extensions to submit memorandum of

law or other information to IHOs. A record is closed when IHO receives post-hearing submissions and transcript. IHOs determine record close dates.

Section 200.5(j)(5) - Record

COMMENT: Clarify “notice” and required content; include response sent to parents when district has not sent a prior written notice regarding complaint subject matter.

DEPARTMENT RESPONSE: Revised 200.5(j)(5)(iv) clarifies ‘notice’ refers to prior written notice and other party response as required by 200.5(j)(4) and (5); replaces term ‘motions’ with ‘requests for an order’; and deletes ‘orders of discovery’ since, if made, would be included under clause (c). Provision is not meant to be restrictive.

COMMENT: Proposed rule relating to the record maintains greater confidentiality.

DEPARTMENT RESPONSE: Nothing proposed relates to confidentiality of records.

COMMENT: Have districts maintain copy of record/exhibits in addition to IHOs; newly appointed IHO can receive the district’s record without delays. Require timeline for record submission. Re ‘returning’ record to district; district did not previously possess it.

DEPARTMENT RESPONSE: Revised rule replaces “return” with “transmit”; does not impose timelines for transmittal of the record to district, but IHOs must timely comply.

Section 200.5(j)(5)(i)-(iv) - Extensions to the Due Date for Rendering the Impartial Hearing Decision

COMMENT: Apply same ‘good cause’ principle that applies to party requested extensions sought to IHO initiated extensions.

DEPARTMENT RESPONSE: Federal regulations do not allow for IHO initiated extensions.

COMMENT: Restore proposed one-time 30 day extension for settlement negotiations. Require considerations and procedures as for other extensions.

DEPARTMENT RESPONSE: Proposed amendment would have imposed stricter restrictions on IHO authority to grant extensions. Currently, there is no limit on the number of extensions provided IHO has made appropriate considerations required by regulation and determined compelling reasons or specific showing of substantial hardship.

Section 200.5(j)(3) - Withdrawals of Requests

COMMENT: Consistent with SRO decisions; does not alter statute of limitations timelines.

DEPARTMENT RESPONSE: Comments supportive; no response necessary.

COMMENT: Clarify IHO should notify parties of intended ruling and give parties opportunity to decide to proceed to hearing or withdraw with prejudice. Rule would not give IHO discretion to refuse withdrawal requests. Require withdrawing party to file a motion with IHO and allow IHO discretion to allow the withdrawal, with or without prejudice.

DEPARTMENT RESPONSE: Revised rule clarifies party must notify IHO and other party of intent to withdraw and IHO must issue an order of termination; withdrawal is deemed to be without prejudice except IHO may, upon notice and an opportunity for parties to be heard, issue a ‘with prejudice’ decision at party request or IHO initiative. Do not agree IHOs should have discretion to force parties to proceed.

Department of Financial Services

EMERGENCY RULE MAKING

Limitation of New Enrollment to the Healthy NY High Deductible Plan Pursuant to Section 4326(g) of the Insurance Law

I.D. No. DFS-38-12-00001-E

Filing No. 886

Filing Date: 2012-08-31

Effective Date: 2012-08-31

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

Action taken: Addition of section 362-2.9 (Regulation 171) to Title 11 NYCRR.

Statutory authority: Financial Services Law, sections 202 and 302; and Insurance Law, sections 301, 1109, 3201, 3216, 3217, 3221, 4235, 4303, 4304, 4305, 4326 and 4327

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

Specific reasons underlying the finding of necessity: Chapter 1 of the Laws of 1999 enacted the Healthy New York (“Healthy NY”) program, an initiative designed to enable small employers to provide health insurance to employees and their families and to provide working uninsured individuals with an affordable health insurance coverage option. The program offers standard benefit packages and high deductible health plan options to eligible individuals and employers. Healthy NY currently provides essential health coverage to over 170,000 New Yorkers.

Due to State fiscal constraints, the New York State budget has set Healthy NY funding appropriations at approximately \$160 million for the past three consecutive fiscal years. During this timeframe, Healthy NY enrollment and claims have increased. As a result, there has been a need to pro-rate stop loss distributions to health plans for the last two years.

Health maintenance organizations and participating insurers (“health plans”) are currently setting Healthy NY premiums for 2012. In developing proposed premium rates for 2012, most health plans have assumed that future funding for Healthy NY will again be held flat. This has caused health plans to apply for significant rate increases, to the detriment of Healthy NY’s low income enrollees and applicants.

In response to the anticipated rate increases, the Department of Financial Services proposes to promulgate this amendment to 11 NYCRR Part 362. Through this amendment, existing Healthy NY enrollees will be permitted to keep their current coverage option. New applicants, for coverage effective January 1, 2012 or later, will be limited to Healthy NY’s high deductible health plans only. This change will allow the Department to better leverage the program’s limited financial resources because Healthy NY high deductible health plans are not as popular with consumers as the standard Healthy NY products. Therefore, we expect new enrollment in the program to decrease. This decrease, combined with normal program attrition, will lead to an overall reduction in the size of the Program. State stop loss funds will go further in providing premium support to this smaller population.

The Department recognizes that this change will pose a hardship for some applicants seeking broader choice in benefit options. However, the Department believes this approach strikes a balance in protecting existing enrollees from unaffordable rate increases, while maintaining an affordable option for those purchasing coverage.

This emergency filing is necessary at this time in order to ensure that the health plans have adequate time to prepare for this change to the program. The plans will need to educate their customer service personnel regarding the new enrollment restrictions, make revisions to websites and consumer materials, and notify brokers about the enrollment restrictions. If the health plans are fully prepared to implement this change, eligible applicants who wish to enroll in the Healthy NY high deductible option effective January 1, 2012 and thereafter will be able to do so without any impediments. The regulation was previously promulgated on an emergency basis on December 7, 2011, March 5, 2012, and June 4, 2012.

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

Subject: Limitation of new enrollment to the Healthy NY high deductible plan pursuant to section 4326(g) of the Insurance Law.

Purpose: To mitigate large premium increases for current enrollees in Healthy NY by limiting new enrollees to the high deductible plan.

Text of emergency rule: A new section 362-2.9 is added to read as follows:

§ 362-2.9 *Healthy New York Enrollment Limitation* (a) *With respect to coverage effective on or after January 1, 2012, a health maintenance organization or a participating insurer may enroll new applicants in the Healthy New York Program only in the high deductible health plans set forth in section 362-2.8 of this Part.*

(b) *With respect to existing enrollees who are in non-high deductible health plans with coverage effective prior to January 1, 2012, a health maintenance organization or a participating insurer shall:*

(1) *permit qualifying individuals to add dependents to or remove dependents from their qualifying health insurance contracts; and*

(2) *permit qualifying small employers to add employees and dependents to or remove employees and dependents from their qualifying health insurance contracts.*

(c) *A health maintenance organization or participating insurer shall permit qualifying individuals and qualifying employers enrolled in non-high deductible plans to change their benefit packages to other non-high deductible plans with the same health maintenance organization or participating insurer at the time of annual recertification or a change in the premium rate.*

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 November 28, 2012.

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 10004-1511, (212) 709-1691, email: david.neustadt@dfs.ny.gov

Regulatory Impact Statement

1. **Statutory authority:** The Superintendent's authority for the adoption of the fourth amendment to 11 NYCRR 362 is derived from sections 202, 301, and 302 of the Financial Services Law ("FSL") and sections 301, 1109, 3201, 3216, 3217, 3221, 4235, 4303, 4304, 4305, 4326, and 4327 of the Insurance Law.

Section 202 of the Financial Services Law establishes the office of the Superintendent and designates the Superintendent to be the head of the Department of Financial Services.

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

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

Section 3201 of the Insurance Law authorizes the Superintendent to approve accident and health insurance policy forms for delivery or issuance for delivery in this state.

Section 3216 of the Insurance Law sets forth the standard provisions to be included in individual accident and health insurance policies written by commercial insurers.

Section 3217 of the Insurance Law authorizes the Superintendent to issue regulations to establish minimum standards, including standards of full and fair disclosure, for the form, content and sale of accident and health insurance policies.

Section 3221 of the Insurance Law sets forth the standard provisions to be included in group or blanket accident and health insurance policies written by commercial insurers.

Section 4235 of the Insurance Law defines group accident and health insurance and the types of groups to which such insurance may be issued.

Section 4303 of the Insurance Law governs the accident and health insurance contracts written by non-for-profit corporations and sets forth the benefits that must be covered under such contracts.

Section 4304 of the Insurance Law includes requirements for individual health insurance contracts written by not-for-profit corporations and health maintenance organizations.

Section 4305 includes requirements for group health insurance contracts written by not-for profit corporations and health maintenance organizations.

Section 4326 of the Insurance Law authorizes the creation of a program to provide standardized health insurance to qualifying small employers and qualifying working uninsured individuals. Section 4326(g) authorizes the Superintendent to modify the copayment and deductible amounts for

qualifying health insurance contracts. Section 4326(g) also authorizes the Superintendent to establish additional standardized health insurance benefit packages to meet the needs of the public after January 1, 2002.

Section 4327 of the Insurance Law authorizes the establishment of stop loss funds for standardized health insurance contracts issued to qualifying small employers and qualifying individuals. Section 4327(k) authorizes the suspension of enrollment in the program if it is anticipated that annual expenditures from the stop loss fund will exceed the total funds available for distribution from the fund.

2. **Legislative objectives:** Chapter 1 of the Laws of 1999 enacted the Healthy New York (Healthy NY) program, an initiative designed to enable small employers to provide health insurance to employees and their families and to provide working uninsured individuals with an affordable health insurance coverage option.

3. **Needs and benefits:** Healthy NY provides essential health coverage to over 170,000 New Yorkers. Due to State fiscal constraints, the New York State budget set Healthy NY funding appropriations at approximately \$160 million for the past three consecutive fiscal years. During this timeframe, Healthy NY enrollment and claims increased. As a result, there has been a need to pro-rate state payments to health plans for the last two years. This has caused health plans to apply for significant rate increases, to the detriment of Healthy NY's low income enrollees and applicants.

In response, the Department of Financial Services intends to better utilize Healthy NY's limited financial resources. Promulgation of this regulation is the first and most necessary step to better utilizing program resources. This rule will permit existing Healthy NY enrollees to keep their current coverage option. New applicants, for coverage effective January 1, 2012 or later, will be limited to Healthy NY's high deductible health plans only. The Department believes this approach strikes a balance in protecting existing enrollees from unaffordable rate increases, while maintaining an affordable option for those purchasing coverage.

Healthy NY high deductible health plans are not as popular with consumers as the standard Healthy NY products. Therefore, we expect new enrollment in the program to decrease. This decrease, combined with normal program attrition, will lead to an overall reduction in the size of the program. State stop loss funds will go further in providing premium support to this smaller population. As noted above, expedited promulgation of this regulation is necessary to begin the limitation of program enrollment that will ultimately lead to more effective usage of the stop loss funds.

4. **Costs:** This rule imposes no compliance costs upon state or local governments. The overall costs of the program are capped at the appropriated funding amounts. Through this rule the Department of Financial Services expects to be able to maintain the viability of the program within the appropriated funding amounts.

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

6. **Paperwork:** Healthy NY requires HMOs and participating insurers to report enrollment changes on a monthly basis and also requires an annual request for reimbursement of eligible claims. Twice a year, enrollment reports that discern enrollment on a county-by-county basis are submitted to the Department. This rule will not impose any new reporting requirements.

7. **Duplication:** There are no known federal or other states' requirements that duplicate, overlap, or conflict with this regulation.

8. **Alternatives:** The Department of Financial Services examined multiple alternatives ranging from full program suspension to adjustments to benefits and cost-sharing amounts. It was determined that a full program suspension would have eliminated an affordable health insurance alternative for the working uninsured, and adjustments to benefits and cost-sharing would have had an insufficient impact on savings. Thus, it was decided that this rule would have the most positive outcome in that it will strike a balance in protecting existing enrollees from unaffordable rate increases, while maintaining an affordable option for those who seek to purchase coverage.

9. **Federal standards:** The Healthy NY high deductible health plans meet all federal standards to ensure that program enrollees achieve any available federal tax benefits.

10. **Compliance schedule:** HMOs and participating insurers are required to comply immediately.

Regulatory Flexibility Analysis

1. **Effect of rule:** This rule will affect small businesses that are seeking to enter the Healthy New York (Healthy NY) program because it will limit the number of Healthy NY coverage options that they can offer to their employees. However, the Department of Financial Services feels that qualifying small businesses that choose to offer the high deductible health plan option to their employees will be able to attract and keep talented workers. This rule will have the greatest impact upon health maintenance organizations (HMOs) and licensed insurers in New York State, none of

which fall within the definition of small business as found in section 102(8) of the State Administrative Procedure Act. This rule will not affect local governments.

2. Compliance requirements: There are no compliance requirements for small businesses or local governments. As noted above, this rule will have the greatest impact upon HMOs and licensed insurers in New York State, none of which fall within the definition of small business as found in section 102(8) of the State Administrative Procedure Act.

3. Professional services: No professional services will be necessitated as a result of this rule.

4. Compliance costs: This rule should reduce insurance costs for qualifying small businesses that choose to offer the high deductible health plan to their employees. This rule imposes no compliance costs to local governments.

5. Economic and technological feasibility: The Healthy NY program is designed to make health insurance premiums more affordable for small businesses. Compliance with this rule should be economically and technologically feasible as it requires no action on their part.

6. Minimizing adverse impact: This rule minimizes the impact on small businesses by providing an affordable health insurance option that the businesses can choose to offer to their employees.

7. Small business and local government participation: This notice is intended to provide small businesses, local governments and public and private entities in rural and non-rural areas with an additional opportunity to participate in the rule-making process.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: Health maintenance organizations (HMOs) and participating insurers to which this regulation is applicable do business in every county of the State, including rural areas as defined under section 102(10) of the State Administrative Procedure Act. Small employers and individuals in need of health insurance coverage are located in every county of the State, including rural areas as defined under section 102(10) of the State Administrative Procedure Act.

2. Reporting, recordkeeping and other compliance requirements; and professional services: Healthy New York requires HMOs and participating insurers to report enrollment changes on a monthly basis and also requires an annual request for reimbursement of eligible claims. Twice a year, enrollment reports that discern enrollment on a county by county basis are submitted to the Department of Financial Services. This rule will not add any new reporting requirements, though it will require separate identification of enrollment in the high deductible health plan option. Nothing in this rule distinguishes between rural and non-rural areas. No special type of professional services will be needed in a rural area to comply with this requirement.

3. Costs: HMOs and participating insurers may incur some minor costs as they educate their customer service staff on the changes being made to the program. There are no costs to local governments. This rule has no impact unique to rural areas.

4. Minimizing adverse impact: Because the same requirements apply to both rural and non-rural entities, the rule will have the same impact on all affected entities.

5. Rural area participation: None.

Job Impact Statement

While this rule may reduce the number of health coverage options available to employees; it will not adversely affect jobs or employment opportunities. A health maintenance organization or a participating insurer shall continue to permit existing Healthy New York (Healthy NY) enrollees to keep their current coverage option. New applicants, for coverage effective January 1, 2012 or later, will be limited to Healthy NY's high deductible health plans only. The Department believes that this approach strikes a balance in protecting existing enrollees from unaffordable rate increases, while maintaining an affordable option for those purchasing new coverage. It is the Department's position that this rule will permit employers enrolled in the program to maintain health insurance coverage for their employees. The ability to offer affordable coverage will allow employers to attract and retain qualified workers. Through this rule the Department of Financial Services intends to better leverage Healthy NY's limited financial resources.

EMERGENCY RULE MAKING

Unauthorized Providers of Health Services

I.D. No. DFS-38-12-00002-E

Filing No. 887

Filing Date: 2012-08-31

Effective Date: 2012-08-31

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

Action taken: Addition of Part 65-5 (Regulation 68-E) to Title 11 NYCRR.

Statutory authority: Financial Services Law, section 202 and arts. 3 and 4; and Insurance Law, sections 301, 5109 and 5221 and arts. 4 and 51

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

Specific reasons underlying the finding of necessity: This regulation concerns the de-authorization of certain providers of health services. Insurance Law § 5109(a) requires the Superintendent, in consultation with the Commissioner of Health and the Commissioner of Education, to promulgate standards and procedures for investigating and suspending or removing the authorization for providers of health services to demand or request payment for health services under Article 51 of the Insurance Law upon findings of certain unlawful conduct reached after investigation, notice, and a hearing pursuant to Insurance Law § 5109.

For years, certain owners and operators of professional service corporations and other types of corporations have abused the no-fault insurance system. These persons are involved in activities that include intentionally staging accidents and billing no-fault insurers for health services that were unnecessary or never in fact rendered. Indeed, recent federal indictments have demonstrated that organized crime has infiltrated and permeated the no-fault provider network. Such wide-scale criminal activity is estimated to have defrauded insurers of at least hundreds of millions of dollars, if not more. Insurers ultimately pass on these costs to New York consumers in the form of higher automobile premiums, and schemes such as the fraudulent staging of auto accidents endangers the innocent public. Furthermore, it places in peril the quality of care received by innocent auto accident victims and the public's health, safety, and welfare.

It is of the utmost importance that the Superintendent, Commissioner of Health, and Commissioner of Education be able, as soon as possible, to prohibit health service providers who engage in such activities from demanding or requesting payment from no-fault insurers.

For the reasons stated above, emergency action is necessary for the public health, public safety, and general welfare.

Subject: Unauthorized Providers of Health Services.

Purpose: Establish standards and procedures for the investigation and suspension or removal of a health service provider's authorization.

Text of emergency rule: Section 65-5.0 Preamble.

(a) For years, certain owners and operators of professional service corporations or other similar business entities have abused the no-fault insurance system. These persons are involved in activities that include intentionally staging accidents and billing no-fault insurers for health services that were unnecessary or never in fact rendered. This fraud costs no-fault insurers tens if not hundreds of millions of dollars, which insurers ultimately pass on to New York consumers in the form of higher automobile insurance premiums.

(b) Among other schemes, of great concern to the public are the ownership, control, and daily operation of professional service corporations or other similar business entities by individuals who are not licensed to practice medicine. Ownership of professional service corporations by unlicensed persons works as follows. Unlicensed persons pay licensed physicians to use the physicians' names, signatures, and licenses for the purpose of fraudulently billing no-fault insurers for services that were never rendered, are of no diagnostic value, or are medically unnecessary. These physicians essentially sell their licenses, for a fee, and become "paper owners" of the professional service corporation, which in turn permits unlicensed and unqualified persons to own, operate, and control a professional service corporation, although they are prohibited from having any financial interest in such a corporation pursuant to Article 15 of the Business Corporation Law. Schemes such as this, which could involve professional business entities other than professional service corporations and health care professionals other than physicians, severely compromise the safety and integrity of the health care system in New York. As a result, certain professional business entities have become unjustly enriched through the ill-gotten proceeds of illegal activity, increasing the cost of insurance premiums for the driving public. More important, these abuses threaten the affordability of health care and the public's health, safety, and welfare.

(c) Insurance Law section 5109 requires the Superintendent of Financial Services, in consultation with the Commissioner of Health and the Commissioner of Education, to establish standards and procedures for the investigation and suspension or removal of a provider of health services' authorization to demand or request payment for health services provided under Article 51 of the Insurance Law. This Subpart implements Insurance Law section 5109.

Section 65-5.1 Definitions.

As used in this Subpart, the following terms shall have the meaning ascribed to them:

(a) "Health services" or "medical services" means services, supplies, therapies, or other treatments as specified in Insurance Law section 5102(a)(1)(i), (ii), or (iv).

(b) "Insurer" shall have the meaning set forth in Insurance Law section 5102(g), and also shall include the motor vehicle accident indemnification corporation and any company or corporation providing coverage for basic economic loss, as defined in Insurance Law section 5102(a), pursuant to Insurance Law section 5103(g).

(c) "Noticing commissioner" means the Commissioner of Health or the Commissioner of Education, whomever sends a notice of hearing under this Subpart.

(d) "Provider of health services" or "provider" means a person or entity who or that renders health services.

(e) "Superintendent" means the Superintendent of Financial Services.

Section 65-5.2 Investigations.

(a) The superintendent may investigate any reports made pursuant to Insurance Law section 405, allegations, or other information in the superintendent's possession, regarding providers of health services engaging in any of the unlawful activities set forth in Insurance Law section 5109(b). After conducting an investigation, the superintendent will send to the Commissioner of Health and the Commissioner of Education a list of any providers who or that the superintendent believes may have engaged in any of the unlawful activities set forth in Insurance Law section 5109(b), together with a description of the grounds for inclusion on the list. Within 45 days of receipt of the list, the Commissioner of Health and Commissioner of Education shall notify the superintendent in writing whether they confirm that the superintendent has a reasonable basis to proceed with notice and a hearing for determining whether any of the listed providers should be deauthorized from demanding or requesting any payment for medical services in connection with any claim under Article 51 of the Insurance Law.

(b) The Commissioner of Health and the Commissioner of Education also may investigate any reports, allegations, or other information in their possession, regarding providers engaging in any of the unlawful activities set forth in Insurance Law section 5109(b). If either commissioner conducts an investigation, then the commissioner, or the superintendent, if so designated, shall be responsible for providing notice and an opportunity to be heard to the providers of health services that they are subject to deauthorization from demanding or requesting any payment for medical services in connection with any claim under Article 51 of the Insurance Law. Nothing in this section, however, shall preclude the superintendent, Commissioner of Health, or Commissioner of Education from conducting joint investigations and hearings, or from conducting professional misconduct proceedings against the providers of health services pursuant to the Public Health Law or Title VIII of the Education Law.

Section 65-5.3 Notice; how given.

(a)(1) The superintendent, Commissioner of Health, or Commissioner of Education shall give notice of any hearing to a provider at least 30 days prior to the hearing, in writing, either by delivering it to the provider or by depositing the same in the United States mail, postage prepaid, registered or certified, and addressed to the last known place of business of the provider or if no such address is known, then to the residence address of the provider.

(2) The notice shall refer to the applicable provisions of the law under which action is proposed to be taken and the grounds therefor, but failure to make such reference shall not render the notice ineffective if the provider to whom it is addressed is thereby or otherwise reasonably apprised of such grounds.

(3) It shall be sufficient for the superintendent or noticing commissioner to give to the provider:

(i) notice of the time and the place at which an opportunity for hearing will be afforded; and

(ii) if the person appears at the time and place specified in the notice or any adjourned date, a hearing.

(b) If the noticed provider seeks a hearing, then the provider shall notify the superintendent or noticing commissioner in writing, within ten days of receipt of the notice, that a hearing is demanded; in such case the superintendent or noticing commissioner shall give the provider a further notice of the time and place of such hearing in the manner stated in this section, to the address specified by the provider if supplied.

(c) At least ten days prior to the hearing date fixed in the notice, the provider may file an answer to any charges with the superintendent or noticing commissioner.

(d) Any hearing of which such notice is given may be adjourned from time to time without other notice than the announcement thereof at such hearing.

(e) The statement of any regular salaried employee of the Department of Financial Services, Department of Health, or Department of Education, subscribed and affirmed by such employee as true under the penalties of perjury, stating facts that show that any notice referred to in this section has been delivered or mailed as hereinbefore provided, shall be presumptive evidence that such notice has been duly delivered or mailed, as the case may be.

Section 65-5.4 Hearings.

(a) Unless otherwise provided, any hearing may be held before the superintendent, Commissioner of Health or Commissioner of Education, any deputy, or any designated salaried employee of the Department of Financial Services, Department of Health, or Department of Education who is authorized by the superintendent or noticing commissioner for such purpose. The hearing shall be noticed, conducted, and administered in compliance with the State Administrative Procedure Act.

(b) The person conducting the hearing shall have the power to administer oaths, examine and cross-examine witnesses, and receive documentary evidence, and shall report his or her findings, in writing, to the superintendent or noticing commissioner with a recommendation. The report, if adopted by the superintendent or noticing commissioner, may be the basis of any determination made by the superintendent or noticing commissioner.

(c) Every such hearing shall be open to the public unless the superintendent or noticing commissioner, or the person authorized by the superintendent or noticing commissioner to conduct such hearing, shall determine that a private hearing would be in the public interest, in which case the hearing shall be private.

(d) Every provider affected shall be permitted to: be present during the giving of all the testimony; be represented by counsel; have a reasonable opportunity to inspect all adverse documentary proof; examine and cross-examine witnesses; and present proof in support of the provider's interest. A stenographic record of the hearing shall be made, and the witnesses shall testify under oath.

(e) Nothing herein contained shall require the observance at any such hearing of formal rules of pleading or evidence.

Section 65-5.5 Report of hearing and findings.

(a) Pending a final determination by the superintendent, Commissioner of Health, or Commissioner of Education, if the superintendent or noticing commissioner believes that the provider has engaged in any activity set forth in Insurance Law section 5109(b), then the superintendent or noticing commissioner may temporarily prohibit the provider from demanding or requesting any payment for medical services under Article 51 of the Insurance Law for up to 90 days from the date of the notice of such temporary prohibition pursuant to Insurance Law section 5109(e).

(b) The hearing officer shall issue to the superintendent or noticing commissioner the report described in Section 65-5.4(b) of this Subpart, with a recommendation. The superintendent or noticing commissioner may adopt, modify, remand, or reject the hearing officer's report and recommendation.

(c) Upon consideration of the hearing officer's report and recommendation, the superintendent or noticing commissioner may issue a final order prohibiting the provider from demanding or requesting any payment for medical services in connection with any claim under Article 51 of the Insurance Law and requiring the provider to refrain from subsequently treating, for remuneration, as a private patient, any person seeking medical treatment under Article 51.

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 November 28, 2012.

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: Section 202 and Articles 3 and 4 of the Financial Services Law, and Sections 301, 5109, and 5221 and Articles 4 and 51 of the Insurance Law. Insurance Law § 301 and Financial Services Law §§ 202 and 302 authorize the Superintendent of Financial Services (the "Superintendent") to prescribe regulations interpreting the provisions of the Insurance Law and to effectuate any power granted to the Superintendent under the Insurance Law. Article 3 of the Financial Services Law sets forth administrative and procedural provisions, while Article 4 of the Financial Services Law confers certain powers and duties on the Superintendent with regard to financial frauds prevention. Insurance Law § 5109 requires the Superintendent to promulgate standards and procedures for investigating and suspending or removing, after notice and a hearing, the authorization of health service providers to bill no-fault insurance if they engage in certain unlawful conduct. Insurance Law § 5221 specifies the duties and obligations of the Motor Vehicle Accident Indemnification Corporation ("MVAIC") with regard to the payment of no-fault benefits to qualified persons. In addition, Article 4 of the Insurance Law sets forth requirements for reporting and preventing fraud, while Article 51 of the Insurance Law governs the no-fault insurance system.

2. Legislative objectives: Insurance Law § 5109 requires the Superintendent, in consultation with the Commissioner of Health and the Com-

missioner of Education, to promulgate standards and procedures for investigating and suspending or removing the authorization for health service providers to demand or request payment for health services under Article 51 of the Insurance Law upon findings of certain unlawful conduct reached after investigation, notice, and a hearing pursuant to § 5109. Furthermore, Insurance Law § 301 and Financial Services Law §§ 202 and 302 authorize the Superintendent to prescribe regulations interpreting the provisions of the Insurance Law and to effectuate any power granted to the Superintendent under the Insurance Law.

3. Needs and benefits: For years, certain owners and operators of professional service corporations and other business entities have abused the no-fault insurance system. These persons are involved in activities that include intentionally staging accidents and billing no-fault insurers for health services that were unnecessary or never in fact rendered. Indeed, recent federal indictments have demonstrated that organized crime has infiltrated and permeated the no-fault provider network. Such wide-scale criminal activity is estimated to have defrauded insurers of at least hundreds of millions of dollars, if not more. Insurers ultimately pass on these costs to New York consumers in the form of higher automobile insurance premiums, and schemes such as the fraudulent staging of auto accidents endanger the innocent public. Furthermore, these activities place in peril the quality of care received by innocent auto accident victims and the public's health, safety, and welfare.

It is of the utmost importance that the Superintendent, Commissioner of Health, and Commissioner of Education be able, as soon as possible, to prohibit health service providers who engage in such activities from demanding or requesting payment from no-fault insurers.

Therefore, after consultation with the Commissioner of Health and the Commissioner of Education, the Superintendent drafted this rule to promulgate standards and procedures for investigating and suspending or removing the authorization for health service providers to demand or request payment for health services under Article 51 of the Insurance Law upon findings of certain unlawful conduct reached after investigation, notice, and a hearing pursuant to § 5109.

4. Costs: This rule does not impose compliance costs on state or local governments. The rule should reduce costs for no-fault insurers, which may include local governments who self-fund their no-fault insurance benefits, because it will permit the Superintendent, Commissioner of Health, or Commissioner of Education to prohibit, after notice and a hearing, health service providers who engage in certain unlawful conduct from demanding or requesting payment from no-fault insurers. The rule also should reduce costs for New York consumers in the form of reduced automobile insurance premiums.

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

6. Paperwork: This rule does not impose any additional paperwork.

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

8. Alternatives: There were no significant alternatives to consider.

9. Federal standards: There are no minimum standards of the federal government for the same or similar subject areas. The rule is consistent with federal standards or requirements.

10. Compliance schedule: Insurance Law § 5109(a) requires notice to all health service providers of the provisions of § 5109 and this rule at least 90 days in advance of the effective date of the rule. This rule was initially promulgated on an emergency basis on March 9, 2012, to take effect 95 days after filing with the Secretary of State, i.e., June 12, 2012, and was repromulgated on June 6, 2012, to take effect on June 12, 2012. The Department provided the required notice by, among other things, posting a copy of the rule on its website on March 9, 2012; emailing notice of Insurance Law § 5109 and the rule on March 14, 2012 to health service provider organizations, such as the Medical Society of the State of New York, New York State Chiropractic Association, and Acupuncture Society of New York; and publishing the rule in the State Register on March 29, 2012.

Regulatory Flexibility Analysis

1. Effect of the rule: The Department of Financial Services ("Department") finds that this rule will generally not impose reporting, recordkeeping or other requirements on small businesses or local governments. The basis for this finding is that this rule does not impose any substantive requirements on small businesses or local governments. In addition, this rule affects no-fault insurers authorized to do business in New York State and self-insurers, none of which fall within the definition of "small business" because none are both independently owned and have less than one hundred employees. Self-insurers are typically large enough to have the financial ability to self-insure losses and the Department does not have any information to indicate that any self-insurers are small businesses.

This rule also affects health service providers, some of whom may be considered small businesses. However, this rule does not impose any substantive requirements on health service providers.

Some local governments self-insure their no-fault benefits. The Depart-

ment has not been able to determine the number of local governments that are self-insured. However, this rule does not impose any substantive requirements on local governments, and any impact on local governments would be positive and should reduce their costs.

2. Compliance requirements: This rule does not impose any additional paperwork.

3. Professional services: This rule does not require anyone to use professional services. However, if a health service provider is subject to a hearing, the provider may be represented by counsel.

4. Compliance costs: This rule does not impose compliance costs on small businesses or local governments, because it does not impose any substantive requirements. The rule should reduce costs for no-fault insurers, which may include local governments who self-fund their no-fault insurance benefits, because it will permit the Superintendent, Commissioner of Health, or Commissioner of Education to prohibit, after notice and a hearing, health service providers who engage in certain unlawful conduct from demanding or requesting payment from no-fault insurers.

5. Economic and technological feasibility: This rule does not impose any substantive requirements on small businesses or local governments, so there should not be any issues pertaining to economic and technological feasibility.

6. Minimizing adverse impact: This rule affects uniformly health service providers and no-fault insurers in all parts of New York State and the rule is mandated by statute. The Department does not believe that it will have an adverse impact.

7. Small business and local government participation: The Department issued a press release regarding the rule on March 8, 2012; posted a copy of the rule on its website on March 9, 2012; emailed notice of Insurance Law § 5109 and the rule on March 14, 2012 to health service provider organizations, such as the Medical Society of the State of New York, New York State Chiropractic Association, and Acupuncture Society of New York; and published the rule in the State Register on March 29, 2012. In addition, interested parties will have the opportunity to comment once the proposal is published in the State Register.

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas: Health service providers, insurers, and self-insurers affected by this regulation do business in every county in this state, including rural areas as defined under Section 102(10) of the State Administrative Procedure Act. Some of the home offices of these health service providers, insurers, and self-insurers lie within rural areas. Some government entities that are self-insurers for no-fault benefits may be located in rural areas.

2. Reporting, recordkeeping and other compliance requirements: This rule does not impose any additional paperwork.

3. Costs: This rule does not impose compliance costs on state or local governments. The rule should reduce costs for no-fault insurers, which may include local governments who self-fund their no-fault insurance benefits, because it will permit the Superintendent, Commissioner of Health, or Commissioner of Education to prohibit, after notice and a hearing, health service providers who engage in certain unlawful conduct from demanding or requesting payment from no-fault insurers. The rule also should reduce costs for New York consumers in the form of reduced automobile insurance premiums.

4. Minimizing adverse impact: This rule affects uniformly health service providers and no-fault insurers in both rural and nonrural areas of New York State and the rule is mandated by statute. The Department of Financial Services does not believe that it will have an adverse impact on rural areas.

5. Rural area participation: The Department issued a press release regarding the rule on March 8, 2012; posted a copy of the rule on its website on March 9, 2012; emailed notice of Insurance Law § 5109 and the rule on March 14, 2012 to health service provider organizations, such as the Medical Society of the State of New York, New York State Chiropractic Association, and Acupuncture Society of New York; and published the rule in the State Register on March 29, 2012. In addition, interested parties will have the opportunity to comment once the proposal is published in the State Register.

Job Impact Statement

This rule will not have any adverse impact on jobs and employment opportunities of persons engaging in lawful conduct in New York State, because the rule only allows the Superintendent of Financial Services, Commissioner of Health, or Commissioner of Education to investigate and suspend or remove the authorization for health service providers to demand or request payment for health services under Article 51 of the Insurance Law upon findings of certain unlawful conduct reached after investigation, notice, and a hearing pursuant to Insurance Law § 5109.

Assessment of Public Comment

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

Public Service Commission

NOTICE OF ADOPTION

Tariff Revision to PSC No. 220 — Electricity, to Revise the Notice Period for the Recharge New York Program

I.D. No. PSC-27-12-00002-A

Filing Date: 2012-09-04

Effective Date: 2012-09-04

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

Action taken: On 9/4/12, the PSC adopted an order approving as a permanent rule Niagara Mohawk Power Corporation d/b/a National Grid's Tariff Revision to PSC No. 220 — Electricity, to revise the notice period for commencement of the Recharge New York Program.

Statutory authority: Public Service Law, sections 5, 65 and 66; Public Authorities Law, section 1005; Economic Development Law, section 188-a

Subject: Tariff revision to PSC No. 220 — Electricity, to revise the notice period for the Recharge New York Program.

Purpose: To approve tariff revision as a permanent rule.

Substance of final rule: The Commission, on September 4, 2012 adopted an order approving as a permanent rule Niagara Mohawk Power Corporation d/b/a National Grid's Tariff Revision to PSC No. 220 — Electricity, to revise the notice period for commencement of the Recharge New York Program from 60 days notice to 30 days notice, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann.ayer@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(11-E-0176SA4)

NOTICE OF ADOPTION

Tariff Revision to Conform the Installed Capacity Requirements Allocation Methodology Under the RNY Program

I.D. No. PSC-27-12-00003-A

Filing Date: 2012-09-04

Effective Date: 2012-09-04

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

Action taken: On 9/4/12, the PSC adopted an order approving as a permanent rule New York State Electric & Gas Corporation & Rochester Gas and Electric Corporation Tariff Revisions, to conform the installed capacity requirements allocation methodology under the RNY.

Statutory authority: Public Service Law, sections 5, 65 and 66; Public Authorities Law, section 1005; Economic Development Law, section 188-a

Subject: Tariff revision to conform the installed capacity requirements allocation methodology under the RNY Program.

Purpose: To approve tariff revision as a permanent rule.

Substance of final rule: The Commission, on September 4, 2012 adopted an order approving as a permanent rule New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation Tariff Revisions, to conform the installed capacity requirements allocation methodology under the Recharge New York (RNY) Program to agreements that the Companies have with the New York Power Authority to deliver RNY economic development power in their respective service territories, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann.ayer@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(11-E-0176SA5)

NOTICE OF ADOPTION

Tariff Revision to Provide Uninterrupted Economic Development Power Under the Recharge New York Program

I.D. No. PSC-27-12-00004-A

Filing Date: 2012-09-04

Effective Date: 2012-09-04

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

Action taken: On 9/4/12, the PSC adopted an order approving as a permanent rule Consolidated Edison Company of New York, Inc., Orange and Rockland Utilities, Inc. and New York State Electric & Gas Corporation Tariff Revisions for the Recharge New York Program.

Statutory authority: Public Service Law, sections 5, 65 and 66; Public Authorities Law, section 1005; Economic Development Law, section 188-a

Subject: Tariff revision to provide uninterrupted economic development power under the Recharge New York Program.

Purpose: To approve tariff revision as a permanent rule.

Substance of final rule: The Commission, on September 4, 2012 adopted an order approving as a permanent rule Consolidated Edison Company of New York, Inc., Orange and Rockland Utilities, Inc. and New York State Electric & Gas Corporation Tariff Revisions, to provide uninterrupted economic development power under the Recharge New York (RNY) Program to customers receiving economic power under the expired Power for Jobs economic development program, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann.ayer@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(11-E-0176SA6)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Approval to Modify EEPS Program Budgets Administered by NFG

I.D. No. PSC-38-12-00003-P

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

Proposed Action: The Commission is considering whether to adopt, in whole or in part, to reject, or to take any other action with respect to an August 15, 2012 petition filed by National Fuel Gas Distribution Corporation (NFG) proposing changes to its EEPS programs.

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

Subject: Approval to modify EEPS program budgets administered by NFG.

Purpose: To modify NFG's EEPS programs by reallocating program budgets.

Substance of proposed rule: The Commission is considering whether to adopt, in whole or in part, to reject, or to take any other action with respect to an August 15, 2012 petition filed by National Fuel Gas Distribution

Corporation (NFG) proposing changes to its Energy Efficiency Portfolio Standard (EEPS) program budgets.

In its petition, NFG proposes to reduce its annual residential Conservation Incentive Program (CIP) budget by \$1,115,047. Subsequently, the company proposes to transfer the funds to the Low-Income Usage Reduction Programs (LIURP) changing its total annual budget from \$4,063,679 to \$5,178,726.

In addition, NFG proposes to reduce its annual Non-Residential Conservation Incentive Program (NRCIP) budget by \$750,000 reducing its total annual budget to \$1,162,642. Subsequently, the company proposes to transfer the NRCIP funds to the Area Development Program (ADP), with the limitation that the \$750,000 of funding be targeted solely to small businesses (less than 12,000 Mcf annual consumption) customers, and specified natural gas energy efficiency applications.

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

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

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

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

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

(07-M-0548SP74)

Racing and Wagering Board

EMERGENCY RULE MAKING

Claims of Thoroughbred Horses That Die on the Track During or After a Race

I.D. No. RWB-29-12-00007-E

Filing No. 888

Filing Date: 2012-08-31

Effective Date: 2012-08-31

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 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.

Since November, 2011, 18 thoroughbred horses in New York State that were entered in claiming races have been injured and subsequently died. Their deaths have prompted a comprehensive analysis of the circumstances and possible causes for the deaths of these horses. One common aspect in these races is the fact that the horse that broke down was involved in a claiming race. This rule is necessary to remove an incentives 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.

Given the danger of a horse breaking down, and the safety threat presented to both the jockey on the horse and the jockeys riding 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 doing so for the purpose of winning and not merely to foster a transaction.

Subject: Claims of thoroughbred horses that die on the track during or after a race.

Purpose: Reduce fatalities of thoroughbred horses and injuries to jockeys.

Text of emergency rule: Subdivision (a) of Section 4038.5 of 9 NYCRR is amended to read as follows:

4038.5. Requirements for claim; determination by stewards.

(a) All claims shall be in writing, sealed in an envelope and deposited in a locked box provided for this purpose by the racing secretary or his designee, at least 10 minutes before post time. Claim slip forms must be completely filled out and must, in the judgment of the stewards, be sufficiently accurate to identify the claim, otherwise the claim will be void. No money shall accompany the claim. Each person desiring to make a claim, unless he shall have such amount to his credit with the association, must first deposit with the association the whole amount of the claim, in a manner approved by the racing secretary or designee for which a receipt will be given. All claims shall be passed upon by the stewards, and the person determined at the closing time for claiming to have the right of claim shall become the owner of the horse when the start is effected, whether it be [alive or dead,] sound or unsound or injured before or during the race or after it, except that:

i. the claim is voidable at the discretion of the new owner pursuant to the conditions stated in section 4038.18 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.

In the event more than one person should enter a claim for the same horse, the disposition of the horse shall be decided by lot by the stewards. Any horse so claimed shall then be taken to the test barn for delivery to the claimant after the test sample is taken.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. RWB-29-12-00007-EP, Issue of July 18, 2012. The emergency rule will expire October 29, 2012.

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, New York 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 up for sale to another individual.

This amendment will reduce the incidence of injuries/deaths in horse races by changing the claiming rule, which presently has no disincentive to a trainer entering a potentially unsound horse with the expectation that it will be claimed. The current rule provides a mechanism by which an unsound horse might be claimed and the risk of racing the unsound horse is not borne by the person who races the horse. This situation is unique to claiming races. This same mechanism also places the jockey at risk.

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 that required the stewards to consult with a designated veterinarian before voiding a claim 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: Compliance can be implemented immediately. The rule previously was adopted as an emergency rule and was originally effective on April 2, 2012 and refilled on June 29, 2012. This rule will be effective for 60 additional days beginning on August 31, 2012. This rule will be effective as permanent rule when the Notice of Adoption appears in the State Register.

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

As is evident by the nature of this rulemaking, this proposal affects the voiding of claims where a horse suffers a fatal breakdown while on the racetrack. The Board currently has a rule that permits the voiding of a claim, and this amendment expands that rule to include the death of a horse. This amendment 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. There will also be no adverse impact on small businesses and jobs 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.

Assessment of Public Comment

No public comment was received as part of the Proposed Rulemaking 45-day public comment period. During the preliminary rule development phase in April 2012, the Board sought public comment regarding the rule. The rule remains unchanged since public comment was received in April 2012.

One response was received from Finger Lakes Race Track, which supported the rulemaking. A second response was received from Dr. Scott Palmer of the New York Task Force on Racehorse Health and Safety, which supported the rulemaking.

A third response was received from James J. Gallagher, Executive Director of the New York Thoroughbred Horsemen's Association, Inc. ("NYTHA"), who urged tabling the proposal until the Governor's task force on equine breakdowns completed their findings. NYTHA believes the rule may create pressure to euthanize a horse on the track and may place undue pressure on the track operator's veterinarian to make a life and death decision under unreasonable time constraints. The Board considered NYTHA's comments but believes that under the rule, a veterinarian is not placed in a position where he or she must compromise his or

her ethical duty to protect the welfare of the horse. The rule does not compel a veterinarian to make a decision for or against one owner over the other, nor does the rule create an incentive to euthanize a horse on the track. Because the rule does not encroach upon a veterinarian's duty to protect the welfare of a race horse, no modification to the rule was made.

NOTICE OF ADOPTION

Maximum Fines for Violations in Thoroughbred, Harness and Quarterhorse Racing

I.D. No. RWB-23-12-00001-A

Filing No. 890

Filing Date: 2012-08-31

Effective Date: 2012-09-19

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

Action taken: Amendment of sections 4022.13, 4102.3(a)(2) and 4207.29(f) of Title 9 NYCRR.

Statutory authority: Racing, Pari-Mutuel Wagering and Breeding Law, sections 101(1), 250, 301(1), 310, 401(1) and 410

Subject: Maximum fines for violations in thoroughbred, harness and quarterhorse racing.

Purpose: To establish maximum fine amounts in accordance with statute (chapter 240 of the Laws of 2010).

Text or summary was published in the June 6, 2012 issue of the Register, I.D. No. RWB-23-12-00001-P.

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

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

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Reimbursement of Costs to the State of New York for Associate Judges and Starters at Harness Races

I.D. No. RWB-25-12-00001-A

Filing No. 889

Filing Date: 2012-08-31

Effective Date: 2012-09-19

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

Action taken: Addition of section 4101.41 to Title 9 NYCRR.

Statutory authority: Racing, Pari-Mutuel Wagering and Breeding Law, sections 101, 301 and 308

Subject: Reimbursement of costs to the State of New York for associate judges and starters at harness races.

Purpose: To implement reimbursement for the costs of hiring certain harness racing officials.

Text or summary was published in the June 20, 2012 issue of the Register, I.D. No. RWB-25-12-00001-P.

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

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

Assessment of Public Comment

The agency received no public comment.

Office for Technology

NOTICE OF ADOPTION

Electronic Recording of Instruments Affecting Real Property

I.D. No. OFT-29-12-00011-A

Filing No. 891

Filing Date: 2012-09-04

Effective Date: 2012-09-19

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

Action taken: Amendment of Part 540 of Title 9 NYCRR.

Statutory authority: State Technology Law, sections 103, 303, 304 and 305; and Real Property Law, section 291-i

Subject: Electronic Recording of Instruments Affecting Real Property.

Purpose: To establish standards in relation to the electronic recording of instruments affecting real property by recording officers.

Text or summary was published in the July 18, 2012 issue of the Register, I.D. No. OFT-29-12-00011-P.

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

Text of rule and any required statements and analyses may be obtained from: John Aveni, Esq., NYS Office of Information Technology Services (ITS), Empire State Plaza, P.O. Box 2062, Albany, New York 12220-0062, (518) 473-5115, email: erecordinglaw.feedback@cio.ny.gov

Assessment of Public Comment

The agency received no public comment.

New York State Thruway Authority

NOTICE OF ADOPTION

Advertising Device Permit Fees for Applications, Permits and Renewals

I.D. No. THR-24-12-00001-A

Filing No. 892

Filing Date: 2012-09-04

Effective Date: 2012-09-19

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

Action taken: Amendment of section 105.5 of Title 21 NYCRR.

Statutory authority: Public Authorities Law, sections 354(5), (8), (15) and 361(1)(a); Vehicle and Traffic Law, section 1630

Subject: Advertising device permit fees for applications, permits and renewals.

Purpose: To provide that the Thruway Authority advertising device permit fees are consistent with DOT advertising device permit fees.

Text or summary was published in the June 13, 2012 issue of the Register, I.D. No. THR-24-12-00001-P.

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

Text of rule and any required statements and analyses may be obtained from: Kathy Clark, NYS Thruway Authority, 200 Southern Blvd., Albany, NY 12209, (518) 436-2876, email: kathy.clark@thruway.ny.gov

Assessment of Public Comment

The agency received no public comment.