

# RULE MAKING ACTIVITIES

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

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

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

## Department of Agriculture and Markets

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

#### Various Trees and Plants of the Prunus Species

I.D. No. AAM-39-12-00005-P

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

**Proposed Action:** Amendment of sections 140.1 and 140.3 of Title 1 NYCRR.

**Statutory authority:** Agriculture and Markets Law, sections 18, 164 and 167

**Subject:** Various trees and plants of the Prunus species.

**Purpose:** To deregulate a regulated area in Wayne County since the plum pox virus has not been detected. To make technical changes.

**Text of proposed rule:** Subdivision (o) of section 140.1 of Title 1 of the Official Compilation of Codes, Rules and Regulations of the State of New York (1 NYCRR) is repealed and a new subdivision (o) is added to read as follows:

(o) *Regulated articles mean plant and plant materials, including trees, seedlings, root stock, budwood, branches, twigs and leaves of the following varieties of the Prunus species:*

(1) *Fruit-bearing and ornamental varieties including all cultivars of:*

<b>SCIENTIFIC NAME</b>	<b>COMMON NAME</b>
<i>Prunus americana</i>	<i>American plum and wild plum</i>
<i>Prunus armeniaca</i>	<i>Apricot</i>

<i>Prunus cerasifera</i>	<i>Myrobalan plum/Cherry plum</i>
<i>Prunus domestica</i>	<i>European plum &amp; Common Plum</i>
<i>Prunus dulcis</i>	<i>Sweet Almond</i>
<i>Prunus persica</i>	<i>Peach &amp; Flowering Peach</i>
<i>Prunus persica</i> var. <i>nucipersica</i>	<i>Nectarine</i>
<i>Prunus salicina</i>	<i>Japanese Plum</i>

(2) *Ornamental varieties including all cultivars of:*

<b>SCIENTIFIC NAME</b>	<b>COMMON NAME</b>
<i>Prunus cerasifera</i>	<i>Purple Leaf Plum</i>
<i>Prunus x cistena</i>	<i>Purple Leaf Sand Cherry</i>
<i>Prunus glandulosa</i>	<i>Flowering Almond</i>
<i>Prunus persica</i>	<i>Flowering Peach &amp; Purple Leaf Peach</i>
<i>Prunus pumila</i>	<i>Sand Cherry</i>
<i>Prunus spinosa</i>	<i>Black Thorn and Sloe</i>
<i>Prunus serrulata</i>	<i>Japanese Flowering Cherry &amp; Kwanzan Cherry</i>
<i>Prunus tomentosa</i>	<i>Nanking Cherry &amp; Hansen's Bush Cherry</i>
<i>Prunus triloba</i>	<i>Flowering Plum</i>

(3) *For the purposes of this Part, the following varieties of the Prunus species are not regulated articles: Prunus avium; Prunus cerasus; Prunus effuse; Prunus laurocerasus; Prunus mahaleb; Prunus padus; Prunus sargentii; Prunus serotina; Prunus serrula; Prunus subhirtella; Prunus yedoensis; and Prunus virginiana.*

(4) *For the purposes of this Part, seeds and fruit that are free of leaves of all varieties of the Prunus species are not regulated articles.*

Subdivision (d) of Section 140.3 of 1 NYCRR is repealed, subdivision (e) is re-lettered subdivision (d) and subdivision (f) is re-lettered subdivision (e).

**Text of proposed rule and any required statements and analyses may be obtained from:** Kevin King, Director, Division of Plant Industry, New York State Department of Agriculture and Markets, 10B Airline Drive, Albany, New York 12235, (518) 457-2087

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

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

#### Regulatory Impact Statement

1. Statutory authority:

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

Section 164 of the Agriculture and Markets Law provides, in part, that the Commissioner shall take such action as he may deem necessary to control or eradicate any injurious insects, noxious weeds, or plant diseases existing within the State.

Section 167 of the Agriculture and Markets Law provides, in part, that the Commissioner is authorized to make, issue, promulgate and enforce such orders, by way of quarantines or otherwise, as he may deem necessary or fitting to carry out the purposes of Article 14 of said Law. Said Section also provides that the Commissioner may adopt and promulgate

such rules and regulations to supplement and give full effect to the provisions of Article 14 of the Agriculture and Markets Law as he may deem necessary.

2. Legislative objectives:

The proposed rule accords with the public policy objectives the Legislature sought to advance by enacting the statutory authority in that it will help to prevent the further spread within the State of a serious viral infection of plants, the plum pox virus (Potyvirus). Those objectives are also enhanced by ensuring that regulatory sanctions are lifted once the virus is eradicated in a regulated or quarantined area.

3. Needs and benefits:

The proposed rule deregulates one of two (2) regulated areas in Wayne County, located in portions of the Towns of Ontario and Williamson, due to the fact that surveys and sampling within this regulated area have yielded negative results for the virus for three (3) consecutive years. The proposal also makes technical changes in the rule. The proposed rule clarifies the definition of regulated articles to include the cultivars of those regulated articles. Cultivars are cultivated varieties of a species of plant. The proposed rule also changes the format of regulated articles from a narrative description to a chart, thereby making the regulations easier to interpret and read. Finally, the proposal corrects the spelling of several regulated articles.

The plum pox virus, Potyvirus, is a serious viral disease of stone fruit trees that affects many of the Prunus species. This includes species of plum, peach, apricot, almond and nectarine. The plum pox virus does not kill infected plants, but debilitates the productive life of the trees. This affects the quality and quantity of the fruit, which reduces its marketability. Symptoms of the plum pox virus may manifest themselves on the leaves, flowers and fruits of infected plants and include green or yellow veining on leaves; streaking or pigmented ring patterns on the petals of flowers; and ring or spot blemishing on the fruit which may also become misshapen. There is no known treatment or cure for this virus. The virus is spread naturally by several aphid species. These insects serve as vectors for the spread of the plum pox virus by feeding on the sap of infected trees and then feeding on plants which aren't infected with the virus. Plum pox virus may also be spread through the exchange of budwood and its propagation.

The plum pox virus was first reported in Bulgaria in 1915. It subsequently spread through Europe, the Middle East and Africa. Plum pox was first discovered in North America in 1999 when trees in an orchard in Pennsylvania were found to be infected with the virus. In the summer of 2000, the plum pox virus was discovered in Ontario within five miles of its border with New York. This prompted the Department, with the support of the United States Department of Agriculture (USDA), to begin annual plum pox surveys of stone fruit orchards in New York. From 2000 through 2005, more than 89,000 leaf samples were taken, analyzed and found to be negative for plum pox.

In 2006, the plum pox virus was detected in two locations in Niagara County near the Canadian border. As a result, on July 16, 2007, the Department adopted, on an emergency basis, a rule which immediately established a plum pox virus quarantine in that portion of Niagara County. The plum pox virus was subsequently detected in four (4) other locations in Niagara County as well as one location in Orleans County. In response to these detections, on October 8, 2008, the Department adopted, on an emergency basis, amendments to the rule, which established the quarantine in Orleans County and extended the quarantine in Niagara County. This rule was adopted on a permanent basis on December 10, 2008.

On July 6, 2010 and August 2, 2010, the plum pox virus was detected in two separate locations in Niagara County. In response to these findings, Part 140 of 1 NYCRR was repealed and a new Part 140 was added to amend the existing quarantine areas in Niagara County; to amend one of the three (3) regulated areas in Niagara County; and to deregulate the second of the three (3) regulated areas in Niagara County, due to the fact that surveys and sampling within this regulated area have yielded negative results for the virus for three (3) consecutive years which justifies deregulation under existing federal protocols.

The proposed amendments are necessary and beneficial since they deregulate an area of Wayne County in which plum pox virus has not been detected for three (3) consecutive years, thereby allowing farmers and homeowners to grow fruit which they previously were prohibited from growing. There are also technical amendments to the rule. The addition of cultivars, which are cultivated varieties of a particular fruit, makes clear that all varieties of a regulated article are also regulated. The change in the format of regulated articles from narrative description to a chart will make the regulations easier to interpret and read. Finally, the spelling of several regulated articles is corrected.

4. Costs:

(a) Costs to regulated parties for the implementation of and continuing compliance with the rule: None. Regulated parties handling regulated articles in the regulated area in Wayne County which will be deregulated

under the proposal, would no longer require compliance agreements with the Department or phytosanitary certificates for intra-state movement of regulated articles.

(b) Costs to the agency, the state and local governments for the implementation and continuation of the rule: None.

(c) The information, including the sources of such information and the methodology upon which the cost analysis is based: The costs analysis set forth above is based upon observations of the industry as well as the provisions of the proposed regulations.

5. Local government mandate:

None.

6. Paperwork:

Nursery dealers and nursery growers handling regulated articles in the regulatory area in Wayne County which would be deregulated under this proposal would no longer require compliance agreements with the Department or phytosanitary certificates for intra-state movement of regulated articles.

7. Duplication:

None.

8. Alternatives:

The only alternative would be to keep the regulatory area in place in Wayne County. This was rejected, since surveys failed to detect the virus in that area for three (3) consecutive years. Deregulating the regulatory area after three consecutive years of no detections is consistent with federal protocols.

9. Federal standards:

Sections 301.74 through 301.74-5 of Title 7 of the Code of Federal Regulations (CFR) restricts the interstate movement of regulated articles susceptible to the plum pox virus. The proposed amendments do not exceed any minimum standards for the same or similar subject areas, since it restricts the intrastate, rather than interstate, movement of regulated articles by establishing a plum pox virus quarantine in New York State.

10. Compliance schedule:

It is anticipated that regulated persons would be able to comply with the proposed amendments immediately.

**Regulatory Flexibility Analysis**

1. Effect on small businesses:

The proposed rule deregulates the one of two (2) regulated areas in Wayne County, located in portions of the Towns of Ontario and Williamson, due to the fact that surveys and sampling within this regulated area have yielded negative results for the virus for three (3) consecutive years. The proposal also makes technical changes in the rule. The proposed rule clarifies the definition of regulated articles to include the cultivars of those regulated articles. Cultivars are cultivated varieties of a species of plant. The proposed rule also changes the format of regulated articles from a narrative description to a chart, thereby making the regulations easier to interpret and read. Finally, the proposal corrects the spelling of several regulated articles.

There are six (6) growers in Wayne County located in the regulated area which will be deregulated under the proposed rule. All of these growers are small businesses.

It is anticipated that the proposal will not affect local governments.

2. Compliance requirements:

None.

3. Professional services:

None.

4. Compliance costs:

(a) Initial capital costs that will be incurred by a regulated business or industry or local government in order to comply with the proposed rule: None.

(b) Annual cost for continuing compliance with the proposed rule: None.

It is anticipated that the proposal will not affect local governments.

5. Minimizing adverse impact:

Since the proposed rule deregulates one of two (2) regulated areas in Wayne County, the proposal minimizes adverse impact since regulated parties in this regulated area will no longer be subject to the requirements of the plum pox quarantine.

It is anticipated that the proposal will not affect local governments.

6. Small business and local government participation:

On December 20, 2011, members of the NYS Plum Pox Advisory Committee met via conference call to discuss any new developments regarding the plum pox virus. The Committee consists of officials from the Department, the New York State College of Agriculture and Life Sciences at Cornell University and the United States Department of Agriculture, as well as growers. The Committee agreed with the deregulation of one of two (2) regulated areas in Wayne County. The Committee was also advised of the proposed technical amendments to the rule and agreed with those changes.

7. Assessment of the economic and technological feasibility of compliance with the rule by small businesses and local governments:

The economic and technological feasibility of compliance with the proposed rule by small businesses and local governments has been addressed and such compliance has been determined to be feasible. The basis for this determination is that by deregulated one of two (2) regulated areas in Wayne County, the proposed rule actually eliminates a regulatory burden on small businesses in that area.

It is anticipated that the proposal will not affect local governments.

**Rural Area Flexibility Analysis**

1. Type and estimated numbers of rural areas:

The proposed rule deregulates the one of two (2) regulated areas in Wayne County, located in portions of the Towns of Ontario and Williamson, due to the fact that surveys and sampling within this regulated area have yielded negative results for the virus for three (3) consecutive years. The proposal also makes technical changes in the rule. The proposed rule clarifies the definition of regulated articles to include the cultivars of those regulated articles. Cultivars are cultivated varieties of a species of plant. The proposed rule also changes the format of regulated articles from a narrative description to a chart, thereby making the regulations easier to interpret and read. Finally, the proposal corrects the spelling of several regulated articles.

There are six (6) growers in Wayne County located in the regulated area which will be deregulated under the proposed rule. All of these entities are situated in rural areas of New York State.

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

None.

3. Costs:

None.

4. Minimizing adverse impact:

The Department has designed the proposed rule to minimize adverse economic impact on regulated parties in rural areas. Since the proposed rule deregulates one of two (2) regulated areas in Wayne County, the proposal minimizes adverse impact since regulated parties in this regulated area will no longer be subject to the requirements of the plum pox quarantine. Accordingly, the approaches for minimizing adverse economic impact required by section 202-a(1) of the State Administrative Procedure Act and suggested by section 202-b(1) of the State Administrative Procedure Act were met.

5. Rural area participation:

On December 20, 2011, members of the NYS Plum Pox Advisory Committee met via conference call to discuss any new developments regarding the plum pox virus. The Committee consists of officials from the Department, the New York State College of Agriculture and Life Sciences at Cornell University and the United States Department of Agriculture, as well as growers. The Committee agreed with the deregulation of one of two (2) regulated areas in Wayne County. The Committee was also advised of the proposed technical amendments to the rule and agreed with those changes.

**Job Impact Statement**

It is anticipated that the proposed rule will not have a substantial adverse impact on jobs and employment opportunities. In fact, deregulation of one of two (2) regulated areas in Wayne County would ease regulated burdens and costs incident thereto, thereby having a positive impact on jobs in the newly deregulated area.

**Specific reasons underlying the finding of necessity:** The proposed amendment to the Regulations of the Commissioner of Education is necessary to conform the Commissioner's Regulations to the requirements of Chapter 460 of the Laws of 2011. Chapter 460 amended Article 156 of the Education Law to amend the scope of practice of occupational therapists, to provide for the supervision of limited permittees in occupational therapy, to provide for practice as exempt individuals by occupational therapy assistant students, to authorize and provide for the definition of practice of occupational therapy assistants, to provide that occupational therapist assistants shall be subject to the disciplinary and regulatory authority of the Board of Regents and the Department, and to make various technical changes to these sections of the Education Law.

The proposed amendment is necessary to implement the new law. The Board of Regents adopted the proposed amendment as an emergency rule at its February meeting, with an effective date of February 14, 2012, consistent with the effective date of the law, and readopted the emergency rule at the April and June Regents meetings to ensure the rule remains continuously in effect until it can be adopted on a permanent basis. The emergency rule included provisions relating to the renewal of a limited permit, the definition of practice of an occupational therapy assistant, the requirements for authority to practice as an occupational therapy assistant, and the exemption to the practice requirements for an occupational therapy assistant.

A Notice of Proposed Rule Making was published in the State Register on March 14, 2012, which provides for the permanent adoption of regulations governing the topics of the previous emergency rules described above, and in addition, included provisions relating to the supervision of holders of limited permits in occupational therapy and supervision of occupational therapy assistants. The 45-day comment period expired on April 30, 2012. The proposed rule was subsequently revised in response to public comment and a Notice of Revised Rule Making was published on July 18, 2012.

The proposed rule, as revised, has now been adopted as a permanent rule at the September 10-11, 2012 Regents meeting. Pursuant to SAPA § 203(1), the earliest effective date of the proposed amendment, if adopted at the September Regents meeting, would be September 26, 2012, the date a Notice of Adoption will be published in the State Register. However, the June emergency rule expires on September 10, 2012, 60 days after its filing with the Department of State on July 13, 2012. A lapse in the rule could potentially disrupt the practice of occupational therapy pursuant to Chapter 460 of the Laws of 2011. Emergency action is therefore necessary for the preservation of the public health and general welfare to ensure that the emergency rule adopted at the February, April and June Regents meetings remains continuously in effect until the effective date of the permanent rule, and to also revise such emergency rule to conform to changes added by the permanent rule.

**Subject:** Occupational Therapy.

**Purpose:** To implement chapter 460 of the Laws of 2011, relating to the profession of occupational therapy.

**Text of emergency rule:** 1. Section 76.4 of the Regulations of the Commissioner of Education is amended, effective September 11, 2012, as follows:

*76.4 Limited Permits.*

(a) ...

(b) Limited permits may be renewed once for a period not to exceed one year at the discretion of the department because of personal or family illness or other extenuating circumstances which prevented the permittee from becoming licensed[, provided that the permittee has not failed the licensing examination in occupational therapy].

(c) *Supervision.*

(1) *A written supervision plan, acceptable to the occupational therapist or licensed physician providing direction and supervision, shall be required for each permittee providing services pursuant to section 7905 of the Education Law. The written supervision plan shall specify the names, professions and other credentials of the persons participating in the supervisory process, the frequency of formal supervisory contacts; the methods (e.g. in-person, by telephone) and types (e.g. review of charts, discussion with permittee) of supervision; the content areas to be addressed; how written treatment notes and reports will be reviewed, including, but not limited to, whether such notes and reports will be initialed or co-signed by the supervisor; and how professional development will be fostered.*

(2) *Documentation of supervision shall include the date and content of each formal supervisory contact as identified in the written supervision plan and evidence of the review of all treatment notes and reports.*

(3) *The determination of the level and type of supervision shall be based on the ability level and experience of the permittee providing the delegated occupational therapy services, the complexity of client needs, and the setting in which the permittee is providing the services. The*

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## Education Department

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### EMERGENCY RULE MAKING

**Occupational Therapy**

**I.D. No.** EDU-11-12-00010-E

**Filing No.** 932

**Filing Date:** 2012-09-11

**Effective Date:** 2012-09-11

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

**Action taken:** Amendment of Part 76 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207(not subdivided), 6504(not subdivided), 6507(2)(a), 7906(4) and (7); and L. 2011, ch. 460

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

supervision plan shall require that the supervisor be notified whenever there is a clinically significant change in the condition or performance of the client, so that an appropriate supervisory action can take place.

(4) Direct supervision shall mean that the supervisor:

(i) initiates, directs and participates in the initial evaluation to the extent required in the supervision plan, interprets the evaluation data, and develops the occupational therapy services plan with input from the permittee;

(ii) participates, on a regular basis, in the delivery of occupational therapy services to the extent required in the supervision plan;

(iii) is responsible for determining the need for continuing, modifying, or discontinuing occupational therapy services;

(iv) takes into consideration information provided by the permittee about the client's responses to and communications during occupational therapy services; and

(v) is available for consultation with the permittee in a timely manner, taking into consideration the practice setting, the condition of the client and the occupational therapy services being provided.

(5) In no event shall the occupational therapist or licensed physician supervise more than five permittees, or its full time equivalent, provided that the total number of permittees being supervised by a single occupational therapist or licensed physician shall not exceed ten.

2. Sections 76.5 and 76.6 of the Regulations of the Commissioner of Education are repealed, and 76.7 of the Regulations of the Commissioner of Education is renumbered 76.5, effective September 11, 2012.

3. The Regulations of the Commissioner of Education are amended by the addition of new sections 76.6, 76.7, 76.8, and 76.9, effective September 11, 2012, to read as follows:

76.6 Definition of occupational therapy assistant practice and the use of the title occupational therapy assistant.

(a) An "occupational therapy assistant" shall mean a person authorized in accordance with this Part who provides occupational therapy services under the direction and supervision of an occupational therapist or licensed physician and performs client related activities assigned by the supervising occupational therapist or licensed physician. Only a person authorized under this Part shall participate in the practice of occupational therapy as an occupational therapy assistant, and only a person authorized under this Part shall use the title "occupational therapy assistant."

(b) As used in this section, client related activities shall mean:

(1) contributing to the evaluation of a client by gathering data, reporting observations and implementing assessments delegated by the supervising occupational therapist or licensed physician;

(2) consulting with the supervising occupational therapist or licensed physician in order to assist him or her in making determinations related to the treatment plan, modification of client programs or termination of a client's treatment;

(3) the utilization of a program of purposeful activities, a treatment program, and/or consultation with the client, family, caregiver, or other health care or education providers, in keeping with the treatment plan and under the direction of the supervising occupational therapist or licensed physician;

(4) the use of treatment modalities and techniques that are based on approaches taught in an occupational therapy assistant educational program registered by the Department or accredited by a national accreditation agency which is satisfactory to the Department, and that the occupational therapy assistant has demonstrated to the occupational therapist or licensed physician that he or she is competent to use; or

(5) the immediate suspension of any treatment intervention that appears harmful to the client and immediate notification of the occupational therapist or licensed physician.

76.7 Requirements for authorization as an occupational therapy assistant.

To qualify for authorization as an occupational therapy assistant pursuant to section 7906(7) of the Education Law, an applicant shall fulfill the following requirements:

(a) file an application with the Department;

(b) have received an education as follows:

(1) completion of a two-year associate degree program for occupational therapy assistants registered by the Department or accredited by a national accreditation agency which is satisfactory to the Department; or

(2) completion of a postsecondary program in occupational therapy satisfactory to the Department and of at least two years duration;

(c) have a minimum of three months clinical experience satisfactory to the state board for occupational therapy and in accordance with standards established by a national accreditation agency which is satisfactory to the Department;

(d) be at least eighteen years of age;

(e) be of good moral character as determined by the Department;

(f) register triennially with the Department in accordance with the pro-

visions of subdivision (h) of this section, sections 6502 and 7906(8) of the Education Law, and sections 59.7 and 59.8 of this Subchapter;

(g) pay a fee for an initial license and a fee for each triennial registration period that shall be one half of the fee for initial license and for each triennial registration period established in Education law for occupational therapists; and

(h) except as otherwise provided by Education Law section 7907(2), pass an examination acceptable to the Department.

76.8 Supervision of occupational therapy assistant.

(a) A written supervision plan, acceptable to the occupational therapist or licensed physician providing direction and supervision, shall be required for each occupational therapy assistant providing services pursuant to section 7906(7) of the Education Law. The written supervision plan shall specify the names, professions and other credentials of the persons participating in the supervisory process, the frequency of formal supervisory contacts, the methods (e.g. in-person, by telephone) and types (e.g. review of charts, discussion with occupational therapy assistant) of supervision, the content areas to be addressed, how written treatment notes and reports will be reviewed, including, but not limited to, whether such notes and reports will be initialed or co-signed by the supervisor, and how professional development will be fostered.

(b) Documentation of supervision shall include the date and content of each formal supervisory contact as identified in the written supervision plan and evidence of the review of all treatment notes, reports and assessments.

(c) Consistent with the requirements of this section, the determination of the level and type of supervision shall be based on the ability level and experience of the occupational therapy assistant providing the delegated occupational therapy services, the complexity of client needs, the setting in which the occupational therapy assistant is providing the services, and consultation with the occupational therapy assistant.

(d) The supervision plan shall require that the occupational therapist or licensed physician be notified whenever there is a clinically significant change in the condition or performance of the client, so that an appropriate supervisory action can take place.

(e) Direction and supervision means that the occupational therapist or licensed physician:

(1) initiates, directs and participates in the initial evaluation, interprets the evaluation data, and develops the occupational therapy services plan with input from the occupational therapy assistant;

(2) participates, on a regular basis, in the delivery of occupational therapy services;

(3) is responsible for determining the need for continuing, modifying, or discontinuing occupational therapy services, after considering any reports by the occupational therapy assistant of any changes in the condition of the client that would require a change in the treatment plan;

(4) takes into consideration information provided about the client's responses to and communications during occupational therapy services; and

(5) is available for consultation with the occupational therapy assistant in a timely manner, taking into consideration the practice setting, the condition of the client and the occupational therapy services being provided.

(f) In no event shall the occupational therapist or licensed physician supervise more than five occupational therapy assistants, or its full time equivalent, provided that the total number of occupational therapy assistants being supervised by a single occupational therapist or licensed physician shall not exceed ten.

76.9 Occupational therapy assistant student exemption. To be permitted to practice as an exempt person pursuant to section 7906(4) of the Education Law, an occupational therapy assistant student shall be enrolled in a program as set forth in section 76.7(b)(1) of this Part and shall be directly supervised by an occupational therapist in accordance with standards established by a national accreditation agency which is satisfactory to the Department. Direct supervision, as required by section 7906(4) of the Education Law, may be provided in conjunction with an occupational therapy assistant who is designated as a fieldwork educator by a program that meets the requirements of section 76.7(b)(1) of this Part. Any such work performed by an occupational therapy assistant as a fieldwork educator shall be subject to the supervision requirements of section 76.8 of this Part.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-11-12-00010-P, Issue of March 14, 2012. The emergency rule will expire November 9, 2012.

**Text of rule and any required statements and analyses may be obtained from:** Mary Gammon, Administrative Assistant, State Education Department, Office of Counsel, State Education Building, Room 148, 89

Washington Ave., Albany, NY, (518) 474-6400, email: legal@mail.nysed.gov

### **Regulatory Impact Statement**

#### **1. STATUTORY AUTHORITY:**

Section 207 of the Education Law grants general rule-making authority to the Board of Regents to carry into effect the laws and policies of the State relating to education.

Section 6504 of the Education Law provides that admission to the professions shall be supervised by the Board of Regents, and administered by the Education Department, assisted by a state board for each profession.

Paragraph (a) of subdivision (2) of section 6507 of the Education Law authorizes the Commissioner of Education to promulgate regulations in administering the admission to and practice of the professions.

Subdivision (4) of section 7906 of the Education Law authorizes the Commissioner of Education to define in regulation the direct supervision of an occupational therapy assistant student engaged in occupational therapy as an exempt person.

Subdivision (7) of section 7906 of the Education Law authorizes the Commissioner of Education to define occupational therapy assistants and to promulgate regulations governing standards for authorization to practice as an occupational therapy assistant, including those relating to education, experience, examination and character, and authorizes the Board of Regents to establish an application fee for such authorization to practice.

#### **2. LEGISLATIVE OBJECTIVES:**

The proposed amendment to section 76.4(b) of the Regulations of the Commissioner of Education carries out the intent of the aforementioned statutes by removing the provision that prohibits a holder of a limited permit in occupational therapy from receiving a renewal of the permit in the event the holder has failed the licensing examination.

The proposed adoption of a new section 76.6 of the Commissioner's regulations carries out the intent of the aforementioned statutes by defining occupational therapy practice and providing that only a person authorized by the Department shall participate in the practice of occupational therapy assistant and use the title occupational therapy assistant.

The proposed adoption of a new section 76.7 of the Commissioner's regulations carries out the intent of the aforementioned statutes by establishing standards for authorization to practice as an occupational therapy assistant, including those relating to education, experience, examination, and character, and by establishing fees for initial licensure and for triennial registration.

The proposed adoption of a new section 76.9 of the Commissioner's regulations carries out the intent of the aforementioned statutes by setting requirements for an occupational therapy student to qualify for the statutory exemption allowing him or her to practice under supervision.

#### **3. NEEDS AND BENEFITS:**

The changes to the existing law governing the practice of occupational therapy that were enacted by Chapter 460 of the Laws of 2011 authorized the Department to establish, in regulation, several significant components of the practice, including the requirements for eligibility and scope of practice for occupational therapy assistants, and requirements for supervision of occupational therapy assistant students. These regulations are necessary to implement the provisions of Chapter 460.

#### **4. COSTS:**

(a) Cost to State government: It is anticipated that the costs to the State Education Department in implementing the requirements of Chapter 460 of the Laws of 2011 will be offset by the licensure and registration fees authorized by the law.

(b) Cost to local government: None.

(c) Cost to private regulated parties: As authorized by Chapter 460 of the Laws of 2011, the proposed regulations also establish fees for licensure and triennial registration.

(d) Costs to the regulatory agency: As stated in "Costs to State Government," the proposed amendment does not impose costs on the State Education Department beyond those covered by the proposed licensure and registration fees for occupational therapy assistants.

#### **5. LOCAL GOVERNMENT MANDATES:**

The proposed amendment does not impose any program, service, duty, or responsibility upon local governments.

#### **6. PAPERWORK:**

The proposed amendments do not require additional paperwork.

#### **7. DUPLICATION:**

The amendment does not duplicate other existing State or Federal requirements.

#### **8. ALTERNATIVES:**

Alternatives to the supervision requirements for occupational therapy assistant students were considered. Virtually all of such students in New York State attend programs accredited by the National Board for Certification in Occupational Therapy (NBCOT), and there is no other recognized national body for accreditation of such programs. NBCOT has established accreditation standards governing the fieldwork of occupational therapy

assistant students, and it is believed that these are adequate to protect the public. The alternative would be to create new standards, but this may create a duplicative set of standards that may not be consistent with those used by a given educational program. It was also noted that the NBCOT accreditation standards permit supervision of students by either occupational therapists or occupational therapist assistants. The statute is clear, however, in requiring that students be directly supervised by an occupational therapist.

#### **9. FEDERAL STANDARDS:**

There are no Federal standards regarding the matters addressed by these regulations.

#### **10. COMPLIANCE SCHEDULE:**

The proposed amendment must be complied with on its stated effective date. No additional period of time is necessary to enable regulated parties to comply.

### **Regulatory Flexibility Analysis**

The proposed amendments would implement various changes to existing law governing the practice of occupational therapy that were enacted by Chapter 460 of the Laws of 2011, including requirements for eligibility and scope of practice for occupational therapy assistants, and requirements for supervision of occupational therapy assistant students.

The amendments do not regulate small businesses or local governments. It does not impose any reporting, recordkeeping, or other compliance requirements on small business or local governments beyond those inherent in the statute, or have any adverse economic effect on them. Because it is evident from the nature of the proposed amendments that they do not affect small businesses or local governments, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses and local governments is not required and one has not been prepared.

### **Rural Area Flexibility Analysis**

#### **1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:**

The proposed amendments apply to all occupational therapy assistants and those occupational therapists and physicians who supervise these professionals who live in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

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

The purpose of the proposed amendment is to implement chapter 460 of the Laws of 2011 which made a variety of changes to the law affecting the practice of occupational therapy and the authorization of occupational therapy assistants. As authorized by chapter 460, the proposed amendment will establish qualifications to be authorized to practice as an occupational therapy assistant, and will not require regulated parties, including those that are located in rural areas of the State, to hire professional services to comply.

#### **3. COSTS:**

The proposed section 76.7(g) of the Commissioner's regulations establishes a fee for an initial license and for each triennial registration for an occupational therapy assistant. The establishment of this fee is mandated by statute. The proposed regulation would set this fee at one half that amount imposed on occupational therapists, which would yield a fee of \$147 for initial licensure and three year registration, and a fee of \$90 for the subsequent three year re-registrations. Currently, these fees are set at \$103 for initial licensure and three year registration, and at \$54 for the subsequent three year registrations only. The increase is required because occupational therapists are now subject to discipline and moral character review by the Department, and the cost of these processes must be covered by fee revenue.

#### **4. MINIMIZING ADVERSE IMPACT:**

The proposed fee structure was determined to be the minimum needed to support additional costs. It is on a par with fee structures in other professions.

#### **5. RURAL AREA PARTICIPATION:**

The State Education Department solicited comments on the proposed amendments from the New York State Occupational Therapy Association (NYSOTA), and Department staff attended a meeting of the Capital District NYSOTA (which includes Schenectady, Rensselaer, Columbia and Greene counties) in Albany and the Hudson-Taconic NYSOTA (which includes Ulster, Sullivan, Dutchess and Delaware counties) in Middletown to discuss these proposed amendments.

### **Job Impact Statement**

The proposed amendments would implement various changes to existing law governing the practice of occupational therapy that were enacted by chapter 460 of the Laws of 2011, including requirements for eligibility and scope of practice for occupational therapy assistants, and requirements for supervision of occupational therapy assistant students.

Because it is evident from the nature of the amendment that it will not

affect job and employment opportunities, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required, and one has not been prepared.

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

Since publication of a Notice of Proposed Rule Making in the March 14, 2012 State Register, the State Education Department received the following comments.

##### **1. COMMENT:**

Generally, the extent of the requirements contained in the regulations governing supervision of occupational therapy assistants will inhibit the hiring of individuals in these professions or cause lay-offs of these professionals. It was noted specifically that no other similarly educated professionals are required to have a written supervision plan, which is required by the proposed regulations.

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

The Department considers the supervision requirements in the proposed amendments appropriate to the circumstances of the profession of occupational therapy. The key element to the supervision of both holders of limited permits in occupational therapy and of occupational therapy assistants in the proposed regulations is the development of a supervision plan. The plan would be unique for each supervised professional and would be tailored to the ability and experience of that professional, to the setting where services are being provided, and to the complexity of the client needs. The Department believes that the supervision plan, if properly developed, will meet the supervision requirements for each individual, and will not be so burdensome as to cause a disruption in the workplace for these professionals.

The occupational therapy profession is unique in that once an evaluation of a client's needs is determined, and a treatment plan is developed, the therapeutic activities that ensue may be performed by an occupational therapist or an occupational therapy assistant under supervision. Unlike other professions, there is generally no restriction on the therapeutic activities which may be performed by an occupational therapy assistant as long as they are within the scope of practice. Nor is there a requirement that a supervisor be in physical proximity to the occupational therapy assistant. Under these circumstances, the Department perceives a need for supervision requirements which are sufficient to protect the public, but are flexible enough to meet the needs of the profession.

##### **2. COMMENT:**

The requirements contained in the regulations governing supervision of holders of limited permits in occupational therapy are too restrictive and unnecessary, given the fact that such individuals have completed their education requirements, including clinical fieldwork. Some comments characterized these supervision requirements as equating holders of limited permits to occupational therapy assistants.

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

The Department has considered the comment, and agrees that the supervisor of a holder of a limited permit need not, in all instances, initiate, direct and participate in the initial evaluation of the client, nor in all instances, participate on a regular basis in the delivery of occupational therapy services. The extent of the supervisor's involvement in these activities may vary depending on the client needs and the experience and training of the holder of the limited permit. Therefore, we have revised the proposed regulation to provide that the extent of the involvement of the supervisor in these activities is to be addressed in the supervision plan.

##### **3. COMMENT:**

The requirement that the ratio of supervised holders of limited permits in occupational therapy and occupational therapy assistants to supervisors be five to one is arbitrary, and should be left to the discretion of the supervisor of these professionals.

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

Some reasonable limitation on the number of professionals one individual occupational therapist or physician may supervise is necessary, and a five to one ratio is considered appropriate by the Department. In discussions with interested parties before the promulgation of this regulation, a provision was developed and included in the proposed regulation which would provide for the supervision of the full-time equivalent of five individuals, to recognize a setting where part-time individuals are being supervised.

##### **4. COMMENT:**

The requirement that the supervisor consider the input of the holder of a limited permit in occupational therapy or occupational therapy assistant in developing a supervision plan is inappropriate and not consistent with the level of expertise and training of the supervising professionals.

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

The proposed regulation at section 76.8(c) requires that the determination of the level and type of supervision be based upon consultation with the supervised occupational therapy assistant. No similar requirement is found with regard to supervision of holders of limited permits in section 76.4(c). The Department recognizes that in many instances, an experienced

occupational therapy assistant has been working with a given client population for a long time with positive results. It is appropriate for input to be provided by the supervised occupational therapy assistant so that the level and type of supervision will not disrupt successful therapeutic relationships that are in place.

##### **5. COMMENT:**

The requirement that the supervision plan specify how professional development of a holder of a limited permit in occupational therapy or an occupational therapy assistant be fostered should not be included in regulation, as regulations should not force one professional to foster another.

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

The Department considers the professional development of licensed professionals to be a basic element of competent practice, and considers it appropriate, therefore, that the supervision plan address professional development.

##### **6. COMMENT:**

The provision in section 76.4(b) that would prohibit the renewal of a limited permit in occupational therapy for an individual who has failed the licensing examination should not be removed. This diminishes the public protection role of the State Board for Occupational Therapy.

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

This provision conforms the existing regulation to a change in statute.

##### **7. COMMENT:**

The proposed amendment to section 76.9 is appreciated, as it permits occupational therapy assistants to participate in the supervision of occupational therapy assistant students engaged in clinical practice, to the extent permitted by statute. Alternatively, one comment suggested that the amendment would prevent an occupational therapy assistant student from working with an occupational therapy assistant as a fieldwork educator.

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

Education Law section 7906(4) permits an occupational therapy student to engage in clinical practice, but only under the direct supervision of an occupational therapist. The Department is aware that accreditation standards applicable to this clinical practice authorize the use of occupational therapy assistants as fieldwork educators. The proposed regulation recognizes the role of such fieldwork educators to the extent permitted under existing law.

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

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

**I.D. No.** EDU-27-12-00011-ERP

**Filing No.** 934

**Filing Date:** 2012-09-11

**Effective Date:** 2012-09-11

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

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

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

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

**Specific reasons underlying the finding of necessity:** The purpose of the proposed rule is to implement New York State's approved Elementary and Secondary Education Act (ESEA) Flexibility Waiver Request. On February 28, 2012, the New York State Education Department submitted to the United States Education Department (USDE) an ESEA Flexibility Waiver Request. On May 29, 2012, the USDE Secretary, based upon his authority to issue waivers pursuant to section 9401 of the ESEA, approved the Waiver Request.

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

The proposed rule was adopted as an emergency action at the June 18-19, 2012 Regents meeting, effective July 1, 2012. Since publication of the Notice of Emergency Adoption and Proposed Rule Making in the State Register on July 3, 2012, the proposed rule has been revised in response to public comment.

Because the Board of Regents meets at scheduled intervals, the November 5-6 2012 meeting is the earliest the revised proposed rule could be presented for permanent adoption, after publication of a Notice of Revised Rule Making in the State Register and expiration of the 30-day public comment period required under State Administrative Procedure Act § 202(4-a). However, the June emergency rule will expire on September 16, 2012. A lapse in the rule will disrupt implementation of New York State's approved ESEA Flexibility Waiver.

A second emergency action is therefore necessary for the preservation of the general welfare to immediately revise the proposed rule to respond to public comment, so that school districts may timely meet school/school district accountability requirements for the 2012-2013 school year and beyond, consistent with New York State's approved ESEA Flexibility Waiver Request and pursuant to statutory requirements, and to otherwise ensure that the emergency rule adopted at the June Regents meeting, as so revised, remains continuously in effect until it can be presented and made effective as a permanent rule.

It is anticipated that the proposed rule will be presented to the Board of Regents for permanent adoption at its November 5-6, 2012 meeting, which is the first scheduled meeting after expiration of the 30-day public comment period mandated by the State Administrative Procedure Act for revised rule makings.

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

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

**Substance of emergency/revised rule:** The Commissioner of Education proposes to add section 100.18 and amend sections 100.2(m), 100.17, 120.3 and 120.4 of the Commissioner's Regulations, relating to Elementary and Secondary Education Act (ESEA) Flexibility and school and school district accountability. On May 29, 2012, the Secretary for the United States Department of Education, based upon his authority to issue waivers pursuant to section 9401 of the ESEA, approved New York State's ESEA Flexibility Waiver Request. The proposed rule implements the approved Waiver Request and was adopted as an emergency rule at the June 18-19, 2012 Regents meeting, and revised and readopted as an emergency rule at the September 10-11, 2012 Regents meeting, effective July 1, 2012.

The following is a summary of the provisions of the revised proposed rule:

- **100.18 ESEA Accountability System** – this new section relates to the specific revisions necessary to conform Commissioner's Regulations to New York's updated accountability system, as a result of the approved ESEA Flexibility Request, and includes the following:
  - **Subdivision (a) Applicability** states that the provisions of section 100.18 are applicable, in lieu of specified paragraphs of section 100.2(p) of the Commissioner's Regulations, during the period of the Elementary and Secondary Education Act (ESEA) waiver, and any revisions and extensions thereof, except as otherwise provided in section 100.18.
  - **Subdivision (b) Definitions** defines various terms used in the section, including performance levels that incorporate measures of growth at the elementary/middle-level and college and career readiness standards at the high school level.
  - **Subdivision (c) Procedure for Registration of Public Schools** provides the procedures for the registration of new schools and determination of their accountability status.
  - **Subdivision (d)** provides that the registration of a public school remains in effect until revoked by the Board of Regents or until a school is closed by a school district.
  - **Subdivision (e) System of Accountability for student success** requires the Commissioner to annually review the performance of each school district, public school, and charter school in the State and make Adequate Yearly Progress determinations regarding the performance of their accountability groups in elementary/middle and high school ELA and mathematics, elementary/middle level science and graduation rate.
  - **Subdivision (f) Adequate Yearly Progress** provides the rules for making Adequate Yearly Progress determinations.
  - **Subdivision (g) Differentiated accountability for school districts** provides the process by which schools are identified as Priority Schools, Focus Schools, or Schools Requiring a Local Assistance Plan and districts are identified as Focus Districts. The subdivision also specifies the requirement for parental and public notification of such designations.

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

**This notice is intended** to serve as both a notice of emergency adoption and a notice of revised rule making. The notice of proposed rule making was published in the *State Register* on July 3, 2012, I.D. No. EDU-27-12-00011-EP. The emergency rule will expire November 9, 2012.

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

**Emergency rule compared with proposed rule:** Substantial revisions were made in sections 100.18(g)(2), (5), (h)(2) and 100.2(m)(6).

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

**Data, views or arguments may be submitted to:** Ken Slentz, Deputy Commissioner P-12 Education, State Education Department, State Education Building 2M West, 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 Emergency Adoption and Proposed Rule Making in the State Register on July 3, 2012, the proposed rule has been revised as follows:

Section 100.18(g)(2)(i)(a)(2) and (3) have been revised for purposes of clarification to refer to the "Performance Index of the" accountability group.

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

Section 100.18(g)(5)(iv) has been revised to clarify that If a school has fewer than a total of 15 non-proficient student results in the accountability group(s) for which it could be potentially identified, then the school will not be identified for non-proficient student results; and that if the school has fewer than 15 non-graduation results in the accountability group(s) for which it could be potentially identified, then the school will not be identified for non-graduation results.

Section 100.18(g)(5)(v) has been revised to clarify that if a school has more than 60 percent of its students meeting or exceeding the proficiency standard in ELA and math or a graduation rate of 60 percent or more for all accountability group(s) for which the school could be identified, then the school's non-proficient and non-graduate results will not be included in computing the number of the school district's non-proficient and non-graduation results.

Section 100.18(g)(5)(viii) has been revised to correct a miscitation by replacing the phrase "meet the conditions specified in subparagraphs (v), (vi) or (vii) of this paragraph" with "meet the conditions specified in subparagraphs (iv), (v) or (vi) of this paragraph."

Section 100.18(g)(5)(ix)(d) has been revised to provide that in the case of the city school district of the City of New York, if the chancellor identifies more than the minimum number of schools in a community school district, the Chancellor may request that such additional schools be credited towards meeting the minimum number of school requirement in other community school districts within the same county.

Section 100.18(h)(2)(i) has been revised to provide that for the 2012-13 school year, school districts shall use School Quality Reviews, External School Curriculum Audits, and Joint Intervention Team Reviews to develop district-wide strategic plans and school-based plans for intervention. Commencing in the 2013-14 school year, the school district will annually use the results of a diagnostic tool of quality indicators, in the form and content prescribed by the commissioner, which may include a visit by an integrated intervention team as appointed by the commissioner, to inform the creation of a District Comprehensive Improvement Plan.

Section 100.18(h)(2)(ii)(a)(1) and (h)(2)(iii)(c) have been revised to provide that the Commissioner may extend timelines for submission of required documents for good cause.(m)(6) has been revised to clarify that the provision regarding redesign of a school applies to Priority Schools.

Section 100.2(m)(6) and (6)(i) have been revised to replace references to "persistently lowest achieving school" and "persistently lowest achieving", respectively, with "Priority School" and "Priority", respectively.

The above changes require that the "Paperwork" section of the previously published Regulatory Impact Statement be revised to read as follows:

#### **6. PAPERWORK:**

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

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

For each school year, public schools, school districts, and charter

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Revised Regulatory Flexibility Analysis**

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

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

**2. COMPLIANCE REQUIREMENTS:**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Revised Rural Area Flexibility Analysis**

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

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

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

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

- Revise Annual Measurable Objective (AMO) timeframe by which schools and districts are expected to ensure that all students are proficient in English language arts (ELA) and mathematics and make the goals more realistic and attainable.
- Use standards on Regents ELA and mathematics examinations that are better aligned to college- and career- readiness to hold schools and districts accountable.
- Discontinue identification of schools for improvement, corrective action and restructuring and instead identify Priority and Focus Schools.
- Identify Focus Districts as a means to ensure districts take dramatic actions in support of schools where performance of disaggregated groups of students is among the lowest in the State and not showing progress.
- Replace current ESEA system of supports and interventions in identified schools and districts with one that better builds the capacity of districts to assist schools to implement transformation and turnaround.

- Use both proficiency and growth measures to make accountability determinations at the elementary and middle school levels.
- Create a single diagnostic tool (“The Diagnostic Tool for School and District Effectiveness”) for use throughout the school and district improvement continuum to drive supports and interventions.
- Reframe existing ESEA set-asides to support enhanced implementation of Regents’ Reform Agenda in Priority and Focus Schools, expanded learning time opportunities for students, and increased parental involvement and engagement.
- Give districts more flexibility in use of Federal funding as required as a condition of Waiver approval.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Upon approval of the integrated intervention team’s recommendations,

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

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

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

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

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

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

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

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

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

The revised proposed rule applies to public schools, school districts and charter schools that receive funding as LEAs pursuant to the ESEA, and will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the revised proposed rule that it will have no impact, on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

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

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on July 3, 2012 the Department received the following comments on the proposed rule.

##### **1. COMMENT:**

The Department should use the designation of Priority and Focus Schools as a floor and not a ceiling in terms of targeting interventions and setting aside funds to improve student achievement and teacher effectiveness. While the comment supports the amendment to section 120.4, the State should set criteria and provide guidance on the use of Title I funds and district choice of supplemental educational services (SES) providers or services. For example, districts should only work with high-quality partners and providers with a record of success raising student achievement across a grade level or school.

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

The Department has provided guidance to the field regarding the approved SES providers that districts may choose to have as the providers and from which parents may select. In addition, the proposed rules specify that Focus Districts must adhere to the Department’s policy on the use of set-asides, which include Title I, II, and III funding. No change to the regulation is necessary.

##### **2. COMMENT:**

Amendments to Section 120.4(f) should require that local education agencies (LEAs) that choose to continue providing SES services provide a plan that describes how the LEA will select and hold accountable the approved providers from which parents may choose. In addition, paragraphs (9) and (12) of Section 120.4(f) should be amended to create stronger accountability for LEAs and providers regarding the quality and effectiveness of the services offered.

In the event that districts opt not to continue providing SES services, additional guidance should be provided to the LEAs as to how to expend the former SES set-aside funds. Requiring that the funds that would have been set-aside for SES services be used for the provision of high-quality expanded learning opportunity (ELO) programs at Focus and Priority Title I Schools would provide LEAs with flexibility around SES while preserving and expanding crucial opportunities for students attending struggling schools to receive assistance outside the traditional school day.

To ensure quality outcomes, the Department should consider requiring partnerships with community-based organizations that can demonstrate a history of improving student outcomes for the establishment of ELO programs with the former SES set-aside dollars, similar to the structure of the 21st Century Community Learning Centers program in New York.

**DEPARTMENT RESPONSE:**

The recommendations made are addressed by the requirements of the Consolidated Application that all LEAs must complete in order to receive Title I funds. The Consolidated Application requires that an LEA submit its plans for provision of SES and use of set aside funds to support programs and services in Priority and Focus Schools. In addition, Priority Schools are required to offer Extended Learning Time (ELT) programs when they begin implementing their mandated whole school reform model. Therefore, no change to the regulation is required.

**3. COMMENT:**

The regulations should be used to give districts and schools direction about how to use Title I funds for expanded learning. Two alternatives to providing these directions are:

1. Provide districts that opt not to offer SES, guidance that will allow them to offer high-quality ELOs to their students attending Focus and Priority Title I Schools.

2. Use the new set-aside of 5-15 percent of Title I, II, and III funds to transform student outcomes through ELOs. In the current form, the diverse array of allowable activities may diminish the impact of the set-aside. In addition, clarification about the requirements for this set-aside should be provided to districts and other stakeholders. Clarification should also be provided to districts that opt to continue SES, i.e. whether they would need to set aside as much as 35 percent of Title I funds.

**DEPARTMENT RESPONSE:**

The Department has provided guidance to the field regarding the approved SES providers that districts may choose for parent selection as well as the acceptable use of set aside funds. No further response is necessary, as the comment is supportive of the revised regulations.

**4. COMMENT:**

There should be "adequate procedural guidelines for districts/schools with former SINI [schools in need of improvement] designations/newly conferred "focus" or "priority" designations." The lack of specificity can allow districts to exploit the new ESEA Waiver flexibility framework and use it to their advantage in thwarting the purpose of NCLB.

Although there is the July 7, 2012 Field Guidance Memo stating that Public School Choice (PSC) was required and must be offered, some districts may choose to not honor the guidance "absent an order or other affirmative language in the revised NYSED regulations mandating compliance with PSC rules." The proposed amendment should be revised to forestall districts' ability to select schools for focus designation, and acknowledge that former SINI designated schools must continue to offer PSC for a specified period of time going forward.

**DEPARTMENT RESPONSE:**

The Department disagrees and believes that the proposed amendment provides the necessary flexibility for school districts to select the schools upon which the school districts will focus their support and intervention efforts. The proposed amendment delineates that districts continue to be required to offer PSC for students attending either Title I Priority or Focus Schools. When a school is designated as a Priority or Focus School, the requirement to offer PSC will remain in effect.

In addition, districts will be required to prepare Local Assistance Plans (LAP) to support schools within the district that show a persistent pattern of failing to make Adequate Yearly Progress (AYP) with a particular student population or have large gaps in student achievement between one or more student subgroups. The suggested revision is unnecessary.

**5. COMMENT:**

The regulations should describe explicitly the allowable activities, supports and interventions, and the development of the District Comprehensive Improvement Plan (DCIP) in collaboration with parents as required by Commissioner's Regulations 100.11 on shared decision-making. In some areas, the regulations should be more prescriptive in the expectations of the allowable activities for students, teachers, and parents. In addition, each Focus District developing a DCIP should be required to hold a public hearing about the findings of the Diagnostic Tool and the proposed interventions. The meeting should be held after business hours and allow a length of time for sufficient discussion and community recommendations to be incorporated in the DCIP to ensure sustainable success.

Finally, the proposed amended rules should require the creation of the District Leadership Team, which would oversee the development, and implementation of the DCIP. The team should include "the Superintendent/Community Superintendent, District Staff, School Leaders Representative, Teacher Representative, Union Representative, Parent Organization Representative, Parents/Guardians, Students, and a Community representative. All team members must sign off on the plan." The Commissioner should not sign off on any plan that does not offer an ade-

quate explanation of the process, choice of intervention strategies, and meaningful participation and collaboration.

**DEPARTMENT RESPONSE:**

The Department believes that the existing requirement for parents and persons in parental relation to be consulted in the development of the DCIP, in collaboration with the school and district, is sufficient and consistent with New York's approved ESEA waiver.

**6. COMMENT:**

Districts should be given flexibility to utilize the Commissioner approved district-based "diagnostic tool" in connection with developing the DCIP and Comprehensive Education Plan (CEP) for the identified Priority and Focus Schools that SED does not visit annually during the school year. Districts should be allowed to use this process whenever a school is designated to undergo a Quality Review. When a school is not designated for a Quality Review, a school should be able to self-review using its district-based rubric.

While urgency is needed to affect whole school reforms at Priority Schools, the September 30, 2012 deadline for submitting the schedule for implementing such reforms, is not feasible. Therefore, the deadline for submission should be December 30, 2012 for this year, and any amendments for subsequent school years re-submitted annually by September 30th.

The amendments require that the DCIP be approved within three months following the designation of the school district as a Focus District. This means that no later than late November (assuming the SED releases the list of Focus Districts in late August). However, as discussed above, this timeline is not feasible. Therefore, the deadline for submission of DCIPs and CEPs should be December 31, 2012, and December 31st in subsequent years.

Certain districts must comply with extensive notice and public hearing procedures associated with certain proposed changes in school utilization. These procedures, which are often triggered in connection with the opening of new schools, do not typically conclude until late April. Therefore, the timeline for submission of petitions for registration of new schools to the Board of Regents should be no later than April 30.

As a preliminary matter, it is unclear what diagnostic tool the Commissioner directs school districts to utilize. Moreover, even if the Commissioner had specified the intended diagnostic tool, there is insufficient time to implement this new tool and obtain information necessary to inform the DCIP to be issued in the 2012-13 school year. Therefore, the amendments should clarify that school districts may use the Differentiated Accountability intervention results from the prior year as a transition for the 2012-13 year, in addition to any local evaluations conducted by the school district.

The Commissioner should revise the identification of Focus Schools such that the city of New York school district may identify a minimum number of schools upon which to focus its intervention efforts on a citywide basis or at a minimum on a borough-by-borough basis, rather than on a community school district basis. Requiring New York City to identify a specific number of Focus Schools in each of its 32 districts does not allow the district to identify its lowest performing schools based on subgroup performance, and instead can have the perverse consequence of capturing higher-performing schools for identification while lower-performing schools remain unidentified.

The regulation refers to "a persistently lowest achieving school," however this designation is no longer applicable. SED should utilize the intended operative school designation, which refers to Priority schools.

**DEPARTMENT RESPONSE:**

The revision to the regulation regarding the diagnostic tool is unnecessary. The intent of the diagnostic tool is for a consistent review process across the state. As such, it addresses the expectations for district and school reforms in the approved waiver.

With respect to the submission timeline for the Priority School implementation schedule, DCIP, CEP, and the petitions for school registration, the regulation has been revised to provide that the Commissioner may waive these timelines for good cause.

With respect to the diagnostic tool to use in the 2012-13 school year, the regulation has been revised to clarify that school districts must use the 2011-12 School Quality Reviews, External School Curriculum Audits, and Joint Intervention Team reviews to inform the DCIP and CEP to be used in the 2012-13 school year.

The regulations have also been revised so that in the city school district of the City of New York, if the Chancellor of the city school district identifies more than the minimum number of schools in a community school district, the Chancellor may request that such additional schools be credited towards meeting the minimum number of school requirement in other community school districts within the same county.

The regulations have been clarified to refer to Priority Schools rather than persistently lowest achieving schools, when Priority Schools is the appropriate applicable term.

## NOTICE OF ADOPTION

**Policy and Guidelines Prohibiting Discrimination and Harassment of Students****I.D. No.** EDU-07-12-00011-A**Filing No.** 930**Filing Date:** 2012-09-11**Effective Date:** 2012-09-26

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

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

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

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

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

**Text or summary was published** in the February 15, 2012 issue of the Register, I.D. No. EDU-07-12-00011-P.

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

**Revised rule making(s) were previously published in the State Register** on April 25, 2012, June 6, 2012 and August 1, 2012.

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

**Assessment of Public Comment**

The agency received no public comment.

## NOTICE OF ADOPTION

**Occupational Therapy****I.D. No.** EDU-11-12-00010-A**Filing No.** 933**Filing Date:** 2012-09-11**Effective Date:** 2012-09-26

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

**Action taken:** Amendment of Part 76 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided), 6504 (not subdivided), 6507(2)(a), 7906(4) and (7); and L. 2011, ch. 460

**Subject:** Occupational Therapy.

**Purpose:** To implement chapter 460 of the Laws of 2011, relating to the profession of occupational therapy.

**Text or summary was published** in the March 14, 2012 issue of the Register, I.D. No. EDU-11-12-00010-P.

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

**Revised rule making(s) were previously published in the State Register** on July 18, 2012.

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

**Assessment of Public Comment**

Since publication of a Notice of Proposed Rule Making in the March 14, 2012 State Register, the State Education Department received the following comments.

## 1. COMMENT:

Generally, the extent of the requirements contained in the regulations governing supervision of occupational therapy assistants will inhibit the hiring of individuals in these professions or cause lay-offs of these professionals. It was noted specifically that no other similarly educated professionals are required to have a written supervision plan, which is required by the proposed regulations.

## DEPARTMENT RESPONSE:

The Department considers the supervision requirements in the

proposed amendments appropriate to the circumstances of the profession of occupational therapy. The key element to the supervision of both holders of limited permits in occupational therapy and of occupational therapy assistants in the proposed regulations is the development of a supervision plan. The plan would be unique for each supervised professional and would be tailored to the ability and experience of that professional, to the setting where services are being provided, and to the complexity of the client needs. The Department believes that the supervision plan, if properly developed, will meet the supervision requirements for each individual, and will not be so burdensome as to cause a disruption in the workplace for these professionals.

The occupational therapy profession is unique in that once an evaluation of a client's needs is determined, and a treatment plan is developed, the therapeutic activities that ensue may be performed by an occupational therapist or an occupational therapy assistant under supervision. Unlike other professions, there is generally no restriction on the therapeutic activities which may be performed by an occupational therapy assistant as long as they are within the scope of practice. Nor is there a requirement that a supervisor be in physical proximity to the occupational therapy assistant. Under these circumstances, the Department perceives a need for supervision requirements which are sufficient to protect the public, but are flexible enough to meet the needs of the profession.

## 2. COMMENT:

The requirements contained in the regulations governing supervision of holders of limited permits in occupational therapy are too restrictive and unnecessary, given the fact that such individuals have completed their education requirements, including clinical fieldwork. Some comments characterized these supervision requirements as equating holders of limited permits to occupational therapy assistants.

## DEPARTMENT RESPONSE:

The Department has considered the comment, and agrees that the supervisor of a holder of a limited permit need not, in all instances, initiate, direct and participate in the initial evaluation of the client, nor in all instances, participate on a regular basis in the delivery of occupational therapy services. The extent of the supervisor's involvement in these activities may vary depending on the client needs and the experience and training of the holder of the limited permit. Therefore, we have revised the proposed regulation to provide that the extent of the involvement of the supervisor in these activities is to be addressed in the supervision plan.

## 3. COMMENT:

The requirement that the ratio of supervised holders of limited permits in occupational therapy and occupational therapy assistants to supervisors be five to one is arbitrary, and should be left to the discretion of the supervisor of these professionals.

## DEPARTMENT RESPONSE:

Some reasonable limitation on the number of professionals one individual occupational therapist or physician may supervise is necessary, and a five to one ratio is considered appropriate by the Department. In discussions with interested parties before the promulgation of this regulation, a provision was developed and included in the proposed regulation which would provide for the supervision of the full-time equivalent of five individuals, to recognize a setting where part-time individuals are being supervised.

## 4. COMMENT:

The requirement that the supervisor consider the input of the holder of a limited permit in occupational therapy or occupational therapy assistant in developing a supervision plan is inappropriate and not consistent with the level of expertise and training of the supervising professionals.

## DEPARTMENT RESPONSE:

The proposed regulation at section 76.8(c) requires that the determination of the level and type of supervision be based upon consultation with the supervised occupational therapy assistant. No similar requirement is found with regard to supervision of holders of limited permits in section 76.4(c). The Department recognizes that in many instances, an experienced occupational therapy assistant has been

working with a given client population for a long time with positive results. It is appropriate for input to be provided by the supervised occupational therapy assistant so that the level and type of supervision will not disrupt successful therapeutic relationships that are in place.

5. COMMENT:

The requirement that the supervision plan specify how professional development of a holder of a limited permit in occupational therapy or an occupational therapy assistant be fostered should not be included in regulation, as regulations should not force one professional to foster another.

DEPARTMENT RESPONSE:

The Department considers the professional development of licensed professionals to be a basic element of competent practice, and considers it appropriate, therefore, that the supervision plan address professional development.

6. COMMENT:

The provision in section 76.4(b) that would prohibit the renewal of a limited permit in occupational therapy for an individual who has failed the licensing examination should not be removed. This diminishes the public protection role of the State Board for Occupational Therapy.

DEPARTMENT RESPONSE:

This provision conforms the existing regulation to a change in statute.

7. COMMENT:

The proposed amendment to section 76.9 is appreciated, as it permits occupational therapy assistants to participate in the supervision of occupational therapy assistant students engaged in clinical practice, to the extent permitted by statute. Alternatively, one comment suggested that the amendment would prevent an occupational therapy assistant student from working with an occupational therapy assistant as a fieldwork educator.

DEPARTMENT RESPONSE:

Education Law section 7906(4) permits an occupational therapy student to engage in clinical practice, but only under the direct supervision of an occupational therapist. The Department is aware that accreditation standards applicable to this clinical practice authorize the use of occupational therapy assistants as fieldwork educators. The proposed regulation recognizes the role of such fieldwork educators to the extent permitted under existing law.

### NOTICE OF ADOPTION

#### Reporting Requirements Under the Dignity for All Students Act (L. 2010, Ch. 482)

**I.D. No.** EDU-15-12-00011-A

**Filing No.** 929

**Filing Date:** 2012-09-11

**Effective Date:** 2012-09-26

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

**Action taken:** Addition of section 100.2(kk) to Title 8 NYCRR.

**Statutory authority:** Education Law, sections 11(1-7), 15(not subdivided), 16(not subdivided), 101(not subdivided), 207(not subdivided), 305(1), (2) and 2854(1)(b); and L. 2010, ch. 482

**Subject:** Reporting requirements under the Dignity for All Students Act (L. 2010, ch. 482).

**Purpose:** To establish standards for reporting material incidents of discrimination and harassment.

**Text or summary was published** in the April 11, 2012 issue of the Register, I.D. No. EDU-15-12-00011-P.

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

**Revised rule making(s) were previously published in the State Register** on July 18, 2012.

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

#### Assessment of Public Comment

Since publication of a Notice of Proposed Rule Making in the State Register on July 18, 2012, the State Education Department received the following comment.

COMMENT:

The proposed regulation is a burdensome reporting requirement which should not cover charter schools. Charter schools were meant to be free from onerous bureaucratic requirements, yet SED continues to add reporting requirements such as this one. The additional reporting burdens do not, in and of themselves, relate to safety, and furthermore, apply only to school districts (not individual schools or charter schools). We respectfully request that SED delete all references to charter schools in the final version of this proposed rule.

DEPARTMENT RESPONSE:

Article 2, Section 10 of the Education Law, the Dignity for All Students Act (Dignity Act) states that the intent of the Dignity Act is to provide all students in public schools with an environment free from discrimination and harassment, foster civility in public schools and prevent and prohibit conduct which is inconsistent with a school's educational mission. Under Education Law section 2853(1)(c), charter schools are considered public schools. Article 2, Section 15 of the Education Law, the Dignity for All Students Act (Dignity Act), requires the Department to create a procedure under which material incidents of discrimination and harassment on school grounds or at a school function are reported to the Department at least on an annual basis. Furthermore, Education Law section 2854(1)(b) provides that charter schools must meet the same health and safety, civil rights, and student assessment requirements applicable to other public schools, except as otherwise specifically provided in Article 56 of the Education Law. Therefore, the provisions of the Dignity Act apply to all public schools, including charter schools, and the Department cannot exempt charter schools from the reporting requirements in the statute.

### NOTICE OF ADOPTION

#### Charter School Public Hearings

**I.D. No.** EDU-23-12-00011-A

**Filing No.** 927

**Filing Date:** 2012-09-11

**Effective Date:** 2012-09-26

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

**Action taken:** Amendment of section 3.16(b) of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101(not subdivided), 206(not subdivided), 207(not subdivided), 305(1), (2), (20), 2853(3)(a) and 2857(1-a)

**Subject:** Charter school public hearings.

**Purpose:** To provide for the Commissioner to conduct, on behalf of the Board of Regents, public hearings required by Article 56 of the Education Law to solicit comments from the community on charter school matters.

**Text or summary was published** in the June 6, 2012 issue of the Register, I.D. No. EDU-23-12-00011-EP.

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

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

#### Assessment of Public Comment

The agency received no public comment.

### NOTICE OF ADOPTION

#### Dignity for All Students Act (L. 2010, Ch. 482)

**I.D. No.** EDU-23-12-00012-A

**Filing No.** 928

**Filing Date:** 2012-09-11

**Effective Date:** 2012-09-26

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

**Action taken:** Amendment of section 100.2(c) of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101(not subdivided), 207(not subdivided), 305(1), (2), 801-a(not subdivided) and 2854(1)(b); and L. 2010, ch. 482

**Subject:** Dignity for All Students Act (L. 2010, ch. 482).

**Purpose:** To prescribe instructional requirements to implement the Dignity Act.

**Text or summary was published** in the June 6, 2012 issue of the Register, I.D. No. EDU-23-12-00012-EP.

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

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

#### Assessment of Public Comment

Since publication of a Notice of Proposed Rule Making in the State Register on June 6, 2012, the State Education Department received the following comment.

#### COMMENT:

The comment supported the proposed amendment, which would require charter schools to provide instruction that supports development of a school environment free of discrimination and harassment, as required by the Dignity Act, including but not limited to instruction that raises awareness and sensitivity to discrimination or harassment based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender or sex.

#### DEPARTMENT RESPONSE:

No response is necessary as the comment is supportive.

### NOTICE OF ADOPTION

#### Educational Requirements for Licensure As a Physical Therapist

**I.D. No.** EDU-27-12-00009-A

**Filing No.** 931

**Filing Date:** 2012-09-11

**Effective Date:** 2012-10-03

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

**Action taken:** Addition of sections 52.41 and 77.11; and amendment of section 77.1 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207(not subdivided), 6504(not subdivided), 6506(1), 6507(2)(a) and 6734(b), as amended by L. 2011, ch. 410

**Subject:** Educational requirements for licensure as a physical therapist.

**Purpose:** To provide for the Commissioner to conduct, on behalf of the Board of Regents, public hearings required by Article 56 of the Education Law to solicit comments from the community on charter school matters.

**Text or summary was published** in the July 3, 2012 issue of the Register, I.D. No. EDU-27-12-00009-P.

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

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

#### Assessment of Public Comment

The agency received no public comment.

### PROPOSED RULE MAKING HEARING(S) SCHEDULED

#### Special Education Services for Students with Disabilities

**I.D. No.** EDU-39-12-00007-P

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

**Proposed Action:** Amendment of sections 200.2, 200.3, 200.4 and 200.5 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101(not subdivided), 207(not subdivided), 305(1), (2), (20), 4402(1)(b)(1)(b), (7)(a), 4403(3) and 4410(13); and L. 2012, chs. 276 and 279

**Subject:** Special education services for students with disabilities.

**Purpose:** To conform to chapters 276 and 279 of the Laws of 2012 regarding additional parent member of CSE and electronic access to IEPs.

**Public hearing(s) will be held at:** 3:00 p.m. - 5:00 p.m., Oct. 24, 2012 at Education Department, Education Bldg., Seminar Rm. 5A/B, Albany, NY, Room Capacity: 70 (approx.). Directions: <http://usny.nysed.gov/contact/driving.html>, Parking: <http://ogs.ny.gov/BU/BA/Parking/Visitor/>; 3:00 p.m. - 5:00 p.m.\*, Oct. 24, 2012 at Genesee Valley BOCES, Leroy Service Center, 80 Munson St., Conference Rm. C, Leroy, NY, Room Capacity: 50 (approx.). Directions: <http://www.gvbooces.org/directions.cfm>; 3:00 p.m. - 5:00 p.m.\*, Oct. 24, 2012 at Shirley A. Chisholm State Office Bldg., 55 Hanson Place, Rm. 1069, Brooklyn, NY, Room Capacity: 50 (approx.). Directions: <http://www.acces.nysed.gov/vr/brooklyn/directions.htm>.

\* The Leroy and New York City public hearings will be conducted by videoconference.

- Pre-registration is not required.
- The meeting rooms are accessible to individuals with disabilities. Individuals who need accommodations for a disability in order to attend the meeting (i.e., interpreting services and/or material in an alternative format) should notify the Office of Special Education at (518) 473-2878 no later than two weeks before the scheduled meeting date.
- You must bring photo identification and follow sign-in procedures, which may include a security scanning, as required at the door.
- Individuals may register to provide comment at the door on a first-come, first-served basis. Comments can be oral or written. Written comments that accompany oral remarks are optional.
- Participants wishing to provide comment between 4:45 p.m. and 5:00 p.m. must arrive and register no later than 4:45 p.m.
- Please check the following website prior to the meeting dates for additional information and any changes regarding these meetings: <http://www.p12.nysed.gov/specialed/timely.htm>
- Questions regarding the public hearings or the proposed regulations may be directed to Alison Connors or Suzanne Corey at (518) 473-2878.

**Interpreter Service:** Interpreter services will be made available to hearing impaired persons, at no charge, upon written request submitted within reasonable time prior to the scheduled public hearing. The written request must be addressed to the agency representative designated in the paragraph below.

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

**Text of proposed rule:** 1. Subparagraph (i) of paragraph (11) of subdivision (b) of section 200.2 of the Regulations of the Commissioner of Education is amended, effective January 2, 2013, as follows:

(i) each regular education teacher, special education teacher, related service provider and/or other service provider, as defined in clause (a) of this subparagraph, who is responsible for the implementation of a student's individualized education program (IEP) is provided a paper or electronic copy of such student's IEP, including amendments to the IEP, made pursuant to section 200.4(g) of this Part, prior to the implementation of such program or shall be able to access such student's IEP electronically. If the policy provides that students' IEPs are to be accessed electronically, then such policy shall also ensure that the individuals responsible for the implementation of a student's IEP shall be notified and trained on how to access such IEPs electronically:

(a) . . .

2. Subparagraph (viii) of paragraph (1) of subdivision (a) of section 200.3 of the Regulations of the Commissioner of Education is amended, effective January 2, 2013, as follows:

(viii) an additional parent member of a student with a disability residing in the school district or a neighboring school district, provided that the additional parent member may be the parent of a student who has been declassified within a period not to exceed five years or the parent of a student who has graduated within a period not to exceed five years[. Such parent is not a required member if the parents of the student request that the additional parent member not participate in the meeting], if specifically requested in writing by the parent of the student, the student or by a member of the committee at least 72 hours prior to the meeting;

3. Subparagraph (i) of paragraph (3) of subdivision (e) of section 200.4 of the Regulations of the Commissioner of Education is amended, effective January 2, 2013, as follows:

(i) ensuring that each regular education teacher, special education teacher, related service provider, and/or other service provider, as defined in section 200.2(b)(11)(i)(a) of this Part, who is responsible for the

implementation of a student's IEP, is provided a paper or electronic copy of the IEP prior to the implementation of such IEP or shall be able to access such student's IEP electronically. If the board of education or board of trustees adopts a policy that the student's IEP is to be accessed electronically, then such policy shall also ensure that the individuals responsible for the implementation of a student's IEP shall be notified and trained on how to access such IEPs electronically;

4. Subparagraphs (iv) and (v) of paragraph (2) of subdivision (c) of section 200.5 of the Regulations of the Commissioner of Education are amended, effective January 2, 2013, as follows:

(iv) for meetings of the committee on special education, inform the parent(s) of his or her right to request, in writing at least 72 hours before the meeting, the presence of the school physician member and an additional parent member of the committee on special education at any meeting of such committee pursuant to section 4402(1)(b) of the Education Law and include a statement, prepared by the State Education Department, explaining the role of having the additional parent member attend the meeting;

(v) for meetings of the committee on preschool special education, inform the parent(s) of his or her right to decline, in writing, the participation of the additional parent member at any meeting of such committee pursuant to section [4402(1)(b)] 4410(3)(a)(1)(v) of the Education Law;

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

**Data, views or arguments may be submitted to:** James P. DeLorenzo, Assistant Commissioner P-12, State Education Department, Office of Special Education, State Education Building, Room 309, 89 Washington Ave., Albany, NY 12234, (518) 402-3353, email: spedpubliccomment@mail.nysed.gov

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

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

**Regulatory Impact Statement**

**STATUTORY AUTHORITY:**

Education Law section 101 continues the existence of the Education Department, with the Board of Regents at its head and the Commissioner of Education as the chief administrative officer, and charges the Department with the general management and supervision of public schools and the educational work of the State.

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

Education Law section 305(1) and (2) provide the Commissioner, as chief executive officer of the State education system, with general supervision over schools and institutions subject to the provisions of education law, and responsibility for executing Regents policies. Section 305(20) authorizes the Commissioner with such powers and duties as are charged by the Regents.

Education Law section 4402 establishes school district duties for the education of students with disabilities.

Education Law section 4403 establishes Department and school district responsibilities concerning education programs and services to students with disabilities. Section 4403(3) authorizes the Department to adopt rules and regulations as the Commissioner deems in their best interests.

Education Law section 4410 establishes requirements for education services and programs for preschool children with disabilities. Section 4410(13) authorizes the Commissioner to adopt regulations.

Chapter 276 of the Laws of 2012 amended section 4402 of the Education Law in relation to the additional parent member of committees on special education (CSE).

Chapter 279 of the Laws of 2012 amended section 4402 of the Education Law in relation to providing teachers and related and other service providers with electronic access to students' individualized education programs (IEPs).

**LEGISLATIVE OBJECTIVES:**

The proposed amendment is consistent with the authority conferred by the above statutes and is necessary to conform the Commissioner's Regulations to Chapters 276 and 279 of the New York State Laws of 2012, which became effective August 1, 2012.

**NEEDS AND BENEFITS:**

The proposed amendment is necessary to conform the Commissioner's Regulations to Chapters 276 and 279 of the New York State Laws of 2012.

Chapter 276 amends Education Law section 4402 to provide that the additional parent member of a CSE need not be in attendance at any CSE meeting unless specifically requested by the parent, the student or the

district in writing at least 72 hours prior to the meeting. The law further requires that parents receive proper written notice of their right to have an additional parent member attend any CSE meeting along with a statement, prepared by the State Education Department, explaining the role of having the additional parent attend the meeting. No changes were made regarding additional parent membership on a Committee for Preschool Special Education.

Chapter 279 amends Education Law section 4402 to allow school districts the option of giving teachers, related service providers and other service providers access to a student's IEP electronically. If the school district's policy provides that a student's IEP is to be accessed electronically, the policy must also ensure that the individuals responsible for the implementation of the IEP are notified and trained on how to access such IEP electronically.

**COSTS:**

- a. Costs to State government: None.
- b. Costs to local governments: None.
- c. Costs to regulated parties: None.
- d. Costs to the State Education Department of implementation and continuing compliance: None.

The proposed amendment is necessary to conform the Commissioner's Regulations to Chapters 276 and 279 of the Laws of 2012, and does not impose any additional costs beyond those imposed by federal and State statutes and regulations.

**LOCAL GOVERNMENT MANDATES:**

The proposed amendment is necessary to conform the Commissioner's Regulations to Chapters 276 and 279 of the Laws of 2012 and does not impose any additional program, service, duty or responsibility upon local governments beyond those imposed by federal and State statutes and regulations.

Consistent with Chapter 276, section 200.3(a)(1)(iii) is amended to repeal the provision that the additional parent member is a required member of the CSE unless the parents of the student request that he/she not participate in the meeting; and add that the additional parent member of the CSE would be a required member of the CSE if requested by the parent, the student or the district in writing at least 72 hours prior to the meeting. Section 200.5(c)(2)(v) is amended to provide that the meeting notice for CSE meetings must inform parents of their right to request, in writing at least 72 hours prior to the meeting, the attendance of an additional parent member at any CSE meeting and that the meeting notice must include a statement, prepared by the State Education Department, explaining the role of having the additional parent attend the meeting. Section 200.5(c)(2)(vi) is revised to clarify that a parent's right to decline the participation of the additional parent member pertains only to meetings of the committee on preschool special education; and corrects a cross reference to Education Law.

Consistent with Chapter 279, section 200.2(i)(11)(i) is amended to provide that, in lieu of providing a paper of electronic copy of the IEP, school district policy may provide that student's teachers, related service providers and other service providers have access to a copy of student's IEP electronically; and that if the policy provides that the IEP is to be accessed electronically, the policy must ensure that the individuals responsible for the implementation of the IEP are notified and trained on how to access the IEP electronically. Section 200.4(e)(3)(i) is amended to provide that school districts may allow a student's teachers, related service providers and other service providers to access a student's IEP electronically; provided that if a school district adopts a policy that provides that a student's IEP is to be accessed electronically, such policy must also ensure that the individuals responsible for the implementation of the IEP are notified and trained on how to access such IEP electronically.

**PAPERWORK:**

The proposed amendment is necessary to conform the Commissioner's Regulations to Chapters 276 and 279 of the Laws of 2012, and does not impose any additional paperwork requirements. While Chapter 276 of the Laws of 2012 added a requirement that school districts notify parents of their right to request the attendance of the additional parent member at any CSE meeting and to include a statement prepared by NYSED explaining the role of the additional parent member, the proposed amendment implements the statute by adding these requirements to the State's existing mandatory meeting notice. Therefore, there would be no additional paperwork requirements imposed on districts since districts must currently use the meeting notice form prescribed by the Commissioner.

Consistent with the requirements of Chapter 279 of the Laws of 2012, the proposed amendment would allow districts the option of providing a student's teachers, related service providers and other service providers with electronic access to the student's IEP, which may result in a reduction of paperwork requirements.

**DUPLICATION:**

The proposed amendment will not duplicate, overlap or conflict with any other State or federal statute or regulation, and is necessary to implement Chapters 276 and 279 of the Laws of 2012.

**ALTERNATIVES:**

The proposed amendment is necessary to conform the Commissioner's Regulations to Chapters 276 and 279 of the Laws of 2012, and there are no significant alternatives and none were considered.

**FEDERAL STANDARDS:**

The proposed amendment is necessary to conform the Commissioner's Regulations to recent changes in State statute and does not exceed any minimum federal standards.

**COMPLIANCE SCHEDULE:**

It is anticipated that regulated parties will be able to achieve compliance with the proposed amendment by its effective date.

**Regulatory Flexibility Analysis****Small Businesses:**

The proposed amendment is necessary to conform the Commissioner's Regulations to Chapters 276 and 279 of the Laws of 2012, relating to, respectively, the additional parent member of a committee on special education (CSE) and authorizing electronic access to students' individualized education programs (IEP). The proposed amendment does not impose any adverse economic impact, reporting, recordkeeping or any other compliance requirements on small businesses. Because it is evident from the nature of the rule that it does not affect small businesses, no affirmative steps are needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

**Local Governments:**

The proposed amendment applies to all public school districts, boards of cooperative educational services (BOCES), charter schools, State-operated and State-supported schools, special act school districts and approved private schools.

**1. COMPLIANCE REQUIREMENTS:**

The proposed amendment is necessary to conform the Commissioner's Regulations to Chapters 276 and 279 of the Laws of 2012, which became effective August 1, 2012, and does not impose any additional compliance requirements beyond those imposed by federal statutes and regulations and State law.

Consistent with Chapter 276, section 200.3(a)(1)(iii) is amended to repeal the provision that the additional parent member is a required member of the CSE unless the parents of the student request that he/she not participate in the meeting; and add that the additional parent member of the CSE would be a required member of the CSE if requested by the parent, the student or the district in writing at least 72 hours prior to the meeting. Section 200.5(c)(2)(iv) is amended to provide that the meeting notice for CSE meetings must inform parents of their right to request, in writing at least 72 hours prior to the meeting, the attendance of an additional parent member at any CSE meeting and that the meeting notice must include a statement, prepared by the State Education Department, explaining the role of having the additional parent attend the meeting. Section 200.5(c)(2)(v) is revised to clarify that a parent's right to decline the participation of the additional parent member pertains only to meetings of the committee on preschool special education; and corrects a cross reference to Education Law.

Consistent with Chapter 279, section 200.2(i)(11)(i) is amended to provide that, in lieu of providing a paper of electronic copy of the IEP, school district policy may provide that student's teachers, related service providers and other service providers have access to a copy of student's IEP electronically; and that if the policy provides that the IEP is to be accessed electronically, the policy must ensure that the individuals responsible for the implementation of the IEP are notified and trained on how to access the IEP electronically. Section 200.4(e)(3)(i) is amended to provide that school districts may allow a student's teachers, related service providers and other service providers to access a student's IEP electronically; provided that if a school district adopts a policy that provides that a student's IEP is to be accessed electronically, such policy must also ensure that the individuals responsible for the implementation of the IEP are notified and trained on how to access such IEP electronically.

**2. PROFESSIONAL SERVICES:**

The proposed amendment is necessary to conform the Commissioner's Regulations to recent changes in NYS Education Law and does not impose any additional professional service requirements on local governments.

**3. COMPLIANCE COSTS:**

The proposed amendment is necessary to conform the Commissioner's Regulations to Chapters 276 and 279 of the Laws of 2012 and does not impose any additional costs beyond those imposed by such federal statutes and regulations and State statutes.

**4. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:**

The proposed amendment does not impose any new technological requirements. Economic feasibility is addressed above under compliance costs.

**5. MINIMIZING ADVERSE IMPACT:**

The proposed amendment is necessary to conform the Commissioner's

Regulations to Chapters 276 and 279 of the Laws of 2012. The proposed amendment has been carefully drafted to meet State statutory requirements and does not impose any additional costs or compliance requirements on local governments beyond those imposed by federal law and regulations and State statutes. While Chapter 276 of the Laws of 2012 added a requirement that school districts notify parents of their right to request the attendance of the additional parent member at any CSE meeting and to include a statement prepared by NYSED explaining the role of the additional parent member, the proposed amendment implements the statute by adding these requirements to the State's existing mandatory meeting notice. Therefore, there would be no additional paperwork requirements imposed on districts since districts must currently use the meeting notice form prescribed by the Commissioner.

Consistent with the requirements of Chapter 279 of the Laws of 2012, the proposed amendment would allow districts the option of providing a student's teachers, related service providers and other service providers with electronic access to the student's IEP, which may result in a reduction of paperwork requirements.

**6. LOCAL GOVERNMENT PARTICIPATION:**

Copies of the proposed amendment have been provided to District Superintendents and the chief officers of the Big 5 city school districts with the request that they distribute them to school districts within their supervisory districts for review and comment. NYSED will be conducting public hearings on the proposed amendments in October 2012.

**Rural Area Flexibility Analysis****1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:**

The proposed amendment will apply to all public school districts, boards of cooperative educational services (BOCES), charter schools, State-operated and State-supported schools, special act school districts and approved private schools in the State, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with population density of 150 per square miles or less.

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

The proposed amendment is necessary to conform the Commissioner's Regulations to Chapters 276 and 279 of the New York State (NYS) Laws of 2012, which became effective August 1, 2012, and does not impose any additional reporting, recordkeeping or other compliance requirements, or professional service requirements, on entities in rural areas.

Consistent with Chapter 276, section 200.3(a)(1)(iii) is amended to repeal the provision that the additional parent member is a required member of the CSE unless the parents of the student request that he/she not participate in the meeting; and add that the additional parent member of the CSE would be a required member of the CSE if requested by the parent, the student or the district in writing at least 72 hours prior to the meeting. Section 200.5(c)(2)(iv) is amended to provide that the meeting notice for CSE meetings must inform parents of their right to request, in writing at least 72 hours prior to the meeting, the attendance of an additional parent member at any CSE meeting and that the meeting notice must include a statement, prepared by the State Education Department, explaining the role of having the additional parent attend the meeting. Section 200.5(c)(2)(v) is revised to clarify that a parent's right to decline the participation of the additional parent member pertains only to meetings of the committee on preschool special education; and corrects a cross reference to Education Law.

Consistent with Chapter 279, section 200.2(i)(11)(i) is amended to provide that, in lieu of providing a paper of electronic copy of the IEP, school district policy may provide that student's teachers, related service providers and other service providers have access to a copy of student's IEP electronically; and that if the policy provides that the IEP is to be accessed electronically, the policy must ensure that the individuals responsible for the implementation of the IEP are notified and trained on how to access the IEP electronically. Section 200.4(e)(3)(i) is amended to add that school districts may allow a student's teachers, related service providers and other service providers to access a student's IEP electronically; provided that if a school district adopts a policy that provides that a student's IEP is to be accessed electronically, such policy must also ensure that the individuals responsible for the implementation of the IEP are notified and trained on how to access such IEP electronically.

**3. COSTS:**

The proposed amendment is necessary to conform the Commissioner's Regulations to Chapters 276 and 279 of the Laws of 2012 and does not impose any additional costs beyond those imposed by federal statutes and regulations and State statutes.

**4. MINIMIZING ADVERSE IMPACT:**

The proposed amendment is necessary to conform the Commissioner's Regulations to Chapters 276 and 279 of the Laws of 2012. The proposed amendment has been carefully drafted to meet State statutory requirements and does not impose any additional costs or compliance requirements on these entities beyond those imposed by federal law and regula-

tions and State statutes. Since these requirements apply to all school districts in the State, it is not possible to adopt different standards for school districts in rural areas.

While Chapter 276 of the Laws of 2012 added a requirement that school districts notify parents of their right to request the attendance of the additional parent member at any CSE meeting and to include a statement prepared by NYSED explaining the role of the additional parent member, the proposed amendment implements the statute by adding these requirements to the State's existing mandatory meeting notice. Therefore, there would be no additional paperwork requirements imposed on districts since districts must currently use the meeting notice form prescribed by the Commissioner.

Consistent with the requirements of Chapter 279 of the Laws of 2012, the proposed amendment would allow districts the option of providing a student's teachers, related service providers and other service providers with electronic access to the student's IEP, which may result in a reduction of paperwork requirements.

#### 5. RURAL AREA PARTICIPATION:

The proposed amendment was submitted for discussion and comment to the Department's Rural Education Advisory Committee, which includes representatives of school districts in rural areas. NYSED will be conducting public hearings on the proposed amendments in October 2012.

#### Job Impact Statement

The proposed amendment is necessary to conform the Commissioner's Regulations to Chapters 276 and Chapter 279 of the Laws of 2012 relating to, respectively, the additional parent member of a committee on special education (CSE) and authorizing electronic access to students' individualized education programs (IEP). The proposed amendment will not have a substantial impact on jobs and employment opportunities. Because it is evident from the nature of the amendment that it will not affect job and employment opportunities, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required, and one has not been prepared.

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## Department of Environmental Conservation

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

#### Section 326.2(b)(4)(ii) Is Amended to Allow the Use of Fluridone Pellets in Waters Less Than Two Feet Deep

I.D. No. ENV-39-12-00011-P

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

**Proposed Action:** Amendment of section 326.2(b)(4)(ii) of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, section 33-0303

**Subject:** Section 326.2(b)(4)(ii) is amended to allow the use of fluridone pellets in waters less than two feet deep.

**Purpose:** Allow the use of fluridone pellets in waters less than two feet deep to control hydrilla, an invasive plant.

**Text of proposed rule:** Subparagraph 326.2(b)(4)(ii) is amended to read as follows:

(ii) applications of pellet formulations are not permitted in waters less than two feet deep. *The use of pellet formulations in waters less than two feet deep may be authorized for the control of invasive species. This use will be authorized by the issuance of an Article 15 permit and the pellet formulations shall only be applied in accordance with label and labeling directions or as modified and approved by the Department of Environmental Conservation.*

**Text of proposed rule and any required statements and analyses may be obtained from:** Anthony Lamanno, Department of Environmental Conservation, Division of Materials Management, 625 Broadway, 9th floor, Albany, NY 12233-7254, (518) 402-8788, email: pestmgt@gw.dec.state.ny.us

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

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

**Additional matter required by statute:** SEQR Negative Declaration, Coastal Assessment Form.

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

#### Regulatory Impact Statement

##### 1. Statutory Authority

Section 33-0303(3)(d), (e) of the Environmental Conservation Law ("ECL") authorizes the Department of Environmental Conservation (department) to promulgate a list of restricted use pesticides and the usages of such pesticides that may be permitted subject to whatever conditions or limitations which the commissioner deems appropriate to fully protect the public interest. In addition, rules and regulations may be promulgated to prescribe methods to be used in the application of pesticides, including the time, place, manner and method of application and equipment used, and may restrict or prohibit use of materials in designated areas to prevent damage or injury to health, property and wildlife.

##### 2. Legislative Objectives

Promulgating regulations that limit or restrict where pesticides may be used is an important and valuable function of the department, consistent with the intent of the Legislature to protect property, health and welfare. The limitation placed on the use of fluridone pellets resulted from a concern by New York State Department of Health that the use of pellets in less than two feet of water may be an attractive nuisance to children wading or swimming in the water body. The use of fluridone pellets could prove very effective for the long-term control of invasive aquatic plants, such as hydrilla. When the department confirms the presence of an invasive species, immediate action may be necessary. A regulatory change will allow the use of fluridone pellets in waters less than two feet deep to control hydrilla.

##### 3. Needs and Benefits

Subparagraph 326.2(b)(4)(ii) of 6 NYCRR prohibits fluridone applications of pellet formulations in waters less than two feet deep. A change to the regulation will allow certified applicators to use fluridone pellets in waters less than two feet to adequately control invasive plant species. Hydrilla (*Hydrilla verticillata*) is considered among the most invasive aquatic plants in North America, and has resulted in significant ecological, recreational and economic impacts in other regions of the country. Its biological traits enable it to out-compete native species and dominate aquatic ecosystems, due to its ability to grow in a variety of environmental settings and to propagate and spread from fragments, turions (overwintering buds) and tubers (reproductive structures attached to plant rhizomes).

The plant was first discovered in New York in 2008. Prior to 2011, this plant was limited in New York to small isolated occurrences in Long Island and Orange County, where the populations can be contained and the risk of spread is greatly reduced. However, dense stands of hydrilla were found in the Cayuga Inlet in late summer of 2011, near the Allen Treman Marine State Park and several private boatyards. If this plant escapes from an approximately 166 acre infestation zone within Cayuga Inlet and its tributaries, it will be extremely difficult to prevent its rapid spread throughout the Finger Lakes and Great Lakes regions.

Immediately after the initial discovery of hydrilla in August of 2011, State and local Task Forces were established to coordinate the response effort, including committees addressing management, surveys and monitoring, and outreach and prevention. The 2011 management plans were limited by the timing of discovery, and informed by the primary goal of reducing biomass and preventing spread of the known infestation. Endothal treatments for the initially discovered 73 acres of the Inlet took place in mid-October, and diver assisted hand harvesting occurred in late November/early December for a portion of the infestation discovered too late for the herbicide regulatory permit. The endothal treatment substantially reduced plant biomass and appeared to prevent continuing production of reproductive tubers and turions, but did little to control the existing tuber bank in the sediments. The reduction in biomass also prevented the fragmentation and spread of plants through the balance of the growing season. The deepest portions of the Inlet will be subject to navigational dredging starting in the fall of 2012; this will have little effect on the hydrilla populations in the majority of the proposed treatment area.

The hydrilla was found within a 166 acre area associated with the Cayuga Inlet north of the fish ladder, Cascadilla Creek west of the Route 13 overpass, and Linderman Creek to the Route 89 culvert. The plant has been found throughout this area, ranging in densities from sparse to dense, and in depth from water less than 1 foot deep to the center of the Inlet, in water 8-12 feet deep. Rooted plants have not been found in Cayuga Lake, although floating fragments were observed during the fall 2011 surveys.

The areas affected by this rule making correspond to very shallow regions where hydrilla tubers have been found. These areas are flow-isolated from the rest of the Inlet and are therefore not likely to be exposed to adequate herbicide from the proposed metered distribution ports in three locations throughout the treatment area. These areas also tend to have warmer water and sediments due to depth and flow isolation, so it is anticipated that hydrilla germination will occur at a different time scale than in the rest of treatment area. This will require the use of direct application pellets to prevent this growth.

If fluridone pellets cannot be applied to shallow waters, hydrilla tubers will not likely be exposed to sufficient herbicide migration from deeper waters to effectively prevent germination. This could lead to production of hydrilla biomass that will quickly reach the water surface, significantly increasing the likelihood of fragmentation and spread from boat traffic, waterfowl, or even wind. This fragmentation will substantially increase the risk of hydrilla spread to Cayuga Lake and to surrounding waterways visited by boaters using Cayuga Inlet.

#### 4. Costs

Enactment of the regulation described herein allowing the use of fluridone pellet in waters less than two feet will not result in any cost to regulated parties, State or local governments, or the general public.

#### 5. Local Government Mandates

The amendment of subparagraph 326.2(b)(4)(ii) of 6 NYCRR will not impose any programs, services, duties or responsibilities upon any county, city, town, village, school district, or fire district.

#### 6. Paperwork

No additional paperwork will be required as a result of this change in regulation.

#### 7. Duplication

There are no other state or federal regulations which govern the use of fluridone pellets in waters less than two feet.

#### 8. Alternatives

Options that have been evaluated by the Task Force and the external reviewers include the use of the just the contact herbicide endothal, diver assisted hand removal and benthic mats. While the fall 2011 Hydrilla treatment for Cayuga Lake Inlet consisted of only endothal treatment, this is not the most ideal long term approach as it does not adequately address the large tuber bank produced by this aquatic invasive species. The systemic herbicide fluridone does impact the tuber bank, thus more effectively controlling hydrilla and reducing the long-term use of herbicides, but requires a long exposure/contact time at a low dosage rate. A balance of endothal and fluridone applications takes advantage of the benefits from both control strategies. The use of diver assisted hand harvesting removed a small percentage of the biomass, but significant turbidity and hard clay substrates prevented effective removal via this method. Small scale use of benthic mats is being considered for 2012, but only in areas that will be challenging to address via herbicide application. High boater usage of these waters makes large scale use of this approach challenging. The department does not see any viable alternative to this rule making to deal with this invasive aquatic weed.

#### 9. Federal Standards

There are no minimum federal standards that apply to use of fluridone pellets in waters less than two feet.

#### 10. Compliance Schedule

This proposed amendment of subparagraph 326.2(b)(4)(ii) of 6 NYCRR has been effect through an emergency rulemaking. The rulemaking will take effect permanently upon filing a Notice of Adoption with the Department of State. The use of fluridone pellets in

waters less than two feet can be applied by certified applicators when the proper permits have been obtained from the department.

#### *Regulatory Flexibility Analysis*

This rule making will not impose an adverse impact on small businesses or local governments. In addition, it will not impose reporting, recordkeeping or other compliance requirements on small businesses or local government.

The regulation will give certified applicators the ability to use fluridone pellets in waters less than two feet deep in order to control an invasive aquatic weed. The regulation, on its face, will not require any reporting or recordkeeping requirements for anyone. Certified applicators that use fluridone pellets in waters less than two feet deep will need to comply with permitting requirements and obtain a permit for such application.

However, since the regulation will not apply to small businesses or local government, there will be no adverse effect. For these reasons, the Department of Environmental Conservation has determined that a regulatory flexibility analysis for small businesses and local government is not required.

#### *Rural Area Flexibility Analysis*

This rule making will not impose any adverse impacts on rural areas and will not impose any additional reporting, recordkeeping or other compliance requirements on public and private entities in rural areas. There will be no initial capital costs or any annual costs to comply with the rule.

The regulation will give certified applicators the ability to use fluridone pellets in waters less than two feet deep in order to control an invasive aquatic plants in waters across New York. The regulation, on its face, will not require any additional reporting or recordkeeping requirements. Certified applicators that use fluridone pellets in waters less than two feet deep will need to comply with permitting requirements and obtain a permit for such application, which is an existing requirement.

However, since the regulation will apply equally to all certified applicators in rural areas Statewide, there will be no adverse effect. For these reasons, the Department of Environmental Conservation has determined that rural area flexibility analysis is not required.

#### *Job Impact Statement*

The Department of Environmental Conservation (department) has determined that this rule will not have a substantial adverse impact on jobs and employment opportunities. There are no jobs or employment opportunities that will be affected, since the nature and purpose of the rule making is simply to allow the use of fluridone pellets in waters less than two feet to control invasive aquatic weeds.

This rule will not eliminate any jobs or limit what a certified applicator can apply. The rule making will allow the use of fluridone pellets in waters less than two feet, which will not affect applicator certification requirements. Therefore, the department has determined that a job impact statement is not required.

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## Department of Financial Services

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### EMERGENCY RULE MAKING

#### Use of Senior-Specific Certifications and Professional Designations in the Sale of Life Insurance and Annuities

**I.D. No.** DFS-34-12-00005-E

**Filing No.** 923

**Filing Date:** 2012-09-07

**Effective Date:** 2012-09-07

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

**Action taken:** Addition of Part 225 (Regulation 199) to Title 11 NYCRR.

**Statutory authority:** Financial Services Law, sections 202, 301 and 302; and Insurance Law, sections 301, 2103, 2104, 2110, 2403 and 4525

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

**Specific reasons underlying the finding of necessity:** This Part sets forth standards to protect consumers from misleading and fraudulent marketing practices with respect to the use of senior-specific certifications and professional designations in the solicitation, sale or purchase of, or advice made in connection with a life insurance policy or annuity contract. The Part prohibits the use of a senior-specific certification or professional designation by an insurance producer in such a way as to mislead a purchaser or prospective purchaser into thinking that the insurance producer has special certification or training in advising or providing services to seniors in connection with the sale of life insurance and annuities.

Seniors are often misled and harmed by the use of senior-specific certifications and designations by insurance producers that imply the existence of a level of expertise and knowledge in senior matters that in fact does not exist. Misleading certifications and professional designations such as “certified elder planning specialist” and “certified senior advisor” are used by insurance producers to gain the confidence of seniors by creating an impression of expertise and knowledge. However, many of these designations are obtained by insurance producers in a manner that requires little more than the payment of a fee.

In recent years, the media has reported cases of unsuitable sales to elderly clients, resulting in the loss of seniors’ savings, by insurance producers utilizing misleading senior-specific certifications or designations. Legislators and regulators, both federal and state, responding to such reports, have proposed and/or adopted prohibitions on the use of senior-specific designations in a misleading manner. In 2008, the National Association of Insurance Commissioners adopted a new Model Regulation on the Use of Senior-Specific Certifications and Professional Designations in the Sale of Life Insurance and Annuities (“the NAIC Model”). The standards and procedures in this rule are substantially the same as those already adopted by the NAIC Model. While more than 15 states have implemented some form of the NAIC Model, New York has no statute or regulation that specifically provides this consumer protection by prohibiting the use of misleading senior-specific certifications or professional designations by an insurance producer in the sale of life insurance and annuities.

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the “Act”) places a high level of importance on state regulation of the appropriate use of certifications and professional designations in the sale of insurance products. In an effort to provide incentives to states to adopt such regulations, the Act offers state agencies that promulgate such regulations federal grants of between \$100,000 and \$600,000 towards enhanced protection of seniors in connection with the sale and marketing of financial products. In order for the Department to be considered for the grants provided under the Dodd-Frank Act, a rule governing the use of senior-specific certifications and designations in the sale of life insurance and annuities, and another governing suitability had to be promulgated by December 31, 2010 and must be maintained in effect. Given the state’s fiscal crisis and the constraints on the Department’s budget, the federal grant money would fund critical efforts to protect consumers.

For the reasons stated above, emergency action is necessary for the general welfare.

**Subject:** Use of Senior-Specific Certifications and Professional Designations in the Sale of Life Insurance and Annuities.

**Purpose:** To protect consumers from misleading use of senior-specific certifications and designations in the sale of life insurance or annuities.

**Text of emergency rule:** A new Part 225 is added to read as follows:

*Section 225.0 Purpose.*

*The purpose of this Part is to set forth standards to protect consumers from misleading and fraudulent marketing practices with respect to the use of senior-specific certifications and professional designations in the solicitation, sale or purchase of, or advice made in connection with, a life insurance policy or annuity contract.*

*Section 225.1 Applicability.*

*This Part shall apply to any solicitation, sale or purchase of, or advice made in connection with, a life insurance policy or annuity contract by an insurance producer.*

*Section 225.2 Prohibited uses of senior-specific certifications and professional designations.*

*(a)(1) No insurance producer shall use a senior-specific certification or professional designation that indicates or implies in such a way as to mislead a purchaser or prospective purchaser that the insurance producer has special certification or training in advising or providing services to seniors in connection with the solicitation, sale or purchase of a life insurance policy or annuity contract or in the provision of advice as to the value of or the advisability of purchasing or selling a life insurance policy or annuity contract, either directly or indirectly through publications or*

*writings, or by issuing or promulgating analyses or reports related to a life insurance policy or annuity contract.*

*(2) The prohibited use of senior-specific certifications or professional designations includes use of:*

*(i) a certification or professional designation by an insurance producer who has not actually earned or is otherwise ineligible to use such certification or designation;*

*(ii) a nonexistent or self-conferred certification or professional designation;*

*(iii) a certification or professional designation that indicates or implies a level of occupational qualifications obtained through education, training or experience that the insurance producer using the certification or designation does not have; and*

*(iv) a certification or professional designation that was obtained from a certifying or designating organization that:*

*(a) is primarily engaged in the business of instruction in sales or marketing;*

*(b) does not have reasonable standards or procedures for assuring the competency of its certificants or designees;*

*(c) does not have reasonable standards or procedures for monitoring and disciplining its certificants or designees for improper or unethical conduct; or*

*(d) does not have reasonable continuing education requirements for its certificants or designees in order to maintain the certificate or designation.*

*(b) There is a rebuttable presumption that a certifying or designating organization is not disqualified solely for purposes of subdivision*

*(a)(2)(iv) of this section when the certification or designation issued from the organization does not primarily apply to sales or marketing and when the organization or the certification or designation in question has been accredited by:*

*(1) The American National Standards Institute (ANSI);*

*(2) The National Commission for Certifying Agencies; or*

*(3) any organization that is on the U.S. Department of Education’s list entitled “Accrediting Agencies Recognized for Title IV Purposes.”*

*(c) In determining whether a combination of words or an acronym standing for a combination of words constitutes a certification or professional designation indicating or implying that a person has special certification or training in advising or providing services to seniors, factors to be considered shall include:*

*(1) use of one or more words such as “senior,” “retirement,” “elder,” or like words combined with one or more words such as “certified,” “registered,” “chartered,” “advisor,” “specialist,” “consultant,” “planner,” or like words, in the name of the certification or professional designation; and*

*(2) the manner in which those words are combined.*

*(d)(1) For purposes of this Part, a job title held by an insurance producer within an organization or other entity that is licensed or registered by a state or federal financial services regulatory agency shall not be deemed a certification or professional designation, unless it is used in a manner that would confuse or mislead a reasonable consumer, when the job title:*

*(i) indicates seniority or standing within the organization or other entity; or*

*(ii) specifies an individual’s area of specialization within the organization or other entity.*

*(2) For purposes of this subdivision, financial services regulatory agency includes an agency that regulates insurers, insurance producers, broker-dealers, investment advisers, or investment companies as defined under the Investment Company Act of 1940.*

*Section 225.3 Violations.*

*A contravention of this Part shall be deemed to be an unfair method of competition or an unfair or deceptive act and practice in the conduct of the business of insurance in this state and shall be deemed to be a trade practice constituting a determined violation, as defined in section 2402(c) of the Insurance Law and shall be a violation of section 2403 of the Insurance Law.*

**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. DFS-34-12-00005-P, Issue of August 22, 2012. The emergency rule will expire December 5, 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: The Superintendent’s authority for promulgation of this rule derives from sections 202, 301, and 302 of the Financial Ser-

vices Law (“FSL”) and sections 301, 2103, 2104, 2403, 2110, and 4525 of the Insurance Law.

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

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.

Sections 2103 and 2104 of the Insurance Law provide the Superintendent with licensing authority over insurance agents and brokers.

Section 2110 of the Insurance Law authorizes the Superintendent to investigate and discipline those licensees.

Section 2403 of the Insurance Law prohibits any person from engaging in this state in any trade practice constituting a defined violation or a determined violation as defined in Insurance Law Article 24.

Section 4525 of the Insurance Law specifically subjects fraternal benefit societies to certain provisions of Insurance Law Article 21, as well as to any other section that specifically applies to fraternal benefit societies.

2. Legislative objectives: Various sections of the Insurance Law address advertisements, statements and representations of licensees used in the solicitation of insurance. These sections seek to protect consumers and insurers in New York by establishing prohibitions and uniform standards governing the dissemination of such information to the public. Although this regulation is directed to certain practices involving the sale of life insurance and annuity contracts, many of the provisions of the law pursuant to which this regulation is promulgated apply equally to other kinds of insurers. In addition, certain other Insurance Law provisions and regulations promulgated thereunder may have corresponding applicability to other kinds of insurance. In any case, the focus of this regulation to life insurance and annuity contracts should not be construed to imply that similar prohibitions do not apply to, or that corrective action should not be implemented for, other types of insurers or other kinds of insurance.

Further, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Act”) places a high level of importance on state regulation of the appropriate use of certifications and professional designations in the sale of insurance products. To encourage state regulation, the Act offers those state agencies with such regulations in effect federal grants to fund specified regulatory activities that provide enhanced protection of seniors in connection with the sale and marketing of financial products.

This rule sets forth standards to protect consumers from misleading and fraudulent marketing practices with respect to the use of senior-specific certifications and professional designations in the solicitation, sale or purchase of, or advice made in connection with, a life insurance policy or annuity contract. It prohibits the use of a senior-specific certification or professional designation by an insurance producer in such a way as to mislead a purchaser or prospective purchaser into believing that the insurance producer has special certification or training in advising or providing services to seniors in connection with the sale of life insurance and annuities.

3. Needs and benefits: Seniors are often misled and harmed by insurance producers’ use of senior-specific certifications and designations, which wrongly imply the existence of expertise and knowledge of senior matters. Misleading certifications and professional designations such as “certified elder planning specialist” and “certified senior advisor” are used by insurance producers to gain the confidence of seniors by creating an impression of expertise and knowledge. However, many of these designations are obtained by insurance producers in a manner that requires little more than the payment of a fee.

In recent years, the media has reported cases of unsuitable sales to elderly clients by insurance producers who utilized misleading senior-specific certifications or designations, which resulted in the loss of seniors’ savings. Federal and state legislators and regulators, in responding to such reports, have proposed and adopted prohibitions on the misleading use of senior-specific designations. In 2008, the National Association of Insurance Commissioners (“NAIC”) adopted a new Model Regulation on the Use of Senior-Specific Certifications and Professional Designations in the Sale of Life Insurance and Annuities (“the NAIC Model”). While more than 15 states have implemented some form of the NAIC Model, New York has no statute or regulation that specifically provides a consumer protection that prohibits the misleading use of senior-specific certifications or professional designations by an insurance producer in the sale of life insurance and annuities. In recognition of the need to provide such consumer protection, the Department of Financial Services is adopting the NAIC Model, with minimal modifications, as Part 225 to Title 11 NYCRR (Insurance Regulation 199). The modifications from the NAIC Model conformed terminology and formatting to New York standards as well as added the violations section of the regulation.

4. Costs: Insurance producers should not incur additional costs to comply with this rule. The acts prohibited by the rule comport with those prohibited by Insurance Law Article 24. The rule clarifies the prohibitions without imposing new obligations.

The rule does not impose additional costs on the Department of Financial Services or other state government agencies or local governments.

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

6. Paperwork: The rule does not impose any reporting or recordkeeping requirements on affected insurance producers.

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

8. Alternatives: The Department of Financial Services considered not implementing the NAIC Model and proceeding under the Department’s more general enforcement authority under Insurance Law Article 24. However, because of the misleading and fraudulent marketing practices reported in recent years, the Department determined that a regulation would be the best way to address the situation.

An outreach draft of the regulation was posted on the Department’s website on October 5, 2010 for a 14-day comment period. Interested parties, such as the Life Insurance Council of New York (LICONY), a life insurance industry trade association, and the National Association of Insurance and Financial Advisors - New York State (NAIFA- New York State), an agent trade association, supported the adoption of this Part in written comments and/or discussions with the Department of Financial Services.

9. Federal standards: There are no minimum standards imposed by the federal government for the same or similar subject area.

10. Compliance schedule: Insurance producers who currently make appropriate use of senior-specific certifications and professional designations in the solicitation, sale or purchase of, or advice made in connection with, a life insurance policy or annuity contract should not need to change their sales practices. The acts prohibited by the rule comport with those prohibited by Insurance Law Article 24. The rule clarifies the prohibitions without imposing new obligations.

#### **Regulatory Flexibility Analysis**

1. Small businesses: The Department of Financial Services finds that this rule will not impose any adverse economic impact on small businesses and will not impose any reporting or recordkeeping requirements or compliance costs on small businesses.

This rule is substantially the same as the National Association of Insurance Commissioners’ (“NAIC”) Model regulation on the Use of Senior-Specific Certifications and Professional Designations in the Sale of Life Insurance and Annuities and is directed at licensed insurance producers within New York State. The acts prohibited by the rule comport with those prohibited by Insurance Law Article 24. The rule clarifies the prohibitions without imposing new obligations. The rule does not impose any additional compliance requirements on insurance producers.

2. Local governments: The Department of Financial Services finds that this rule will not impose any adverse compliance requirements or adverse impacts on local governments. The basis for this finding is that this rule is directed at insurance producers, none of which are local governments.

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

1. Types and estimated numbers of rural areas: Insurance producers covered by this rule do business in every county in this state, including rural areas as defined under State Administrative Procedure Act section 102(13).

2. Reporting, recordkeeping and other compliance requirements, and professional services: The rule prohibits the misuse of senior-specific certifications and professional designations by insurance producers in connection with solicitation or sale of, or advice made in connection with, a life insurance policy or annuity contract.

The rule does not impose any reporting, recordkeeping, or professional services requirements on affected insurance producers.

3. Costs: Insurance producers should not incur additional costs to comply with this rule. The acts prohibited by the rule comport with those prohibited directly by Insurance Law Article 24. The rule clarifies the prohibitions without imposing new obligations.

4. Minimizing adverse impact: This rule should not result in an adverse impact on rural areas.

5. Rural area participation: Affected parties doing business in rural areas of the State had the opportunity to comment on the draft of the rule posted on the Department website during the two-week comment period that commenced on October 5, 2010.

#### **Job Impact Statement**

The Department of Financial Services finds that this rule will have little or no impact on jobs and employment opportunities. This rule sets forth standards to protect consumers from misleading and fraudulent sales prac-

tices with respect to the use of senior-specific certifications and professional designations by insurance producers in the solicitation, sale, or purchase of, or advice made in connection with, life insurance policies and annuity contracts.

The Department has no reason to believe that this rule will have any adverse impact on jobs or employment opportunities, including self-employment opportunities.

## EMERGENCY RULE MAKING

### Suitability in Annuity Transactions

**I.D. No.** DFS-39-12-00002-E

**Filing No.** 921

**Filing Date:** 2012-09-07

**Effective Date:** 2012-09-07

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

**Action taken:** Addition of Part 224 (Regulation 187) to Title 11 NYCRR.

**Statutory authority:** Financial Services Law, sections 202, 301 and 302; and Insurance Law, sections 301, 308, 309, 2110, 2123, 2208, 3209, 4226, 4525 and art. 24

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

**Specific reasons underlying the finding of necessity:** This Part requires life insurance companies and fraternal benefit societies (“insurers”) to set standards and procedures for recommendations to consumers with respect to annuity contracts so that the insurance needs and financial objectives of consumers at the time of a transaction are appropriately addressed.

As a result of a low interest rate environment, unsuitable annuities have been aggressively marketed to this state’s most vulnerable residents, particularly senior citizens. In New York alone, life insurance companies wrote \$17 billion in annuity premiums in 2009. The increased complexity of annuities, including the significant investment risk assumed by purchasers of some annuity products, requires the immediate adoption of this Part, which provides critical consumer protections in all annuity sales transactions.

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the “Act”) places a high level of importance on state regulation of the suitability of annuities. In an effort to provide incentives to states to adopt suitability requirements, the Act offers state agencies that promulgate suitability regulations federal grants of between \$100,000 to \$600,000 towards enhanced protection of seniors in connection with the sale and marketing of financial products. In order for the Department to be considered for the grants provided under the Dodd-Frank Act, a rule governing suitability and another governing the use of senior-specific certifications and designations in the sale of life insurance and annuities had to be promulgated by December 31, 2010 and must be maintained in effect. Given the state’s fiscal crisis and the constraints on the Department’s budget, the federal grant money would fund critical efforts to protect consumers.

For the reasons stated above, emergency action is necessary for the general welfare.

**Subject:** Suitability in Annuity Transactions.

**Purpose:** Set forth standards and procedures for recommendations to consumers with respect to annuity contracts.

**Text of emergency rule:** A new Part 224 is added to read as follows:

#### Section 224.0 Purpose.

*The purpose of this Part is to require insurers to set forth standards and procedures for recommendations to consumers with respect to annuity contracts so that the insurance needs and financial objectives of consumers at the time of the transaction are appropriately addressed. These standards and procedures are substantially similar to the National Association of Insurance Commissioners’ Suitability in Annuity Transactions Model Regulation (“NAIC Model”) for annuities, and the Financial Industry Regulatory Authority’s current National Association of Securities Dealers (“NASD”) Rule 2310 for securities. To date, more than 30 states have implemented the NAIC Model, while NASD Rule 2310 has applied nationwide for nearly 20 years. Accordingly, this Part intends to bring these national standards for annuity contract sales to New York.*

#### Section 224.1 Applicability.

*This Part shall apply to any recommendation to purchase or replace an annuity contract made to a consumer by an insurance producer or an insurer, where no insurance producer is involved, that results in the purchase or replacement recommended.*

#### Section 224.2 Exemptions.

*Unless otherwise specifically included, this Part shall not apply to transactions involving:*

*(a) a direct response solicitation where there is no recommendation made; or*

*(b) a contract used to fund:*

*(1) an employee pension or welfare benefit plan that is covered by the Employee Retirement and Income Security Act (ERISA);*

*(2) a plan described by Internal Revenue Code sections 401(a), 401(k), 403(b), 408(k) or 408(p), as amended, if established or maintained by an employer;*

*(3) a government or church plan defined in Internal Revenue Code section 414, a government or church welfare benefit plan, or a deferred compensation plan of a state or local government or tax exempt organization under Internal Revenue Code section 457;*

*(4) a nonqualified deferred compensation arrangement established or maintained by an employer or plan sponsor; or*

*(5) a settlement or assumption of liabilities associated with personal injury litigation or any dispute or claim resolution process.*

#### Section 224.3 Definitions.

*For the purposes of this Part:*

*(a) Consumer means the prospective purchaser of an annuity contract.*

*(b) Insurer means a life insurance company defined in Insurance Law section 107(a)(28), or a fraternal benefit society as defined in Insurance Law section 4501(a).*

*(c) Recommendation means advice provided by an insurance producer, or an insurer where no insurance producer is involved, to a consumer that results in a purchase or replacement of an annuity contract in accordance with that advice.*

*(d) Replace or Replacement means a transaction subject to Part 51 of this Title (Insurance Regulation 60) and involving an annuity contract.*

*(e) Suitability information means information that is reasonably appropriate to determine the suitability of a recommendation, including the following:*

*(1) age;*

*(2) annual income;*

*(3) financial situation and needs, including the financial resources used for the funding of the annuity;*

*(4) financial experience;*

*(5) financial objectives;*

*(6) intended use of the annuity;*

*(7) financial time horizon;*

*(8) existing assets, including investment and life insurance holdings;*

*(9) liquidity needs;*

*(10) liquid net worth;*

*(11) risk tolerance; and*

*(12) tax status.*

#### Section 224.4 Duties of Insurers and Insurance Producers.

*(a) In recommending to a consumer the purchase or replacement of an annuity contract, the insurance producer, or the insurer where no insurance producer is involved, shall have reasonable grounds for believing that the recommendation is suitable for the consumer on the basis of the facts disclosed by the consumer as to the consumer’s investments and other insurance policies or contracts and as to the consumer’s financial situation and needs, including the consumer’s suitability information, and that there is a reasonable basis to believe all of the following:*

*(1) the consumer has been reasonably informed of various features of the annuity contract, such as the potential surrender period and surrender charge, availability of cash value, potential tax implications if the consumer sells, surrenders or annuitizes the annuity contract, death benefit, mortality and expense fees, investment advisory fees, potential charges for and features of riders, limitations on interest returns, guaranteed interest rates, insurance and investment components, and market risk;*

*(2) the consumer would benefit from certain features of the annuity contract, such as tax-deferred growth, annuitization or death or living benefit;*

*(3) the particular annuity contract as a whole, the underlying subaccounts to which funds are allocated at the time of purchase or replacement of the annuity contract, and riders and similar product enhancements, if any, are suitable (and in the case of a replacement, the transaction as a whole is suitable) for the particular consumer based on the consumer’s suitability information; and*

*(4) in the case of a replacement of an annuity contract, the replacement is suitable including taking into consideration whether:*

*(i) the consumer will incur a surrender charge, be subject to the commencement of a new surrender period, lose existing benefits (such as death, living or other contractual benefits), be subject to tax implications if the consumer surrenders or borrows from the annuity contract, or be subject to increased fees, investment advisory fees or charges for riders and similar product enhancements;*

*(ii) the consumer would benefit from annuity contract enhancements and improvements; and*

(iii) the consumer has had another annuity replacement, in particular, a replacement within the preceding 36 months.

(b) Prior to the recommendation of a purchase or replacement of an annuity contract, an insurance producer, or an insurer where no insurance producer is involved, shall make reasonable efforts to obtain the consumer's suitability information.

(c) Except as provided under subdivision (d) of this section, an insurer shall not issue an annuity contract recommended to a consumer unless there is a reasonable basis to believe the annuity contract is suitable based on the consumer's suitability information.

(d)(1) Except as provided under paragraph (2) of this subdivision, neither an insurance producer, nor an insurer, shall have any obligation to a consumer under subdivision (a) or (c) of this section related to any annuity transaction if:

(i) no recommendation is made;

(ii) a recommendation was made and was later found to have been prepared based on materially inaccurate material information provided by the consumer;

(iii) a consumer refuses to provide relevant suitability information and the annuity purchase or replacement is not recommended; or

(iv) a consumer decides to enter into an annuity purchase or replacement that is not based on a recommendation of the insurer or the insurance producer.

(2) An insurer's issuance of an annuity contract subject to paragraph (1) of this subdivision shall be reasonable under all the circumstances actually known to the insurer at the time the annuity contract is issued.

(e) An insurance producer or an insurer, where no insurance producer is involved, shall at the time of purchase or replacement:

(1) document any recommendation subject to subdivision (a) of this section;

(2) document the consumer's refusal to provide suitability information, if any; and

(3) document that an annuity purchase or replacement is not recommended if a consumer decides to enter into an annuity purchase or replacement that is not based on the insurance producer's or insurer's recommendation.

(f) An insurer shall establish a supervision system that is reasonably designed to achieve the insurer's and insurance producers' compliance with this Part. An insurer may contract with a third party to establish and maintain a system of supervision with respect to insurance producers.

(g) An insurer shall be responsible for ensuring that every insurance producer recommending the insurer's annuity contracts is adequately trained to make the recommendation.

(h) No insurance producer shall make a recommendation to a consumer to purchase an annuity contract about which the insurance producer has inadequate knowledge.

(i) An insurance producer shall not dissuade, or attempt to dissuade, a consumer from:

(1) truthfully responding to an insurer's request for confirmation of suitability information;

(2) filing a complaint with the superintendent; or

(3) cooperating with the investigation of a complaint.

#### Section 224.5 Insurer Responsibility.

The insurer shall take appropriate corrective action for any consumer harmed by a violation of this Part by the insurer, the insurance producer, or any third party that the insurer contracts with pursuant to subdivision (f) of section 224.4 of this Part. In determining any penalty or other disciplinary action against the insurer, the superintendent may consider as mitigation any appropriate corrective action taken by the insurer, or whether the violation was part of a pattern or practice on the part of the insurer.

#### Section 224.6 Recordkeeping.

All records required or maintained under this Part, whether by an insurance producer, an insurer, or other person shall be maintained in accordance with Part 243 of this Title (Insurance Regulation 152).

#### Section 224.7 Violations.

A contravention of this Part shall be deemed to be an unfair method of competition or an unfair or deceptive act and practice in the conduct of the business of insurance in this state and shall be deemed to be a trade practice constituting a determined violation, as defined in section 2402(c) of the Insurance Law, except where such act or practice shall be a defined violation, as defined in section 2402(b) of the Insurance Law, and in either such case shall be a violation of section 2403 of the Insurance Law.

**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 December 5, 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: The Superintendent's authority for promulgation of this rule derives from sections 202, 301, and 302 of the Financial Services Law ("FSL") and sections 301, 308, 309, 2110, 2123, 2208, 3209, 4226, 4525, and Article 24 of the Insurance Law.

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

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.

Insurance Law section 308 authorizes the Superintendent to address to any authorized insurer or its officers any inquiry relating to its transactions or condition or any matter connected therewith.

Insurance Law section 309 authorizes the Superintendent to make examinations into the affairs of entities doing or authorized to do insurance business in this state as often as the Superintendent deems it expedient.

Insurance Law section 2110 provides grounds for the Superintendent to refuse to renew, revoke or suspend the license of an insurance producer if, after notice and hearing, the licensee has violated any insurance laws or regulations.

Insurance Law section 2123 prohibits an agent or representative of an insurer from making misrepresentations, misleading statements and incomplete comparisons.

Insurance Law section 2208 provides that an officer or employee of a licensed insurer or a savings bank, who has been certified pursuant to Insurance Law Article 22, is subject to section 2123 of the Insurance Law.

Insurance Law section 3209 mandates disclosure requirements in the sale of life insurance, annuities, and funding agreements.

Insurance Law section 4226 prohibits an authorized life, or accident and health insurer from making misrepresentations, misleading statements, and incomplete comparisons.

Insurance Law section 4525 applies Articles 2, 3, and 24 of the Insurance Law, and Insurance Law sections 2110(a), (b), (d) - (f), 2123, 3209, and 4226 to authorized fraternal benefit societies.

Insurance Law Article 24 regulates trade practices in the insurance industry by prohibiting practices that constitute unfair methods of competition or unfair or deceptive acts or practices.

2. Legislative objectives: The Legislature has long been concerned with the issue of suitability in sales of life insurance and annuities. Chapter 616 of the Laws of 1997, which, in part, amended Insurance Law § 308, required the Superintendent to report to the Governor, Speaker of the Assembly, and the majority leader of the Senate on the advisability of adopting a law that would prohibit an agent from recommending the purchase or replacement of any individual life insurance policy, annuity contract or funding agreement without reasonable grounds to believe that the recommendation is not unsuitable for the applicant (the "Report"). The Legislature set forth four criteria that an agent would consider in selling products, including: a consumer's financial position, the consumer's need for new or additional insurance, the goal of the consumer and the value, benefits and costs of any existing insurance.

In drafting the Report, the Department considered the legislative changes set forth in Chapter 616 of the Laws of 1997, and the Department's subsequent regulatory requirements that were designed to improve the disclosure requirements to consumers that purchased or replaced life insurance policies and annuity products. It was the Department's determination in the Report that additional time was needed to assess the efficacy of those changes.

Since the Department's Report, the purchase of annuities have become complex financial transactions resulting in a greater need for consumers to rely on professional advice and assistance in understanding available annuities and making purchase decisions. While the Financial Industry Regulatory Authority ("FINRA") regulation and standards for the sale of certain variable annuities have existed nationwide for some time, the National Association of Insurance Commissioners ("NAIC") adopted, in 2003 (and further revised in 2010), the Suitability in Annuity Transactions Model Regulation (the "NAIC Model") for all annuity transactions. To date, more than 30 states have implemented the NAIC Model. Accordingly, this Part is intended to bring these national standards for annuity contract sales to New York. In addition, in light of a low interest rate environment that encourages unsuitable annuity sales, and federal incentives to impose suitability standards, the minimum suitability standards are critical.

3. Needs and benefits: This rule requires insurers to set forth standards and procedures for recommendations to consumers with respect to annuity contracts so that the insurance needs and financial objectives of consum-

ers at the time of the transaction are appropriately addressed. It regulates the activities of insurers and producers who make recommendations to consumers to purchase or replace annuity contracts to ensure that insurers and producers make suitable recommendations based on relevant information obtained from the consumers.

As a result of a low interest rate environment, unsuitable annuities have been aggressively marketed to this state's most vulnerable residents, particularly senior citizens. In New York alone, life insurance companies wrote \$17 billion in annuity premiums in 2009. The increased complexity of annuities, including the significant investment risk assumed by purchasers of some annuity products, requires the immediate adoption of this Part, which provides critical consumer protections in all annuity sales transactions. In fact, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Act") places such a high level of importance on state regulation of the suitability of annuities that, in an effort to provide incentives to states to adopt suitability requirements, the Act offers state agencies that promulgate suitability regulations federal grants of between \$100,000 to \$600,000 towards enhanced protection of seniors in connection with the sale and marketing of financial products.

4. Costs: Section 224.4(f) of New York Comp. Codes R. & Reg., tit. 11, Part 224 (Insurance Regulation 187) requires an insurer to establish a supervision system designed to ensure an insurer's and its insurance producers' compliance with the provisions of Insurance Regulation 187. Additionally, § 224.4(g) requires an insurer to be responsible for ensuring that every insurance producer recommending the insurer's annuity contracts is adequately trained to make the recommendation.

As previously stated, the standards and procedures required by this rule are substantially similar to the standards and procedures set forth in the NAIC Model and the NASD Rule 2310. Thus, insurers selling variable annuities will likely already have in place the required supervisory system and training procedures to comply with NASD Rule 2310 and this rule. Similarly, insurers who sell fixed annuities in states where the NAIC Model previously has been adopted will likely have in place the required supervisory system and training procedures to comply with the requirements of the NAIC Model and this rule. As a result, most insurers should incur minimal additional costs in order to comply with the requirements of this rule.

The rule does not impose additional costs to the Department of Financial Services or other state government agencies or local governments.

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

6. Paperwork: The rule requires an insurance producer or an insurer to document: any recommendation subject to § 224.4(a) of Insurance Regulation 187; the consumer's refusal to provide suitability information, if any; and that an annuity purchase or replacement is not recommended if a consumer decides to enter into an annuity purchase or replacement that is not based on the insurance producer's or insurer's recommendation. Additionally, all records required or maintained in accordance with this rule must be maintained in accordance with Part 243 (Insurance Regulation 152).

The documentation required in this rule is substantially similar to the requirements of the aforementioned NAIC Model and NASD Rule 2310. As the NAIC Model has been implemented in many other states and NASD Rule 2310 is imposed nationwide, many companies are already complying with the similar provisions in other jurisdictions. As a result, minimal additional paperwork is expected to be required of most insurers in order to comply with the requirements of this rule.

7. Duplication: Sales of insurance products that are securities under federal law, such as variable annuities, are required to meet the suitability standards and procedures in the NASD Rule 2310. However, there currently exists no state or federal rule that specifically requires application of suitability standards in the sales of all annuities to New York consumers.

8. Alternatives: This rule is a modified version of the NAIC Model. NAIC Model provisions detailing the procedures and standards of the supervision system required to be established by an insurer and the insurance producer training requirements were not included in this rule.

In 2009, the Department held four public hearings throughout the state to gather information about suitability in order to ascertain whether additional oversight and regulation was needed to protect consumers when they are considering the purchase of life insurance and annuities in New York State and if so, the scope and form of such regulation. Testimony at the public hearings by the life insurance industry and agent trade associations supported adoption of a regulation setting forth standards and procedures for recommendations to consumers that was consistent with the NAIC Model.

An outreach draft of this regulation was posted on the Department's website for public comment. In addition to submitted written comments, the Life Insurance Council of New York (LICONY), a life insurance industry trade association, and the National Association of Insurance and

Financial Advisors - New York State (NAIFA - New York State), an agent trade association, met with Department representatives to discuss the draft. Some revisions were made to the draft based on these comments and discussions. NAIFA-New York State remains concerned about producer education and training provisions in the regulation and supports the NAIC Model provisions, which permit an insurance producer to rely on insurer-provided product-specific training standards and materials to comply with the regulation.

9. Federal standards: While NASD Rule 2310 requires suitability standards to be met in the sale of insurance products which are securities under federal law, there are no minimum federal standards for the sale of fixed annuity products.

10. Compliance schedule: The standards included in this rule were previously adopted on an emergency basis and have applied to any recommendation to purchase or replace an annuity contract made to a consumer on or after June 30, 2011 by an insurance producer or an insurer and therefore, insurance producers and insurers have been required to comply with the requirements of the rule since such time. Therefore, this rule will be implemented upon its permanent adoption.

#### **Regulatory Flexibility Analysis**

1. Effect of the rule: This rule requires insurers to set forth standards and procedures for recommendations to consumers with respect to annuity contracts so that the insurance needs and financial objectives of consumers at the time of the transaction are appropriately addressed.

This rule is directed to insurers and insurance producers. Most of insurance producers are small businesses within the definition of "small business" set forth in section 102(8) of the State Administrative Procedure Act, because they are independently owned and operated, and employ 100 or fewer individuals.

This rule should not impose any adverse compliance requirements or adverse impacts on local governments. The basis for this finding is that this rule is directed at the entities allowed to sell annuity contracts, none of which are local governments.

2. Compliance requirements: The affected parties are required to make suitable recommendations for the purchase or replacement of annuity contracts based on relevant information obtained from the consumers. The rule requires an insurance producer to document: any recommendation subject to Section 224.4(a) of this Part, the consumer's refusal to provide suitability information, if any, and that an annuity purchase or replacement is not recommended if a consumer decides to enter into an annuity purchase or replacement that is not based on the insurance producer's recommendation. Furthermore, all records required under this rule are to be maintained in accordance with Part 243 of this Title.

3. Professional services: None is required to meet the requirements of this rule.

4. Compliance costs: Minimum additional costs are anticipated to be incurred by regulated parties. While there may be costs associated with the compliance of this rule, these costs should be minimal.

5. Economic and technological feasibility: Although there may be minimal additional costs associated with the new rule, compliance is economically feasible for small businesses.

6. Minimizing adverse impact: There is little if no adverse economic impact on small businesses. The compliance, documentation and record-keeping requirements of this rule should have little impact on small businesses. Differing compliance or reporting requirements or timetables for small businesses were not necessary.

7. Small business and local government participation: Affected small businesses had the opportunity to comment at suitability public hearings held by the Department of Financial Services in 2009 and on the outreach draft of the rule, which was posted on the Department website for a two-week comment period.

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

1. Types and estimated numbers of rural areas: Insurers and insurance producers covered by this rule do business in every county in this state, including rural areas as defined under State Administrative Procedure Act Section 102(13).

2. Reporting, recordkeeping and other compliance requirements, and professional services: The rule requires an insurance producer or an insurer to document: any recommendation subject to section 224.4(a) of this Part; the consumer's refusal to provide suitability information, if any; and that an annuity purchase or replacement is not recommended if a consumer decides to enter into an annuity purchase or replacement that is not based on the insurance producer's or insurer's recommendation.

All records required or maintained under this Part shall be maintained in accordance with Part 243 (Insurance Regulation 152).

3. Costs: The standards and procedures required by this rule are substantially similar to the National Association of Insurance Commissioners' "Suitability in Annuity Transactions" Model Regulation ("NAIC Model") for annuities, and the Financial Industry Regulatory

Authority's current National Association of Securities Dealers ("NASD") Rule 2310 for securities. Accordingly, insurers that currently sell variable annuities will likely already have in place the required supervisory system and training procedures to comply with NASD Rule 2310 and this rule. Similarly, insurers that sell fixed annuities in states in which the NAIC Model previously has been adopted will likely have in place the required supervisory system and training procedures to comply with the requirements of the NAIC Model and this rule. As a result, most insurers will incur minimal additional costs in order to comply with the requirements of this rule.

4. Minimizing adverse impact: This rule applies to insurers and insurance producers that do business throughout New York State. As previously stated, the standards and procedures required by this rule are substantially similar to the NAIC Model for annuities and the NASD Rule 2310 for securities. Since the NAIC Model has been implemented in many other states and NASD Rule 2310 is imposed nationwide, many companies are already complying with the provisions contained in this rule.

5. Rural area participation: Affected parties doing business in rural areas of the State had the opportunity to comment at suitability public hearings held by the Department of Financial Services in 2009 and on the outreach draft of the rule, which was posted on the Department website for a two-week comment period.

#### **Job Impact Statement**

The Department of Financial Services finds that this rule will have little or no impact on jobs and employment opportunities. This rule requires insurers to set forth standards and procedures for recommendations to consumers with respect to annuity contracts so that the insurance needs and financial objectives of consumers at the time of the transaction are appropriately addressed.

The Department has no reason to believe that this rule will have any adverse impact on jobs or employment opportunities, including self-employment opportunities.

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## Department of Health

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### EMERGENCY RULE MAKING

#### **NYS Medical Indemnity Fund**

**I.D. No.** HLT-39-12-00003-E

**Filing No.** 924

**Filing Date:** 2012-09-07

**Effective Date:** 2012-09-07

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

**Action taken:** Amendment of Part 69 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 2999-j

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

**Specific reasons underlying the finding of necessity:** These regulations are being promulgated on an emergency basis because of the need for the Fund to be operational as of October 1, 2011. Authority for emergency promulgation was specifically provided in section 111 of Article VII of the New York State 2011-2012 Budget.

**Subject:** NYS Medical Indemnity Fund.

**Purpose:** To provide the structure within which the NYS Medical Indemnity Fund will operate.

**Substance of emergency rule:** As required by new section 2999-j(15) of the Public Health Law ("PHL"), the New York State Commissioner of Health, in consultation with the Superintendent of Financial Services, has promulgated these regulations to provide the structure within which the New York State Medical Indemnity Fund ("Fund") will operate. Included are (a) critical definitions such as "birth-related neurological injury" and "qualifying health care costs" for purposes of coverage, (b) what the application process for enrollment in the Fund will be, (c) what qualifying health care costs will require prior approval, (d) what the claims submission process will be, (e) what the review process will be for claims denials, (f) what the process will be for reviews of prior approval, and (g) how and when the required actuarial calculations will be done.

The application process itself has been developed to be as streamlined as possible. Submission of a completed application form, a signed release form, and a certified copy of a judgment or court-ordered settlement that

finds or deems the plaintiff to have sustained a birth-related neurological injury is all that is required for actual enrollment in the Fund. Prior to coverage being provided, the parent or other person authorized to act on behalf of a qualified plaintiff must provide the Fund with documentation regarding the nature and degree of the plaintiff's birth related neurological injuries, including diagnoses and impact on the applicant's activities of daily living and instrumental activities of daily living. In addition, the parent or other authorized person must submit the name, address, and phone number of all providers providing care to the applicant at the time of enrollment for purposes of both claims processing and case management. To the extent that documents prepared for litigation and/or other health related purposes contain the required background information, such documentation may be submitted to meet these requirements as well, provided that this documentation still accurately describes the applicant's condition and treatment being provided.

Those expenses that will or can be covered as qualifying health care costs are defined as broadly as defined by the statute. Prior approval is required only for very costly items, items that involve major construction, and/or out of the ordinary expenses. Such prior approval requirements are similar to the prior approval requirements of various Medicaid waiver programs and to commercial insurance prior approval requirements for certain items and/or services.

Reviews of denials of claims and denials of requests for prior approval will provide enrollees with full due process and prompt decisions. Enrollees are entitled to a conference with the Fund Administrator or his or her designee and a review, which may involve a hearing before a Department of Health hearing officer. In those cases, the hearing officer will make a recommendation regarding the issue and the Commissioner or his designee will make the final determination. An expedited review procedure has also been developed for urgent situations.

**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 December 5, 2012.

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

#### **Regulatory Impact Statement**

##### **Statutory Authority:**

Section 2999-j(15) of the Public Health Law (PHL) specifically states that the Commissioner of Health, in consultation with the Superintendent of Financial Services (the Superintendent of Insurance until October 3, 2011), "shall promulgate. . . all rules and regulations necessary for the proper administration of the fund in accordance with the provisions of this section, including, but not limited to those concerning the payment of claims and concerning the actuarial calculations necessary to determine, annually, the total amount to be paid into the fund as otherwise needed to implement this title."

##### **Legislative Objectives:**

The Legislature delegated the details of the Fund's operation to the two State agencies that have the appropriate expertise to develop, implement and enforce all aspects of the Fund's operations. Those two agencies are the Department of Health and the Department of Financial Services. These proposed regulations reflect the collaboration of both agencies in providing the administrative details for the manner in which the Fund will operate.

##### **Needs and Benefits:**

The regulations have the goal of establishing a process to provide that persons who have obtained a settlement or a judgment based on having sustained a birth-related neurological injury as the result of medical malpractice will have lifetime medical coverage.

##### **Costs:**

##### **Regulated Parties:**

There are no costs imposed on regulated parties by these regulations. Qualified plaintiffs will not incur any costs in connection with applying for enrollment in the Fund or coverage by the Fund.

##### **Costs to the Administering Agencies, the State, and Local Governments:**

Costs associated with the Fund will be covered by applicable appropriations. The Department of Health will also seek Federal Financial Participation for the health care costs of qualified plaintiffs that otherwise would be covered by Medicaid. No costs are expected to local governments.

##### **Local Government Mandates:**

##### **None.**

##### **Paperwork:**

The proposed regulations impose no reporting requirements on any regulated parties.

##### **Duplication:**

There are no other State or Federal requirements that duplicate, overlap, or conflict with the statute and the proposed regulations. Although some of the services to be provided by the Fund are the same as those available under certain Medicaid waivers, the waivers have limited slots. Coordination of benefits will be one of the responsibilities of the Fund Administrator. Health care services, equipment, medications or other items that any commercial insurance coverage that a qualified plaintiff may have is legally obligated to provide or that the qualified plaintiff is receiving or is not receiving only because his or her parent or guardian has made no effort to obtain commercial insurance coverage they may have or through other State or Federal programs such as the Early Intervention Program or as part of an Individualized Education Plan will not be covered by the Fund.

**Alternatives:**

Given the statute's directive, there are no alternatives to promulgating the proposed regulations.

**Federal Standards:**

There are no minimum Federal standards regarding this subject.

**Compliance Schedule:**

The Fund must be operational by October 1, 2011.

**Regulatory Flexibility Analysis**

**Effect of Rule:**

For 2009, of the 135 general hospitals in New York State that provided maternity services, only ten had less than two hundred deliveries that year.

**Compliance Requirements:**

The regulations impose no new reporting or recordkeeping obligations.

**Professional Services:**

None.

**Compliance Costs:**

There are no costs imposed by these regulations on regulated businesses or local governments.

**Economic and Technological Feasibility:**

The proposed regulations should not create any economic or technological issues for any hospitals or other health care providers. Manual billing will be permitted for those providers that do not have electronic billing capacity.

**Minimizing Adverse Impact:**

There will be no adverse impact on small businesses and local governments.

**Small Business and Local Government Participation:**

For purposes of the regulation drafting process, input was sought from hospital associations, provider associations and advocacy organizations throughout the State as well as the Consumer Advisory Committee required by the statute.

**Rural Area Flexibility Analysis**

**Types and Estimated Number of Rural Areas:**

The New York State Medical Indemnity Fund being implemented by these regulations will cover future medical expenses for all qualified plaintiffs throughout New York State who have obtained a judgment or a settlement based on a birth-related neurological impairment on or after April 1, 2011.

**Reporting, Recordkeeping and Other Compliance Requirements; and Professional Services:**

No reporting, recordkeeping, other compliance requirement or professional services other than the submission of claims are required by the regulations.

**Costs:**

There are no costs to rural areas associated with these regulations.

**Minimizing Adverse Impact:**

There will be no adverse impact on rural areas as a result of the proposed regulations.

**Rural Area Participations:**

For purposes of the regulation drafting process, input was sought from hospital associations, provider associations and advocacy organizations throughout the State as well as the Consumer Advisory Committee required by the statute.

**Job Impact Statement**

**Nature of Impact:**

The regulations should have no substantial impact on jobs and employment opportunities.

**Categories and Numbers Affected:**

None.

**Regions of Adverse Impact:**

None.

**Minimizing Adverse Impact:**

None.

**Self-Employment Opportunities:**

None.

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

**Synthetic Phenethylamines and Synthetic Cannabinoids (SP and SC) Prohibited**

**I.D. No.** HLT-39-12-00009-P

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

**Proposed Action:** Addition of Part 9 to Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 225

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

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

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

*Part 9*

*Synthetic Phenethylamines and Synthetic Cannabinoids Prohibited*

*§ 9.1 Definitions.*

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

*3,4-Methylenedioxyamphetaminone (Methylone);*

*4-Methoxymethcathinone;*

*3-Fluoromethcathinone;*

*4-Fluoromethcathinone;*

*Ethylpropion (Ethcathinone);*

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

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

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

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

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

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

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

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

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

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

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

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

*iii) Naphthoylpyrroles. Any compound containing a 3-(1-naphthoyl) pyrrole structure with substitution at the nitrogen atom of the pyrrole ring by an alkyl, haloalkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl, 1-(N-methyl-2-piperidinyl)methyl, or 2-(4-morpholinyl)ethyl group, whether or not further substituted in the pyrrole ring to any extent and whether or not substituted in the naphthyl ring to any extent. (Other names in this structural class include but are not limited: JWH 307).*

*iv) Naphthylmethylindenes. Any compound containing a naphthylmethyl indenes structure with substitution at the 3-position of the indene ring by an alkyl, haloalkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl,*

1-(N-methyl-2-piperidinyl)methyl, or 2-(4-morpholinyl)ethyl group, whether or not further substituted in the indole ring to any extent and whether or not substituted in the naphthyl ring to any extent. (Other names in this structural class include but are not limited: JWH-176).

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) public officers or their employees in the lawful performance of their official duties requiring possession of synthetic phenethylamines or synthetic cannabinoids, or products containing the same;

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

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

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

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

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

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

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

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

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

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

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

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

#### Regulatory Impact Statement

##### Statutory Authority:

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

##### Legislative Objectives:

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

##### Needs and Benefits:

This regulation pertains to synthetic phenethylamines that are commonly packaged and marketed online, in convenience stores, gas stations and smoke shops as "bath salts," plant food and other ordinary household goods, and which are not approved by the federal Food and Drug Administration ("FDA"). The compounds stimulate the body's central nervous system, and cause effects similar to those caused by cocaine and amphetamines, including but not limited to increased heart rate and blood pressure, hallucinations, paranoia, suicidal thoughts, violent behavior, nausea and vomiting. Some synthetic phenethylamines are also commonly referred to as "designer drugs" because they are specifically synthesized with a similar, but slightly modified structure of a Schedule I controlled substance in order to avoid existing drug laws, and can be continually chemically modified to avoid legal repercussions, while maintaining their intended effects and usages. Certain synthetic phenethylamines are prevalent drugs of abuse.

From January 2011 through April 2012, poison control centers through-

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

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

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

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

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

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

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

#### Costs:

##### Costs to Private Regulated Parties:

The regulation imposes no new costs for private regulated parties.

##### Costs to State Government and Local Government:

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

##### Local Government Mandates:

The SSC establishes a minimum standard for regulation of health and

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

#### Paperwork:

The regulation imposes no new reporting or filing requirements.

#### Duplication:

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

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

#### Alternatives:

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

#### Federal Standards:

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

#### Compliance Schedule:

Regulated parties should be able to comply with these regulations effective upon publication of a Notice of Adoption in the New York State Register.

#### *Regulatory Flexibility Analysis*

##### Effect of Rule:

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

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

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

##### Compliance Requirements:

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

Local governments must comply by enforcing the State Sanitary Code. Local boards of health may impose civil penalties for a violation of this regulation of up to \$2,000 per violation, pursuant to PHL § 309(1)(f). Pur-

suant to PHL § 229, local law enforcement may seek criminal penalties for a first offense of up to \$250 and 15 days in prison, and for each subsequent offense up to \$500 and 15 days in prison.

**Professional Services:**

Small businesses will need no additional professional services to comply.

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

**Compliance Costs:**

**Costs to Private Regulated Parties:**

The regulation imposes no new costs for private regulated parties.

**Costs to State Government and Local Government:**

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

**Economic and Technological Feasibility:**

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

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

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

**Minimizing Adverse Impact:**

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

**Small Business and Local Government Participation:**

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

**Cure Period:**

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

**Rural Area Flexibility Analysis**

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

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

**Job Impact Statement**

**Nature of the Impact:**

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

**Categories and Numbers Affected:**

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

**Regions of Adverse Impact:**

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

**Minimizing Adverse Impact:**

Not applicable.

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

**State Aid: Radioactive Materials and Radiation Producing Equipment; Individual Water and Sewage Systems; Calculation**

**I.D. No.** HLT-39-12-00010-P

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

**Proposed Action:** Amendment of Part 40 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, sections 602 and 619

**Subject:** State Aid: Radioactive Materials and Radiation Producing Equipment; Individual Water and Sewage Systems; Calculation.

**Purpose:** Establish funding for safety programs related to radioactive materials and radiation-producing equipment. Technical amendments.

**Text of proposed rule:** Paragraph (a) of Section 1.40 of Part 40 is amended to read as follows:

(a) [A State aid base grant shall be paid to municipalities providing all of the basic public health services as approved in the municipal health services plan in the amount of 25 cents per capita or \$ 250,000, whichever is greater, provided that this amount does not exceed the net cost of such basic services eligible for State aid after deduction of ineligible expense and earned revenue. Capitation] *When calculating the State aid base grant in accordance with the Public Health Law, a municipality's population shall be based on local population data published annually by the Bureau of [Biostatistics] Biometrics and Health Statistics of the New York State Department of Health.*

Paragraph (b) of Section 1.40 of Part 40 is repealed, and paragraphs (c) through (e) are renumbered accordingly.

Sections 40-2.200 and 40-2.201 are amended to read as follows:

40-2.200 Individual water and sewage systems; performance standard.

Residents of the municipality shall receive, upon request, technical assistance regarding the installation, *maintenance and operation* of individual water supplies and individual sewage systems.

40-2.201 Municipal public health services plan; requirements.

The plan shall include a program for providing technical assistance to property owners regarding the installation, *maintenance and operation* of individual water supplies and individual sewage systems. The plan shall include, at a minimum, provision of technical assistance regarding installation, *maintenance and operation* of individual water supplies and individual sewage systems.

New Sections 40-2.240, 40-2.241, 40-2.250, and 40-2.251 are added to read as follows:

40-2.240. Radioactive materials licensing and inspection program; performance standard.

The municipal public health services plan shall include a radioactive materials licensing and inspection program containing those provisions set forth in section 40-2.241 of this Subpart, if the Department has authorized the municipality to conduct such a program.

40-2.241. Radioactive materials licensing and inspection program; authorization.

The department shall authorize a municipality's radioactive materials licensing and inspection program if such program includes, at a minimum, provisions for:

(a) regulating all facilities in the municipality's jurisdiction;

(b) ensuring the technical quality of licensing actions by the municipality;

(c) assessing licensee compliance with (i) the conditions of the license and (ii) Part 16 of the State Sanitary Code, or substitute licensure requirements approved by the Department pursuant to Section 16.1;

(d) ensuring correction of violations; and

(e) inspecting regulated facilities at a minimum frequency established by the department.

40-2.250. Radiation-producing equipment program; performance standard.

The municipal public health services plan shall include a radiation-producing equipment inspection program containing those provisions set forth in section 40-2.251 of this Subpart, if the department has certified such a program for the municipality.

40-2.251 Radiation-producing equipment program; authorization.

The department shall certify a municipality's radiation producing equipment inspection program if such program includes, at a minimum, provisions for:

(a) inspecting all facilities and equipment in the municipality's jurisdiction; and

(b) performing inspections and issuing reports consistent with Part 16 of the State Sanitary Code and, in particular, reporting as described in section 16.10.

Subpart 40-3 is repealed, in its entirety.

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

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

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

**Regulatory Impact Statement**

**Statutory Authority:**

Article 6 of the Public Health Law (PHL) provides statutory authority to provide State aid to municipalities for general public health work (GPHW). PHL §§ 602 and 619 authorize the Commissioner to adopt rules and regulations to effectuate the provisions of Article 6, including, but not limited to, the authority: to establish standards of performance for environmental health services delivered under the GPHW program; to es-

establish reasonable costs; and for the monitoring and evaluation of the municipalities' expenditures and performance of GPHW.

#### Legislative Objectives:

The goal of PHL Article 6 is the establishment of mechanisms and standards for the provision of State aid to municipalities for GPHW.

#### Needs and Benefits:

Effective January 1, 2007, the Legislature amended PHL § 605 by changing the reimbursement algorithm for State aid. Effective July 1, 2011, the Legislature amended PHL § 605 to eliminate "optional services" as a category of services eligible for State aid. Services formerly designated as optional are still described in the Department's regulations at 10 NYCRR Subpart 40-3.

The proposed changes update the regulations to conform to the statutory provisions in two ways. First, the amendments contain technical changes, such as repealing defunct provisions in Subpart 40-3 and clarifying that the Bureau of Biometrics and Health Statistics is the proper unit for establishing population data for purposes of calculating State aid. Second, technical clarifications are made to provisions relating to State aid for individual water and sewage systems programs. When the Legislature eliminated optional programs, counties raised questions regarding State aid regulations pertaining to individual water supply and sewage systems. Up until that point, both basic and optional State aid programs existed with respect to individual water supply and sewage programs. See 10 NYCRR 40-2.200 and 40-2.201 (basic) and 10 NYCRR 40-3.50 et seq. (optional).

Additionally, the proposed changes clarify that the basic State aid program is intended to cover the installation, maintenance and operation of individual water supply and sewage programs. Historically, the majority of technical assistance needed for these systems pertains to operation and maintenance issues with aging individual water and sewage systems—not merely with initial installation. Indeed, aging individual water supply and individual sewage systems present the most significant public health hazard.

However, the current regulations at 40-2.200 and 40-2.201 only use the term "installation." Counties were unsure whether, after the elimination of optional programs, basic State aid would continue to be available for technical assistance with the operation and maintenance, or whether State aid for these activities was being eliminated along with optional services. The proposed regulations seek to clarify this by explicitly including technical assistance with operation and maintenance of individual water supply and sewage systems, consistent with the Department's practice.

Finally, the regulations include new substantive provisions relating to State aid for programs involving radioactive materials and radiation producing equipment. Specifically, two formerly optional services are of such critical importance that the Department proposes to re-categorize them as "basic" public health services: regulation of radioactive materials and regulation of radiation producing equipment. Radioactive materials and radiation producing equipment present significant environmental health hazards to the public and, therefore, are eligible for State aid pursuant to PHL § 605(3)(b)(5). By making these services part of basic public health work, the Department will help counties defray the cost of protecting citizens from the environmental health effects of radioactive materials and radiation producing equipment.

The Department recognizes that not every county has the technical capability to regulate radioactive materials and radiation producing equipment. Counties without such technical capability should not be rendered ineligible for State aid as a result of their inability to perform all general public health work. Accordingly, the proposed amendments provide that a county's basic public health work includes regulation of radioactive materials and radiation producing equipment only if that county has the technical capability to do so, as authorized or certified by the Department.

Pursuant to a New York State agreement with the federal Nuclear Regulatory Commission (NRC), radioactive materials must be regulated throughout the State. Currently, the New York City Department of Health and Mental Hygiene (DOHMH) is the only municipality certified by the Department to regulate radioactive materials; the State provides this service in all other counties. DOHMH licenses and inspects approximately 350 radioactive material facilities in New York City. By protecting the public from the environmental health hazards from these radioactive materials, DOHMH provides a substantial benefit to the public health.

Additionally, pursuant to Part 16 of the State Sanitary Code, the Department has certified DOHMH and four additional counties (Suffolk, Westchester, Dutchess and Niagara) to inspect radiation producing equipment. DOHMH and these additional counties license and inspect nearly 10,000 radiation equipment facilities. Like the radioactive materials program, these municipalities offer a substantial public health benefit by protecting their citizens from the environmental health hazards potentially created by radiation producing equipment.

Failure to conduct timely inspections of any of these facilities could

result in equipment failure or technician errors going unnoticed and uncorrected for longer periods of time, resulting in radiation overexposure during diagnostic or therapeutic procedures or misadministration of nuclear medicine for patients who require these life-saving health services. Inspection of facilities that use radioactive materials ensures appropriate handling and minimizes exposure to workers, the public and the environment. A security check of high-risk radiation sources is also conducted during these inspections.

A series of New York Times articles published in 2011 indicated the public's concern over radiation medical events and malpractice has significantly increased. In addition, the March 2011 earthquake and related events in Japan further indicated that the public is highly concerned about radiation exposure. During the week of March 14, 2011, the Department's Bureau of Environmental Radiation Protection received approximately 40 calls every day from citizens with concerns about exposure. The public rightfully expects a robust regulatory program, which DOHMH and other counties currently provide, through their partnership with the Department.

Due to the public health threat presented by radiation, it is imperative that these local governments continue to operate their radiation protection programs. The proposed regulation ensures that municipalities have the resources to protect the public from the environmental health threat posed by radioactive materials and radiation producing equipment.

Costs to Regulated Parties for the Implementation of, and Continuing Compliance with, the Rule:

Because the regulated municipalities are already performing these programs, no increase in costs will be incurred. Rather, regulated municipalities that wish to continue these programs will save money by continuing to receive State aid. However, without this regulatory change, municipalities that wish to continue these programs will see their costs increase substantially.

Costs to the Agency, the State and Local Governments for the Implementation of the Rule:

The municipalities that operate these programs and receive funding have indicated they would discontinue the programs if State aid is not provided. By encouraging counties to continue these programs, the Department will save money. As noted, pursuant to the State's agreement with the federal Nuclear Regulatory Commission, if DOHMH ceases to regulate radioactive materials, the State must do so. This will cost substantially more than the \$370,000 in State aid that was paid to New York City in 2009, which represents only 26 percent of DOHMH's total costs for regulating radioactive materials. Although the NRC could theoretically take over regulation of radioactive materials, the burden on local businesses to pay federal fees would be more than five (5) times higher than the costs imposed by the programs operated by the State and local governments. Similarly, as a matter of sound public policy, the Department would take over regulation of radiation producing equipment if municipalities cease to do so.

In 2009, the cost to the State to fund the municipalities that conduct these programs was approximately \$560,000. Specifically, New York City was reimbursed \$370,000 for its radioactive materials inspection and licensing program and \$119,000 for the radiation producing equipment program, for a total of \$489,000. Two other counties were reimbursed approximately \$71,000 for their radiation producing equipment programs. The remaining two counties recovered enough in fees in that year that the programs exceeded their expenses and were therefore ineligible for State aid. These costs are not expected to change if the proposed regulations are adopted.

It would be fiscally inefficient for the State to take over programs that are already operational in these municipalities, considering the initial cost of transition and the continuous costs of travel for State employees. Thus, this regulation represents sound fiscal policy as well as good public health policy.

The Information, Including the Source(s) of Such Information and the Methodology, upon which the Cost Analysis is Based:

The cost analysis is based on calendar year 2009 State Aid claims provided by municipalities, as currently required by PHL § 618 and 10 NYCRR § 40-1.20(b). An annual summary of State aid is routinely prepared by the Department.

#### Local Government Mandates:

This proposed rule does not impose any program, service, duty or responsibility upon the municipalities that has not already been agreed to and certified by the Department.

#### Paperwork:

The requirements for reporting will remain unchanged.

#### Duplication:

There are no relevant rules and other legal requirements of the state and federal governments, that duplicate, overlap or conflict with the proposed rule.

#### Alternatives:

The alternative is for the Department to take over regulation of radioactive materials as well as regulation of radiation producing equipment in those municipalities that discontinue these programs because they are ineligible for State aid. It is estimated that this alternative would cost the State over \$3,000,000, based on the cost of funding the 22 FTEs currently employed by the municipalities to operate these programs. This number does not include clerical, administrative, and management positions that support the municipal programs. Because of the magnitude of these costs, the Department has opted to reject this alternative and instead propose these regulations to support already existing county programs.

**Federal Standards:**

There is no federal minimum standard that determines whether the State must supply State aid to municipalities that choose to provide these services. However, the federal government does require that these programs be provided throughout the State.

**Compliance Schedule:**

The regulations will take effect upon publication of the Notice of Adoption in the State Register.

**Regulatory Flexibility Analysis**

**Effect on Small Business:**

The substantive regulations—which relate to regulation of radioactive materials and radiation producing equipment—will apply to county programs that are certified by the Department or that become certified in the future. Currently only Dutchess, Niagara, Westchester, Suffolk counties and New York City have such programs. The proposed regulatory change will result in no additional cost to these local governments.

However, without this change, the fees that registered facilities must pay are likely to increase. 10 NYCRR 16.41(c) and (d) indicate the fees for State inspection programs and county inspection programs, respectively. In all cases, the State fees are higher. Thus, if the State is required to take over these programs, the fee costs will increase. This will result in an increase in costs to small businesses. Further, if the federal NRC were to take over regulation of radioactive materials, the cost to small business would be at least five (5) times higher than it is now.

**Compliance Requirements:**

The certified county programs already meet the requirements and comply with the regulations. Facilities inspected will still be required to meet the requirements of Part 16, regardless of whether they are inspected by county inspectors or State inspectors.

**Professional Services:**

Certified counties do not need professional services to establish or maintain certification.

**Capital Costs and Annual Costs of Compliance:**

There are no capital or annual costs associated with this regulation that are not already realized by the municipalities authorized to operate these programs.

**Economic and Technological Feasibility:**

The proposed regulatory change will result in no additional cost to local governments or impose any new technology requirements or costs.

However, without this change, the fees that registered facilities must pay are likely to increase. 10 NYCRR 16.41(c) and (d) indicate the fees for State inspection programs and county inspection programs, respectively. In all cases, the State fees are higher. Thus, if the State is required to take over these programs, the fee costs will increase. This will result in an increase in costs to small businesses. Further, if the federal NRC were to take over regulation of radioactive materials, the economic cost to small business would be at least five (5) times higher than it is now.

**Minimizing Adverse Impact:**

No adverse impact of implementation has been identified. Failure to implement may result in some county programs dropping certification, which will then require the State DOH to implement these programs.

**Small Business Input:**

No small businesses were surveyed. The proposed changes do not have any direct effect on small business. Failure to implement these changes may result in fee increases for small business.

**Rural Area Flexibility Analysis**

A rural area flexibility analysis is not required for this proposal because it will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on rural areas. The only municipalities affected by the substantive regulations involving radioactive materials and radiation producing equipment are New York City and the Counties of Dutchess, Niagara, Westchester and Suffolk.

**Job Impact Statement**

A job impact statement is not required for this proposal because it will have no adverse impact on jobs or employment opportunities. The substantive regulations involving radioactive materials and radiation producing equipment will support counties that continue or wish to adopt these programs.

## Division of the Lottery

### NOTICE OF ADOPTION

**Quick Draw Sales**

**I.D. No.** LTR-29-12-00001-A

**Filing No.** 935

**Filing Date:** 2012-09-11

**Effective Date:** 2012-09-26

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

**Action taken:** Amendment of section 2835.6 of Title 21 NYCRR.

**Statutory authority:** Tax Law, sections 1601, 1604 and 1612

**Subject:** Quick Draw sales.

**Purpose:** To conform to amendments made to subparagraph (A) of paragraph 1 of subdivision a of Tax section 1612 made by chapter 59 of the Laws of 2012.

**Text or summary was published** in the July 18, 2012 issue of the Register, I.D. No. LTR-29-12-00001-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Julie B. Silverstein Barker, Associate Attorney, New York Lottery, One Broadway Center, Schenectady, NY 12301-7500, (518) 388-3408, email: nylrules@lottery.ny.gov

**Assessment of Public Comment**

The agency received no public comment.

## Office of Mental Health

### EMERGENCY/PROPOSED

### RULE MAKING

### NO HEARING(S) SCHEDULED

**Personalized Recovery Oriented Services (PROS)**

**I.D. No.** OMH-39-12-00006-EP

**Filing No.** 926

**Filing Date:** 2012-09-11

**Effective Date:** 2012-09-11

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

**Proposed Action:** Amendment of Part 512 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.09(b), 31.04(a), 43.02(a), (b) and (c); Social Services Law, sections 364(3) and 364-a(1)

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

**Specific reasons underlying the finding of necessity:** The proposed rule implements a rate adjustment for PROS programs and programmatic changes. The impetus for the Emergency filing stems from the need to implement the rate changes. These adjustments have been approved by the Director of the Division of the Budget and are effective July 1, 2012. It is believed that the rate adjustments will preserve program funding and will enable PROS providers to continue to serve individuals in need of services. Since this proposed regulation has significant impact upon public health, safety and general welfare, the proposed rule warrants emergency filing.

**Subject:** Personalized Recovery Oriented Services (PROS).

**Purpose:** Adjust fees paid to providers as well as update and clarify existing PROS regulations.

**Substance of emergency/proposed rule (Full text is posted at the following State website: [www.omh.ny.gov](http://www.omh.ny.gov)):** This rule will amend Part 512 of Title 14 NYCRR, which establishes the certification standards for Personalized Recovery-Oriented Services (PROS) programs. The complete text of the proposed rule is available at [www.omh.state.ny.us](http://www.omh.state.ny.us).

**OVERVIEW:**

The purpose of a PROS program is to partner with individuals in their recovery from mental illness through the delivery of integrated rehabilitation, treatment and support services. Such services are available within a site-based program setting as well as in off-site locations in the communities where individuals live, learn, work and socialize. PROS programs establish a therapeutic environment which fosters awareness, hopefulness and motivation for recovery and incorporates a harm reduction philosophy. The PROS regulations have been amended several times since they were adopted nearly six years ago. Over time, the Office of Mental Health has received valuable information through the evaluation of operational PROS programs and feedback from PROS providers. The changes to the PROS regulations are necessary in order to provide flexibility of the service delivery system and clarify the expectations of the Office of Mental Health with respect to PROS providers of service.

**REVISIONS REGARDING ASSESSMENT PROCESS:**

One issue that had been a source of confusion in the existing PROS regulation was the assessment process. The proposed rule clarifies that the assessments required are based on the individual's enrollment in a specific PROS component. For example, individuals who are enrolled in clinical treatment services at the PROS must receive a psychiatric assessment and a health assessment. Each assessment must result in a summary of findings, within the context of the specific assessment focus that addresses the individual's strengths, talents, and abilities, as well as the challenges and barriers presented by the individual's mental illness.

**REVISIONS REGARDING DOCUMENTATION REQUIREMENTS:**

The proposed regulation includes documentation requirements for individuals who are receiving Integrated Treatment for Dual Disorders from the PROS provider and clinical treatment services from a source other than the PROS. In this situation, there must be an exchange of information and documentation of progress and outcomes, as well as the name of the treating psychiatrist or nurse practitioner at the clinic who will collaborate with a designated member of the PROS clinical staff.

Documentation requirements associated with the Initial Service Recommendation Plan have been included in the amended regulation. The Initial Service Recommendation Plan identifies the individual's primary service needs and lists the services in which the individual will participate. After an individual is admitted to the PROS program, the Initial Service Recommendation Plan must be developed by or under the supervision of a member of the professional staff in partnership with the individual. This plan remains valid for up to 60 days or until the Individualized Recovery Plan (IRP) is completed. The Initial Service Recommendation Plan is considered to be part of the admission documentation and must be maintained in the case record as a separate document, distinct from the IRP.

**REQUIRED REVIEWS:**

The revised regulation includes the time table associated with the development, review and update of the IRP, as well as the review of the need for continued Intensive Rehabilitation and Ongoing Rehabilitation and Support services.

**RATE ADJUSTMENTS:**

The proposed rule includes Medicaid fee changes paid to PROS providers of services effective July 1, 2012. This fee modification is necessary to bring the rate structure for PROS more in line with the intention, achievements and utilization of the program. It is anticipated that the fee modifications will preserve the viability of PROS programs.

**REVISED DEFINITIONS:**

The amended regulation offers clarity in other areas by elaborating on the definitions of "capacity", "monthly caseload", "service frequency", "social worker", "New York Employment Support System (NYESS)" and "relapse prevention plan". Further explanation is provided for "individualized recovery planning", "integrated treatment for dual disorders", and "family psychoeducation/intensive family support". Examples of "family psychoeducation/intensive family support" have been provided.

**MISCELLANEOUS:**

Erroneous and outdated references within the existing regulation have been corrected by the proposed rule.

**This notice is intended:** to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire December 9, 2012.

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

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

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

**Regulatory Impact Statement**

1. Statutory authority: Subdivision (b) of Section 7.09 of the Mental Hygiene Law grants the Commissioner of the Office of Mental Health the

authority and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction.

Subdivision (a) of Section 31.04 of the Mental Hygiene Law empowers the Commissioner to issue regulations setting standards for licensed programs for the rendition of services for persons with mental illness.

Subdivision (a) of Section 43.02 of the Mental Hygiene Law provides that payments under the Medical Assistance Program for services approved by the Office of Mental Health shall be at rates certified by the Commissioner of Mental Health and approved by the Director of the Budget. Subdivision (b) of Section 43.02 of the Mental Hygiene Law gives the Commissioner authority to request from operators of facilities licensed by the Office of Mental Health such financial, statistical and program information as the Commissioner may determine to be necessary. Subdivision (c) of Section 43.02 of the Mental Hygiene Law gives the Commissioner of Mental Health authority to adopt rules and regulations relating to methodologies used in establishment of schedules of rates for services.

Sections 364(3) and 364-a(1) of the Social Services Law give the Office of Mental Health responsibility for establishing and maintaining standards for medical care and services in facilities under its jurisdiction, in accordance with cooperative arrangements with the Department of Health.

2. Legislative objectives: Articles 7, 31 and 43 of the Mental Hygiene Law reflect the Commissioner's authority to establish regulations regarding mental health programs and establish rates of payments for services under the Medical Assistance program. Sections 364 and 364-a of the Social Services Law reflect the role of the Office of Mental Health regarding Medicaid reimbursed programs. The rule making furthers the Legislative intent under Article 7 by ensuring that the Office of Mental Health fulfills its responsibility to assure the development of comprehensive plans, programs and services in the care, treatment, rehabilitation and training of persons with mental illness.

3. Needs and benefits: The Personalized Recovery-Oriented Services (PROS) initiative created a framework to assist individuals and providers in improving both the quality of care and outcomes for people with serious mental illness in New York State. The PROS regulations have been amended several times since they were adopted nearly six years ago. Over time, the Office has received valuable information through the evaluation of operational PROS programs and feedback from PROS providers. The changes within the PROS regulations are necessary in order to provide flexibility of the service delivery system and clarify the expectations of the Office regarding PROS providers of service.

One issue that had been a source of confusion in the existing PROS regulation was the assessment process. The proposed rule clarifies the required assessments based on the individual's enrollment in a specific PROS component. For example, individuals who are enrolled in clinical treatment services at the PROS program must receive a psychiatric assessment and a health assessment.

Another change as a result of the proposed regulation is the inclusion of provisions regarding documentation requirements for individuals who are receiving Integrated Treatment for Dual Disorders from the PROS provider and clinical treatment services from a source other than the PROS program. There must be an exchange of information and documentation of progress and outcomes, as well as the name of the treating psychiatrist or nurse practitioner at the clinic who will collaborate with a designated member of the PROS clinical staff.

Documentation requirements associated with the Initial Service Recommendation Plan have been included in the amended regulation. The Initial Service Recommendation Plan identifies the individual's primary service needs and lists the services in which the individual will participate. After an individual is admitted to the PROS program, the Initial Service Recommendation Plan must be developed by or under the supervision of a member of the professional staff in partnership with the individual. This plan remains valid for up to 60 days or until the Individualized Recovery Plan (IRP) is completed. The Initial Service Recommendation Plan is considered to be part of the admission documentation and must be maintained in the case record as a separate document, distinct from the IRP. The revised regulation includes the time table associated with the development, review and update of the IRP, as well as the review of the need for continued Intensive Rehabilitation and Ongoing Rehabilitation and Support services.

The amended regulation offers clarity in other areas by elaborating on the definitions of "capacity", "monthly caseload", "service frequency", "social worker", "New York Employment Support System (NYESS)" and "relapse prevention plan". Further explanation is provided for "family psychoeducation/intensive family support", "individualized recovery planning" and "integrated treatment for dual disorders". Examples of family psychoeducation/intensive family support have been provided.

Erroneous and outdated references within the existing regulation have been corrected by the proposed rule.

Lastly, the proposed rule includes Medicaid fee changes paid to PROS providers of services effective July 1, 2012. This fee modification is nec-

essary to bring the rate structure for PROS more in line with the intention, achievements and utilization of the program. It is anticipated that the fee modifications will preserve the viability of PROS programs.

4. Costs:

(a) Cost to state government: These regulatory amendments are not expected to result in any additional costs to State government. The impact of the fee adjustment for PROS programs would have resulted in a cost of \$1.8 million to State government, but these additional costs will be offset by an adjustment in the array of outpatient services licensed by the Office.

(b) Cost to local government: These regulatory amendments are not expected to result in any additional costs to local government.

(c) Cost to regulated parties: These regulatory amendments are not expected to result in any additional costs to regulated parties.

5. Local government mandates: The regulation will not mandate any additional imposition of duties or responsibilities upon county, city, town, village, school or fire districts.

6. Paperwork: This rule making should not result in an increase in paperwork requirements. In fact, it is believed that this proposed rule will reduce the paperwork of providers.

7. Duplication: The regulatory amendment does not duplicate existing State or federal requirements.

8. Alternatives: The only alternative would have been to continue with the current PROS regulations in place. As the amendments provide clarity regarding the expectations of the Office of Mental Health, and should ultimately result in a more flexible mental health service delivery system, that alternative was necessarily rejected.

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

10. Compliance schedule: The regulatory amendment will become effective upon adoption.

**Regulatory Flexibility Analysis**

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this notice because the amended rule will not have an adverse economic impact upon small businesses or local governments. The proposed rule updates and clarifies the expectations of the Office of Mental Health with respect to PROS providers of services, and includes an adjustment of fees paid to PROS providers effective July 1, 2012.

**Rural Area Flexibility Analysis**

The amendments to Part 512 of Title 14 NYCRR update and clarify the expectations of the Office of Mental Health with respect to PROS providers of services, and include an adjustment of fees paid to PROS providers effective July 1, 2012. The amendments will not impose any adverse economic impact on rural areas; therefore, a Rural Area Flexibility Analysis is not submitted with this notice.

**Job Impact Statement**

A Job Impact Statement is not submitted with this notice because the purpose of the proposed rule is to update and clarify the expectations of the Office of Mental Health with respect to PROS providers of services. In addition, the proposed rule includes an adjustment of fees paid to PROS providers effective July 1, 2012. There will be no adverse impact on jobs and employment opportunities as a result of this proposed rule.

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## Niagara Frontier Transportation Authority

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### NOTICE OF ADOPTION

**NFTA's Procurement Guidelines**

**I.D. No.** NFT-20-12-00001-A

**Filing No.** 896

**Filing Date:** 2012-09-05

**Effective Date:** 2012-09-26

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

**Action taken:** Amendment of section 1159.4 of Title 21 NYCRR.

**Statutory authority:** Public Authorities Law, sections 1299-e (5) and 1299-t

**Subject:** NFTA's Procurement Guidelines.

**Purpose:** To amend the NFTA's Procurement Guidelines to make a technical change.

**Text or summary was published** in the May 16, 2012 issue of the Register, I.D. No. NFT-20-12-00001-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Ruth A. Keating, Niagara Frontier Transportation Authority, 181 Ellicott Street, Buffalo, New York 14203, (716) 855-7398, email: Ruth\_Keating@nfta.com

**Assessment of Public Comment**

The agency received no public comment.

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## Office for People with Developmental Disabilities

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### NOTICE OF ADOPTION

**HCBS Waiver Community Habilitation Phase II**

**I.D. No.** PDD-41-11-00031-A

**Filing No.** 936

**Filing Date:** 2012-09-11

**Effective Date:** 2012-10-01

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

**Action taken:** Amendment of sections 635-10.4, 635-10.5 and Subpart 635-12 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 13.07, 13.09(b) and 43.02

**Subject:** HCBS Waiver Community Habilitation Phase II.

**Purpose:** To establish Community Habilitation Phase II as a new HCBS waiver service.

**Text of final rule:** Paragraph 635-10.4(b)(3) is amended as follows:

(3) *Hourly community* [Community] habilitation (CH) services are similar in scope to residential habilitation services and day habilitation services, however, the focus of these services is directed towards service delivery occurring largely in community (non-certified) settings to facilitate and promote independence and community integration. (*See subdivision 635-10.5(ab) for further requirements related to CH services.*)

Note: the rest of the paragraph is unchanged.

A new paragraph 635-10.4(b)(4) is added as follows:

(4) *Community Habilitation Phase II (CH II) services are similar in scope to residential habilitation services and day habilitation services. Individuals who receive CH II must be residents of supervised Individual Residential Alternatives or supervised Community Residences who are not receiving residential habilitation or day habilitation services. (See subdivision 635-10.5(ac) for further requirements related to CH II services.)*

(i) *Community Habilitation Phase II services include all of the types of services specified in paragraphs (1) and (2) of this subdivision.*

(ii) *Allowable activities include all of the allowable activities specified in subparagraphs (1)(i)-(xv) and (2)(i)-(xv) of this subdivision.*

Subdivision 635-10.5(ab) is amended as follows:

(ab) *Hourly community* [Community] habilitation (CH) services. The following shall apply to CH services (see section 635-10.4(b)(3) of this Subpart).

Note: the rest of the subdivision is unchanged, except for paragraph (3).

(3) Reimbursement shall be contingent on documentation that those receiving CH services have received the services in accordance with the person's individualized service plan (ISP) and *hourly community habilitation plan (CH plan).*

A new subdivision (ac) is added to section 635-10.5 as follows:

(ac) *Community Habilitation Phase II (CH II) services. The following shall apply to CH II services (see section 635-10.4(b)(4) of this Subpart).*

(1) *Standards for the reimbursement of CH II. In order for the provider to receive reimbursement for the delivery of CH II the following standards must be met:*

(i) *OPWDD shall approve the person's need for CH II services prior to the receipt of services. OPWDD shall approve persons for CH II services based on the compatibility of the individual with available CH II services and the potential economy and efficiency of the delivery of CH II compared to residential habilitation and day habilitation services.*

(ii) The individual must reside in a supervised IRA or supervised CR.

(2) Payment Standards:

(i) The unit of service is one month. Providers may bill for a full month or for a half month.

(ii) For a full month, the provider must document the delivery of:

(a) at least one individualized face-to-face service in accordance with the individual's ISP and CH II Plan on 22 separate days of the calendar month; and

(b) an additional 22 face-to-face services in accordance with the individual's ISP and CH II Plan that may be delivered anytime during the calendar month (including the same day that a service described in clause (a) of this subparagraph is delivered).

(iii) For a half month, the provider must document the delivery of:

(a) at least one individualized face-to-face service in accordance with the individual's ISP and CH II Plan on 11 separate days of either the first half or the second half of the calendar month; and

(b) an additional 11 face-to-face services in accordance with the individual's ISP and CH II Plan that may be delivered anytime during the same half of the calendar month in which the services described in clause (a) are delivered (including the same day that a service described in clause (a) of this subparagraph is delivered).

(iv) CH II services delivered when an individual is admitted to a hospital, nursing home, intermediate care facility for persons with developmental disabilities (ICF/DD) or other certified, licensed or government funded residential setting may not be used to meet the minimum requirements for service delivery established in subparagraphs (ii) or (iii) of this paragraph. CH II services delivered on the day of admission or on the day of discharge may be used to meet the minimum standards if the CH II services are delivered prior to admission or after discharge and the services are not delivered in those settings.

(v) During the month or half month that the individual is receiving CH II, no provider will be reimbursed for the delivery of any of the following services to the individual: residential habilitation, group day habilitation, individual day habilitation, prevocational services, supported employment services, blended services (which are a combination of day habilitation, prevocational services and/or supported employment services), comprehensive services (which are a combination of IRA residential habilitation services and day habilitation), and Consolidated Supports and Services.

(4) A provider is authorized to provide CH II if it:

(i) operates at least one facility certified by OPWDD which is designated as a supervised IRA or supervised CR; and

(ii) is authorized to provide group day habilitation.

(5) CH II which is self-directed or family-directed. The following requirements apply to CH II services which are self-directed or family-directed.

(i) The management of self-directed or family-directed services is described in a co-management agreement between the individual, the CH II provider and, if one exists, an identified adult as that term is used in subparagraph (ii) of this paragraph.

(ii) CH II services which are self-directed are available when all parties to the co-management agreement concur that the individual receiving the CH II services:

(a) is an adult who is capable and willing to make informed choices and manage the self-directed services; or

(b) is an adult who:

(1) is capable and willing to make informed choices; and

(2) has selected an identified adult who is a family member or other adult, and the identified adult is willing to assist in making informed choices and co-managing the self-directed services; or

(c) is a minor and there is an identified adult who is either:

(1) a parent or legal guardian who is available and willing to make informed choices and co-manage the self-directed services; or

(2) a family member or other adult who is available and willing to make informed choices and co-manage the self-directed services.

(iii) CH II services which are family-directed are available when all parties to the co-management agreement concur that an adult receiving the CH II services does not qualify for self-direction and there is an identified adult who is willing and able to make informed choices and co-manage the family-directed services for the benefit of the person.

(iv) Eligible individuals and identified adults (if they exist) assume the responsibilities as mutually agreed to by the provider, individual, and identified adult in the co-management agreement. The co-management agreement shall specify the responsibilities of the provider, the individual, and any identified adult who will be managing or assisting in the management of the self-directed or family-directed services. The co-management agreement shall be documented in the individual's record.

(v) The following responsibilities (except as noted in subparagraph (vi) of this paragraph) shall be the individual's and/or the identified adult's:

(a) recruiting staff;

(b) making recommendations for staff selection and discharge of staff;

(c) managing the staff schedule; and

(d) identifying when and on what schedule the habilitation activities identified in the individual's CH II plan will be carried out.

(vi) The provider may agree to assist with one or more of the responsibilities specified in subparagraph (v) of this paragraph. The provider's agreement to assist with those responsibilities shall be documented in the individual's record.

(vii) The provider's responsibilities shall include:

(a) monitoring that services are delivered in accordance with all applicable requirements;

(b) monitoring that services are properly documented, and collecting and maintaining all necessary service documentation;

(c) submitting requests for reimbursement;

(d) providing payroll services, and managing any employee benefits or other compensation for staff;

(e) complying with and monitoring staff compliance with the applicable requirements of Parts 624 and 633 of this Title, and this Part (e.g., requesting criminal history record checks, training staff, and supervising staff);

(f) determining whether any staff training is necessary beyond the training required by Part 633 of this Title and providing the necessary training; and

(g) monitoring the individual's continuing ability and willingness to fulfill those responsibilities agreed to and specified in his or her record and/or the identified adult's continuing availability and willingness to fulfill those responsibilities agreed to and specified in the individual's record.

(viii) The individual receiving the CH II service, any identified adults, and the provider shall review their respective management responsibilities to evaluate whether self-direction or family direction continues to be appropriate at least once every two years.

(ix) All agencies authorized by OPWDD to provide CH II are authorized to provide self-direction and family direction as an option under CH II.

(6) Price setting:

(i) On October 1, 2012, for each agency which is authorized to provide CH II (see paragraph 635-10.5(ac)(4)), OPWDD shall establish an individual CH II price that represents an amalgamation of the provider's IRA price and its group day habilitation price. It shall be calculated as follows:

(a) The individual monthly price from the IRA price sheet in effect on September 30, 2012 shall be utilized and the split between non-room and board, and room and board, shall be maintained. The individual monthly price shall include all operating cost categories, efficiency adjustments, offsets, miscellaneous items itemized separately in the price, and property. The price shall be expressed in terms of a full month's reimbursement per individual served.

(b) Total approved costs in the group day habilitation price sheet in effect on September 30, 2012 shall be utilized. Total approved costs shall include all operating cost categories, efficiency adjustments, offsets, miscellaneous items itemized separately in the price, and property. To determine an individual monthly price, total approved annual costs shall be divided by capacity and divided by 12. The capacity shall be established as the authorized units reflected on the price sheet on September 30, 2012 divided by 215. The result shall be multiplied by a statewide average group day habilitation occupancy factor. The individual monthly price shall be expressed in terms of a full month's reimbursement per individual.

(c) The non-room and board component of the individual CH II price shall be the sum of:

(1) the non-room and board component of the individual monthly price derived from the IRA price sheet as described in clause (a) of this subparagraph; and

(2) the individual monthly price derived from the group day habilitation price sheet as described in clause (b) of this subparagraph.

(d) The room and board component of the CH II price shall be the room and board component of the individual monthly price from the IRA price sheet in effect on September 30, 2012.

(e) The non-room and board component and the room and board component summed together yield the individual CH II price.

(f) For a half month reimbursement, the individual CH II price shall be halved.

(ii) Subsequent prices. In the event that either the IRA price or the group day habilitation price used to calculate the individual CH II price is revised, the CH II price shall be revised accordingly.

(iii) The prices determined in accordance with this paragraph shall not be considered final unless approved by the director of the Division of the Budget.

(iv) *The individual CH II price determined through the application of this paragraph may be corrected or appealed pursuant to either section 686.13(h) or (i) of this Title, except that the determination following a first level appeal process shall be the commissioner's final decision.*

A new subparagraph 635-12.1(h)(1)(iv) is added as follows:

(iv) *residential habilitation and/or group day habilitation which is received by an individual who formerly received community habilitation phase II in the following circumstances:*

(a) *The individual received residential habilitation and/or group day habilitation prior to the receipt of community habilitation phase II and the services were Preexisting Services, and*

(b) *After the individual stopped receiving community habilitation phase II, he or she resumed receipt of the residential habilitation and/or day habilitation services which were formerly provided, and*

(c) *The residential habilitation and/or day habilitation services would have been Preexisting Services except for the intervening receipt of community habilitation phase II.*

Paragraph 635-12.1(h)(2) is amended as follows:

(2) For Medicaid service coordination; day treatment services; the following HCBS waiver services: at home residential habilitation services, hourly community habilitation services, prevocational services, supported employment services, respite services; and blended services and comprehensive services, preexisting services means:

Note: rest of the paragraph remains the same except for subparagraph (iv).

Subparagraph 635-12.1(h)(2)(iv) is amended as follows:

(iv) *hourly community habilitation services which converted on November 1, 2010 from [an] at home residential habilitation services if:*

Note: Clause (a) remains the same.

(b) *the hourly community habilitation services are delivered by the same provider.*

Subdivision 635-12.1(j) is amended as follows:

(j) Services means ICF/DD services (Intermediate Care Facilities for Persons with Developmental Disabilities, see Part 681 of this Title), Medicaid service coordination, day treatment services, and the following HCBS waiver services: residential habilitation services (community [in a community residence], IRA, family care, and at home), hourly community habilitation services, day habilitation services, prevocational services, supported employment services, [and] respite services, and community habilitation phase II services. Blended services, which are a combination of day habilitation, prevocational services and/or supported employment services, and comprehensive services, which are a combination of IRA residential habilitation services and day habilitation, are also considered services. A limited exception to the applicability of certain sections of this Subpart has been made in the case of some individuals who are applying for or receiving supported employment services or respite services (see section 635-12.12 of this Subpart).

A new subdivision 635-12.3(g) is added as follows:

(g) *Community Habilitation Phase II services are "other than Preexisting Services."*

Subdivision 635-12.9(n) is amended as follows:

(n) For hourly community habilitation services, the fee shall equal the Medicaid fee OPWDD established for the hourly community habilitation services for the dates [of] the services were provided.

A new subdivision 635-12.9(o) is added as follows:

(o) *For community habilitation phase II services, the price shall equal the Medicaid fee OPWDD established for community habilitation phase II services for the dates the services were provided.*

**Final rule as compared with last published rule:** Nonsubstantive changes were made in sections 635-10.4, 635-10.5 and 635-12.

**Text of rule and any required statements and analyses may be obtained from:** Barbara Brundage, Director, Regulatory Affairs Unit, OPWDD, 44 Holland Avenue, Albany, NY 12229, (518) 474-1830, email: barbara.brundage@opwdd.ny.gov

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

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

Minor changes were made to the proposed regulation to change the name of the waiver program to CH II throughout the text; to identify dates specified in the regulations in paragraph 635-10.5 (ac)(6); to correct a word order error in paragraph 635-10.4(b)(3); to correct two regulatory cross-references in subparagraphs 635-10.5(ac)(6)(i) and (iv); and to correct a typographical error in subparagraph 635-12.1 (h)(2)(iv).

These changes do not necessitate revisions to the previously published Regulatory Impact Statement, Regulatory Flexibility Analysis for Small Business and Local Governments, Rural Area Flexibility Analysis, or Job Impact Statement.

### Assessment of Public Comment

Administrators of three not-for-profit provider agencies and a parent of one individual receiving services submitted comments.

Comment: The executive director of a not-for-profit provider agency that serves individuals with dual diagnoses, significant health care issues, and/or challenging behaviors strongly endorsed the proposed rule. He noted that the community habilitation phase II model seems especially well-suited for individuals the agency serves, who do not "fit" well in existing day services models.

Response: OPWDD appreciates the support from this not-for-profit provider.

Comment: The executive director of the not-for-profit provider agency noted that while the proposed regulations present "a nearly perfect match" with the agency's need for a flexible service planning methodology, he hopes that the community habilitation phase II option currently proposed for individuals residing in supervised settings will also become available to individuals who live in supportive settings, by regulation, or on a case by case or approved exception basis.

Response: OPWDD strongly supports enhanced flexibility and choice for all individuals receiving services in the OPWDD system. Options for providing more flexible and individualized services to individuals, including those who reside in supportive settings, are currently under consideration by OPWDD as part of the People First Waiver. Beginning now and throughout the five-year period of the People First Waiver, OPWDD will design and demonstrate effective ways to infuse the principles of quality, choice, and community into the core of a more efficient and accountable service delivery system.

Comment: The comptroller of another not-for-profit provider agency expressed concerns about the pricessetting methodology proposed for community habilitation phase II services. She observed that some IRAs are more expensive to operate than others and therefore the initial IRA price sheets are very different from one another. By the current pricessetting methodology, the prices get averaged out by rollup. She observed that if an individual from a less expensive IRA receives monthly community habilitation, that the individual is in essence taking a portion of the monies from the more expensive IRA, into his personal budget. She suggested that perhaps the IRA pricessheets should be unrolled to determine the price of the community habilitation phase II.

Response: The commenter is correct in noting that, under the IRA reimbursement methodology, OPWDD establishes an agency-wide price, as opposed to a site-specific price. OPWDD does not think that the use of agency-wide day habilitation and IRA prices to determine the community habilitation phase II price will lead to inadequate funding for community habilitation phase II services. The use of agency-wide prices does not currently lead to inadequate funding for IRA and day habilitation services. Also, although IRA and day habilitation prices are based on the services each individual needs, individuals in IRAs and day habilitation do not have personal budgets.

Comment: The day habilitation services director from another not-for-profit provider agency expressed a different concern about the rate-setting methodology proposed for community habilitation phase II services. He expressed specific concern about potential duplication of applying both a "statewide occupancy factor" and incorporating an assumption of the delivery of 215 units of service annually, which assumes a 15% absentee rate. He stated that the individuals who reside in his agency's residences tend to have a higher average attendance rate than 215 units of service annually, so that the price set for community habilitation phase II would be less than the amount currently received by the agency for the delivery of services to the individual. He noted that the additional application of a statewide occupancy factor would reduce the agency's price further. Finally, he observed that a reduction in revenue in this climate will make things exceedingly difficult.

Response: The day habilitation component of community habilitation phase II will be calculated with the assumption of a 99 percent occupancy factor. This is OPWDD's determination of the current day habilitation occupancy level in circumstances in which the IRA and day habilitation service provider is the same. Since this factor will be applied to each provider's existing September 30, 2012 day habilitation funding level in the determination of community habilitation phase II reimbursement, the provider should not experience a revenue decrease.

Comment: The mother of an individual who receives residential services from one not-for-profit provider agency and day services from a different not-for-profit provider agency described the benefits of her daughter's current service arrangements and expressed concern that the proposed regulation would force her daughter, and other individuals with similar service arrangements, to receive both their residential and day services from a single provider agency. The mother also expressed her general belief that one agency should not provide every service an individual receives.

Response: OPWDD notes that community habilitation phase II services

are an option individuals can choose and not a requirement. Individuals who choose to receive residential habilitation and day habilitation services from different providers can continue to receive these services in the same manner.

**NOTICE OF ADOPTION**

**Plan of Care Support Services Requirements**

**I.D. No.** PDD-29-12-00027-A  
**Filing No.** 937  
**Filing Date:** 2012-09-11  
**Effective Date:** 2012-10-01

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

**Action taken:** Amendment of section 635-10.5(a) of Title 14 NYCRR.  
**Statutory authority:** Mental Hygiene Law, sections 13.07, 13.09(b) and 16.00

**Subject:** Plan of Care Support Services Requirements.  
**Purpose:** To revise qualifications for service coordinators, eligibility for services, and reimbursement eligibility and methodology.

**Text or summary was published** in the July 18, 2012 issue of the Register, I.D. No. PDD-29-12-00027-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Barbara Brundage, Director, Regulatory Affairs Unit, OPWDD, 44 Holland Avenue, Albany, NY 12229, (518) 474-1830, email: barbara.brundage@opwdd.ny.gov

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

**Assessment of Public Comment**

One service coordinator submitted comments on the proposed rule.

**Comment:** The service coordinator characterized increasing the number of allowable units of PCSS per year as “important.” She stated that having those two additional units would be conducive to the continued ability of a service coordinator to provide needed services.

**Response:** OPWDD appreciates the support.

**NOTICE OF ADOPTION**

**Changes to HCBS Waiver Hourly Community Habilitation Services**

**I.D. No.** PDD-29-12-00028-A  
**Filing No.** 938  
**Filing Date:** 2012-09-11  
**Effective Date:** 2012-10-01

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

**Action taken:** Amendment of section 635-10.5 of Title 14 NYCRR.  
**Statutory authority:** Mental Hygiene Law, sections 13.07, 13.09(b) and 16.00

**Subject:** Changes to HCBS waiver hourly community habilitation services.  
**Purpose:** To modify the fee schedule for the clinical oversight component of funding and to provide expectations for clinical oversight.

**Text of final rule:**

HOURLY COMMUNITY HABILITATION AMENDMENTS TO 14 NYCRR SECTION 635-10.5

Effective date: Monday, October 1, 2012

• Section 635-10.5(ab)(12)(iii) is amended by the addition of a new clause (c) as follows:

(c) *The following fees will be effective on October 1, 2012 or the date as of which necessary federal approval is effective, whichever is later:*

*CH Direct Support--Fee is hourly per person*

<i>Individual Serving 1</i>	<i>Group Serving 2</i>	<i>Group Serving 3</i>	<i>Group Serving 4</i>
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<i>Region I</i>	<i>\$37.05</i>	<i>\$23.16</i>	<i>\$18.53</i>	<i>\$16.21</i>
<i>Region II</i>	<i>\$38.39</i>	<i>\$23.99</i>	<i>\$19.20</i>	<i>\$16.80</i>
<i>Region III</i>	<i>\$37.51</i>	<i>\$23.44</i>	<i>\$18.76</i>	<i>\$16.41</i>

• Section 635-10.5(ab) is amended by the addition of a new paragraph (15) as follows:

*(15) Use of Funds.*

*(i) Effective October 1, 2012 providers of CH services must ensure that at least 90% of the Medicaid revenue billed and received for the provision of CH services is used to fund the direct support of individuals within the CH program. For the purpose of this calculation, such direct support includes allowable administrative expenses. Any Medicaid revenue below such 90% not spent on CH services is subject to recoupment.*

*(ii) Effective January 1, 2014 providers of CH services must ensure that at least 95% of the Medicaid revenue billed and received for the provision of CH services is used to fund the direct support of individuals within the CH program. For the purpose of this calculation, such direct support includes allowable administrative expenses. Any Medicaid revenue below such 95% not spent on CH services is subject to recoupment.*

*(iii) The fees contain funding for clinical oversight. Clinical oversight includes the training and mentoring of direct support staff on diagnostic issues, care plan/habilitation plan issues and behavior management issues, as well as the troubleshooting of any plan issues discovered during plan reviews. Effective October 1, 2012, clinicians must document discussions with direct support staff and include that documentation as supplemental clinical notes in individuals’ files at least annually. The documentation requirement will be applicable for any twelve month period in which an individual is enrolled in CH for the entire twelve month period and has received any CH service during that period.*

**Final rule as compared with last published rule:** Nonsubstantive changes were made in section 635-10.5(ab).

**Text of rule and any required statements and analyses may be obtained from:** Barbara Brundage, Director, Regulatory Affairs Unit, OPWDD, 44 Holland Avenue, Albany, NY 12229, (518) 474-1830, email: barbara.brundage@opwdd.ny.gov

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

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

Minor changes were made to the proposed regulation to add additional clarity. The revised language concerns the inclusion of allowable administrative expenses in the calculation of funds for the direct support of individuals within the hourly community habilitation program. The revision addresses public comments made about this provision which requested clarification.

These changes do not necessitate revisions to the previously published Regulatory Impact Statement, Regulatory Flexibility Analysis for Small Business and Local Governments, Rural Area Flexibility Analysis or Job Impact Statement.

**Assessment of Public Comment**

OPWDD received public comments about the proposed regulations from 10 individuals. One was from a representative of a provider association, eight were from the executive director or staff of providers and one was from a member of the public.

**Comment:** The provider association and five providers requested clarification of the requirements pertaining to clinical oversight. Specifically, the comments asked for clarification regarding the definition of clinician, the definition of clinical oversight and the qualifications for clinicians.

**Response:** The clinical oversight clarification requested is related to the Hourly Community Habilitation regulations (issued as At-Home Residential Habilitation) that were effective on February 1, 2009. The proposed regulations do not alter the definition of clinical oversight or the identification or qualifications of individuals appropriate to

provide clinical oversight. However, in an effort to achieve greater clarity in this area, OPWDD will be issuing separate guidance regarding clinical oversight as it applies to Hourly Community Habilitation.

Comment: A provider claimed that the clinical oversight component of the rate and any other components of the rate “were never shared by OPWDD.” The provider stated that “sharing such information may have had an impact on the utilization of funds if they had been readily shared with agencies prior to your analysis.”

Response: Prior to the implementation of the February 1, 2009 regulations, for the service now identified as Hourly Community Habilitation, OPWDD made extensive training sessions available to providers. At each of these sessions, comprehensive information was presented regarding the programmatic design and expectations, including clinical oversight, of the service. The changes that were implemented on February 1, 2009 were specifically targeted to meet programmatic goals including the recruitment and retention of highly skilled direct support staff. Providers were given an opportunity to ask any questions that they had regarding service requirements and expectations at the training sessions. Additionally, providers could have asked questions of OPWDD personnel if more clarity was needed regarding the service.

As stated above, OPWDD will be issuing separate guidance regarding clinical oversight in an effort to achieve even greater clarity regarding this integral programmatic component of Hourly Community Habilitation.

Comment: A provider commented that “the proposed regulations on the clinical documentation make sense, but do not clarify what occurs if the annual documentation is not completed, nor what occurs if there is no clinical oversight for a given individual.”

Response: In the event of non-compliance with any regulation, a number of enforcement mechanisms are available to OPWDD which are utilized depending on the particulars of the situation. OPWDD does not typically provide information about the consequences of non-compliance in each and every regulation that it promulgates. OPWDD is not adding specific references to enforcement mechanisms to this regulation.

Comment: A provider claimed that “the CFR data was also used in making the decisions in the memo and proposed regulations, particularly in setting new rates.” The provider also asserted that “adjusting the rates based solely on the survey seems like it would not have been possible, particularly in coming up with specific dollar figures.”

Response: The decisions affecting the regulations were made based on the results of fiscal review findings which revealed that the February 1, 2009 regional fees were constructed with clinical oversight components at too high a level. Therefore, the clinical oversight component of the CH fee is being reduced in accordance with fiscal review results. The provider is correct that information obtained from the survey and information from the CFR data were utilized in formulating the specific proposal.

Comment: A provider commented that this proposed “cut/change” was unexpected as information about it was not provided in the NYS Budget. The provider asserted that this demonstrated a lack of transparency.

Response: The NYS Budget does not typically detail specific changes to rate methodologies affecting provider reimbursement in the OPWDD system. OPWDD notified all affected providers of the proposed changes in a memo dated July 11, 2012, so that providers have had almost three months to make whatever changes are necessary in the hourly community habilitation program. Additionally, OPWDD identified providers which might have significant impacts and held individual meetings as necessary to discuss the requirements and to assist providers in developing a plan for compliance.

Comment: A provider association stated that many providers have expressed confusion regarding the intent of a specific provision in the regulations. The provider association indicated that “the wording leads one to believe that a certain amount of money must be spent on ‘direct support’ as opposed to ‘administration’ - much like the recent Executive Order #38 regarding limits on administrative expenses. We believe this is not OPWDD’s intent, but that the wording is misleading.” Three providers made similar comments which indicated

that their interpretation of the regulations is to restrict administrative interchange.

Response: OPWDD has made non-substantive changes in the final text of the regulation in order to provide clarification in response to this concern. The final regulations specify that the direct support of individuals within the CH program “includes allowable administrative expenses.” This more clearly expresses the substance of the proposed regulation.

Comment: A provider suggested that “clarification be provided on how the 10/1/12 date can be the effective date.” The provider further commented that “it would seem that the agency’s fiscal year start date would be the more appropriate date, since with that, audited statements for the fiscal/calendar year could be used for determining the percentages. It would seem difficult if not impossible to use months where the financial statements are not audited.” Further, the provider stated “it seems to be less than fair to start something that essentially has (for us) a 1/1/12 effective date with a memo that was not released until July and regulations that are not effective until October. It would seem much more appropriate to start this 1/1/13 when our next fiscal year starts.”

Response: OPWDD disagrees. It is important to implement the reforms in this regulation as soon as possible. OPWDD is therefore promulgating the regulations with no changes to the effective date of 10/1/12. OPWDD notes that it does not audit against requirements that were not in effect at the time of an audit and thus will not be auditing against the requirements of this regulation for time periods prior to 10/1/12.

Comment: A provider association suggested that a specific provision of the regulations “be broadened to allow the required documentation for clinical oversight include discussions with family members and/or other appropriate individuals directly involved with the person receiving the CH service.”

Response: There is nothing in this regulation prohibiting clinicians from having discussions with family members and others. They just do not constitute clinical oversight of the direct support professionals who are providing community habilitation. Therefore, documentation of discussions with family members, etc. does not meet the requirements of the regulation.

Comment: The provider association suggested that the language of a specific provision of the regulations “be clarified to indicate that only one clinician per year is required to provide documentation of clinical oversight for each person served.” A provider also made a similar comment.

Response: The necessary clinical oversight may be provided by a single clinician or more than one clinician in any given year. Annual documentation that clinical oversight is provided by only one clinician is sufficient to satisfy the regulatory requirement. The referenced requirement is written in plural form as it references services to more than one individual. OPWDD considers that the requirement is adequately clear as written.

Comment: A member of the public suggested that OPWDD remove two specific requirements that specify the minimum percentages of CH program Medicaid revenue that must be spent on direct support of individuals, stating that “these requirements will encourage providers to spend money instead of losing it to these recoupment and that the requirements will discourage efficiencies in the program.” Additionally, a provider commented that the regulations “could result in difficulties in some agencies where under-funded services have been off-set by others.”

Response: OPWDD considers the CH program an essential program as it promotes the independence of individuals and facilitates community inclusion, integration and relationship building. It is important that high quality services be provided in the CH program and OPWDD has therefore funded the program at a level sufficient for providers to employ highly trained direct support professionals and provide them with quality clinical oversight. OPWDD is concerned that providers who are generating surpluses in the CH program are not utilizing OPWDD funding for the intended purpose and are therefore stinting on the quality of the service provided. OPWDD would welcome improvements in the quality of the CH services provided by these agencies that result from the redirection of funds into the CH program.

Comment: A provider expressed concern that a reduction in the CH program fee schedule will “reduce the provider’s ability to deliver this critical service resulting in increased dependence on day habilitation and residential programs.” Another provider stated that reductions in CH fees will cause hardship for providers.

Response: OPWDD notes that this decrease is only associated with a reduction in the clinical oversight component of the fees. This decrease is justified by fiscal review findings used by OPWDD to evaluate the CH program. The primary fiscal finding was that the February 1, 2009 regional fees were constructed with clinical oversight components at too high a level. Therefore, the clinical oversight component of the CH fee is being reduced in accordance with fiscal review results.

## Public Service Commission

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

#### Mothballing of Generation Facility Units and Related Electric Service Reliability Remedies

**I.D. No.** PSC-39-12-00008-P

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

**Proposed Action:** The Commission is considering a notice filed by Cayuga Operating Company, LLC on the mothballing of generation facility units located in Lansing, New York, and related electric service reliability remedies.

**Statutory authority:** Public Service Law, sections 5(1)(b), (2), 65(1), (2), (3), 66(1), (2), (3), (4), (5), (6), (8), (9), (10), (11), (12), (12-a), (12-b), (16) and (20)

**Subject:** Mothballing of generation facility units and related electric service reliability remedies.

**Purpose:** Consideration of the mothballing of generation facility units and related electric service reliability remedies.

**Substance of proposed rule:** The Public Service Commission is reviewing impacts arising out of a notice submitted by Cayuga Operating Company, LLC (Cayuga) on July 20, 2012, stating that Cayuga intends to mothball two electric generating units, located in Lansing, New York, no later than January 16, 2013. Cayuga’s notice was submitted pursuant to the Commission’s Order Adopting Notice Requirements for Generation Unit Retirements issued in Case 05-E-0889.

As discussed in letters from Iberdrola USA Management Corp. and the New York Independent System Operator, Inc., dated August 24, 2012, the proposed mothballing of Cayuga’s generating units would raise issues affecting the reliability of electric service. The Commission is considering remedies to ensure reliability, including the adoption of any rates, terms, or conditions necessary to preserve adequate reliability. The documents identified above are available on the Commission’s website, by going to the following web address: [http://www.dps.ny.gov/New\\_Search.html](http://www.dps.ny.gov/New_Search.html) and searching Case Numbers 12-E-0400 and 05-E-0889.

**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](mailto:leann.ayer@dps.ny.gov)

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

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

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

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

(12-E-0400SP1)

## Department of State

### NOTICE OF ADOPTION

#### Foreign Language Advertising by Notaries Public

**I.D. No.** DOS-27-12-00016-A

**Filing No.** 939

**Filing Date:** 2012-09-11

**Effective Date:** 90 days after filing

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

**Action taken:** Addition of Part 200 to Title 19 NYCRR.

**Statutory authority:** Executive Law, section 135-b

**Subject:** Foreign language advertising by notaries public.

**Purpose:** To protect consumers against false and misleading advertising.

**Text or summary was published** in the July 3, 2012 issue of the Register, I.D. No. DOS-27-12-00016-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Whitney Clark, NYS Department of State, Office of Counsel, 1 Commerce Plaza, 99 Washington Avenue, Albany, NY 12213, (518) 473-2728, email: [whitney.clark@dos.ny.gov](mailto:whitney.clark@dos.ny.gov)

#### Assessment of Public Comment

The agency received no public comment.

## Department of Taxation and Finance

### ERRATUM

A Notice of Proposed Rule Making, I.D. No. TAF-37-12-00003-P, pertaining to Fuel Use Tax on Motor Fuel and Diesel Motor Fuel and the Art. 13-A Carrier Tax Jointly Administered Therewith, published in the September 12, 2012 issue of the *State Register* contained an incorrect figure in the text of the rule. Following is the corrected text of the proposed rule:

**Text of proposed rule:** Section 1. Paragraph (1) of subdivision (b) of section 492.1 of such regulations is amended by adding a new subparagraph (lxviii) to read as follows:

Motor Fuel			Diesel Motor Fuel		
Sales Tax Component	Composite Rate	Aggregate Rate	Sales Tax Component	Composite Rate	Aggregate Rate
(lxvii) July-September 2012					
16.0	24.0	41.8	16.0	24.0	40.05
(lxviii) October-December 2012					
16.0	24.0	41.8	16.0	24.0	40.05

The Department of State apologizes for any confusion this may have caused.

## Urban Development Corporation

### EMERGENCY RULE MAKING

#### Innovate NY Fund

**I.D. No.** UDC-39-12-00004-E

**Filing No.** 925

**Filing Date:** 2012-09-11

**Effective Date:** 2012-09-11

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

**Action taken:** Addition of Part 4252 to Title 21 NYCRR.

**Statutory authority:** Urban Development Corporation Act, sections 9-c and 16-u; L. 1968, ch. 174

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

**Specific reasons underlying the finding of necessity:** The current economic crisis, including high unemployment and the immediate lack of seed stage capital for job generating small business, are the reasons for the emergency adoption of this Rule which is required for the immediate implementation of the Innovate NY Fund Program in order to promptly provide assistance to the State's small businesses engaged in one or more emerging technology fields and demonstrating a potential for substantial growth and job development. These businesses shall be in the pre-revenue, recently established revenue stream phase or not yet in receipt of institutional investments. This assistance will sustain and increase employment generated by these businesses.

**Subject:** Innovate NY Fund.

**Purpose:** Provide the basis for administration of The Innovate NY Fund.

**Text of emergency rule: Part 4252**

#### INNOVATE NY FUND

##### Section 4252.1 Purpose

The purpose of these regulations is to facilitate administration of the Innovate NY Fund (the "Fund" or the "Program") authorized pursuant to section sixteen-u of the New York State Urban Development Corporation Act (the "Act").

##### Section 4252.2 Definitions

The following terms shall have the meanings given below:

1. "Beneficiary Company" shall mean a Seed Stage Business that an Investment Entity selects for a Fund investment (also referred to as a "Portfolio Company" after the Fund investment is made).

2. "Carried Interest on Capital Gains" shall mean the share of any profits that the owners, partners or members of an Investment Entity receive as compensation.

3. "Corporation" shall mean the New York State Urban Development Corporation d/b/a Empire State Development, a corporate governmental agency of the State of New York, constituting a political subdivision and public benefit corporation created by chapter one hundred seventy-four of the Laws of nineteen hundred sixty-eight, as amended.

4. "Disbursement Process" means the process for disbursing Program funds to Investment Entities.

5. "Due Diligence" shall mean an in-depth investigative approach to evaluating the Beneficiary Company and verifying an investment opportunity, which may include assessment of the management team, business plan, financial history, financial projections, and the Beneficiary Company's technology and products/services.

6. "Emerging Technology Field" shall mean one or more of the emerging technologies, as defined in section thirty-one hundred two-e of the Public Authorities Law, or any field, area or technology that is achieving or has the potential to achieve contemporary technological advances, innovation, transformation or development.

7. "Equity" shall mean common stock, convertible preferred stock, stock warrants or convertible notes or bonds that can also convert to common stock, and similar types of securities.

8. "Follow-on Investment" shall mean a subsequent investment made by an investor after an initial round of investment in a Portfolio Company.

9. "Hybrid Investment" shall mean an investment that combines Equity and debt features, such as preferred stocks, convertible bonds, and convertible notes.

10. "Investment Entity" shall mean a regional and local economic development organization, technology development organization, research university, or investment fund that provides or is otherwise qualified to make seed-stage investments in companies located in the State of New York.

11. "Leveraging" or "leverage" shall mean utilizing investment assets alongside other sources of capital.

12. "Matching Investment Funds" shall mean monies secured in addition to Program funds.

13. "Portfolio Company" shall mean a Beneficiary Company after the Fund investment is made.

14. "Seed-Stage Business" shall mean a Small Business, located in New York State and working in one or more Emerging Technology Fields, which demonstrates a potential for substantial growth and job development, has the potential to generate additional economic activity in New York State, and that is pre-revenue, has only begun to earn revenue, or has not yet received institutional investments.

15. "Small Business" shall have the meaning as set forth in section 131 of the Economic Development Law.

16. "State" shall mean the State of New York.

#### Section 4252.3 Investment Objectives

The Fund objective is to invest in Seed Stage Businesses through Investment Entities that are selected by and are under contract to the Corporation. Investment priority shall be given to Seed Stage Businesses involved in commercialization of research and development or high technology manufacturing.

#### Section 4252.4 Selection of Investment Entities

The Corporation shall identify and select Investment Entities through one or more competitive statewide, regional or local solicitations. Investment Entity applicants shall be evaluated on criteria including, but not limited to, the applicant's: (a) record of success in raising investment funds and successfully investing them; (b) capacity to perform Due Diligence and to provide management expertise and other value-added services to Beneficiary Companies; (c) financial resources for identifying and investing in seed-stage and early-stage companies; (d) ability to secure non-State Matching Investment Funds at a ratio that is equal to or greater than one-to-one (1:1); (e) ability to evaluate the commercial potential of emerging technologies; (f) ability to secure partnerships with local or regional investors; (g) conflict of interest policy acceptable to the Corporation; (h) investment record and capacity to invest in the State; (i) management fees, promotes, share of return and other fees and charges and; (j) other criteria that the Corporation determines is relevant to making investment decisions consistent with the purposes of the Fund. Applicants must specify particular industry sector, regional or other investment strategies. The Corporation shall determine the amount of the Program funds to commit to an Investment Entity. After an Investment Entity is under contract to the Corporation, the Corporation may award additional Program funds to an Investment Entity without an additional solicitation.

#### Section 4252.5 General Requirements

1. The Corporation and each Investment Entity receiving Program funds shall enter into one or more written agreements governing the Corporation's investment, which may include a Limited Partnership Agreement, that are consistent and in compliance with the Act, including section 16-u thereof, this rule, and other applicable laws and regulations.

2. The Corporation shall distribute Program funds promptly pursuant to a Disbursement Process agreed to between the Corporation and the Investment Entity in order to enable the Investment Entity to fulfill its commitments to Beneficiary Companies in a timely manner.

3. The commitment period for an Investment Entity to make investments with the Program funds shall typically be three years or less.

4. Returns on investments or interest accrued with respect to Program funds received by an Investment Entity through the Fund shall be returned to the Corporation in accordance with the agreements entered into between the Investment Entity and the Corporation.

#### Section 4252.6 Eligible Investments in Beneficiary Companies

In order to be eligible for an investment, including a Follow-on Investment, that includes Program funds, a Beneficiary Company must be a Seed-Stage Business. Prior to the investment of Program funds in a Beneficiary Company, the Beneficiary Company must agree, pursuant to a written agreement satisfactory to the Corporation, that the Beneficiary Company will be located and remain located within the State for a period satisfactory to the Corporation and that in the event that the Beneficiary Company breaches such obligation, the Corporation shall have all remedies at law and such other remedies as the Corporation may set forth in the agreement with the Beneficiary Company, which may include recovery or recapture, if full or in part, of the Program funds investment.

Investment Entities shall not invest Program funds in a Beneficiary Company in an amount greater than five hundred thousand dollars, or seven hundred fifty thousand dollars in the case of a biotechnology-related

*Beneficiary Company, at any one time, unless the Beneficiary Company and the Investment Entity can demonstrate to the satisfaction of the Corporation that exceeding the applicable investment limit significantly increases the potential of the investment to result in substantially greater growth, job development, and additional economic activity in New York State and the Corporation consents to such greater investment in writing. Program funds may be used for Follow-on Investments in Portfolio Companies, subject to the investment amount limits and exceptions set forth above. Investments in Beneficiary Companies may take the form of Equity or Hybrid Investments.*

#### **Section 4252.7 Fund Accounts**

*Each participating Investment Entity shall deposit Program funds and program related investment proceeds (including, without limiting the foregoing, returns and interest) into a bank account in a State or Federally chartered banking institution, satisfactory to the Corporation, or as otherwise agreed in writing between the Corporation and the Investment Entity.*

#### **Section 4252.8 Matching Investment Funds Requirements**

*At such time as an Investment Entity has invested fifty percent of the Program funds committed to such Investment Entity and annually thereafter, the aggregate investments of Program funds by the Investment Entity in Beneficiary Companies shall be leveraged with Matching Investment Funds from private sources of capital, excluding investments after the initial funding round, at a ratio equal to or greater than two to one (2:1). Investments made in funding rounds prior to the date of the initial investment of Program Funds shall not be counted toward satisfying this Matching Investment Funds requirement. Funding provided by the State of New York, including, but not limited to, Small Business Technology Investment Fund proceeds, does not satisfy this Matching Investment Funds requirement.*

#### **Section 4252.9 Fees and Capital Gains**

*The Investment Entities may charge fees, pursuant to a written schedule of fees, and receive Carried Interest on Capital Gains with the prior written approval of the Corporation. The amount of any fees and the amount of the Carried Interest on Capital Gains will be detailed in the agreements to be entered into between the Investment Entity and the Corporation. Returns to the Corporation, such as capital gains and the return of the investment, will be detailed in the agreements to be entered into between the Investment Entity and the Corporation.*

#### **Section 4252.10 Auditing, Compliance and Reporting**

*The Corporation shall evaluate the investment activities of each participating Investment Entity in conformance with the agreements to be entered into between the Corporation and the Investment Entity, in accordance with the criteria set forth in section 16-u of the Act, and this rule and in accordance with other applicable law and regulations. Each Investment Entity will be required to provide quarterly and annual reports outlining the impact and effectiveness of the investments made, current status, leveraged funds, business revenue, numbers of jobs created, and other items as determined by Corporation. These annual reports and additional reports as requested at the discretion of the Corporation may be required to include:*

- a. The number of investments made;*
- b. The type of each investment;*
- c. The location of each Beneficiary Company;*
- d. The amount of Program funds and private funds invested in each Beneficiary Company;*
- e. The projected and actual number of jobs created or retained by each Beneficiary Company receiving Program funds;*
- f. The type of product or technology being developed or produced by each Beneficiary Company; and*
- g. Such other information as the Corporation may require.*

*The Corporation may conduct or request audits of the Investment Entities in order to ensure compliance with the provisions of section 16-u of the Act, any regulations promulgated with respect thereto and agreements between the Investment Entities and the Corporation of all aspects of the use of Program funds and investment transactions.*

*In the event that the Corporation finds substantive noncompliance at any time, the Corporation may terminate the Investment Entity's participation in the Program. The agreements between the Corporation and the Investment Entity shall provide that, upon termination of an Investment Entity's participation in the Program, the Investment Entity shall return to the Corporation, promptly after its demand thereof, all Program funds held by the Investment Entity, and provide to the Corporation, promptly after its demand thereof, an accounting of all Program funds, including all currently outstanding investments that were made using Program funds. Notwithstanding such termination, the Investment Entity shall remain liable to the Corporation with respect to any unpaid amounts due from the Investment Entity pursuant to the terms of the agreements between the Corporation and the Investment Entity. In the event that an Investment Entity's participation in the Program is terminated, the*

*Corporation, in its discretion, may transfer to one or more of the other participating Investment Entities without an additional solicitation all or part of the award made to such Investment Entity.*

#### **Section 4252.11 Confidentiality and State Employees**

*To the extent permitted by law, all information regarding the financial condition, marketing plans, customer lists, or other trade secrets and proprietary information of a Beneficiary Company shall be confidential and exempt from public disclosures.*

*To the extent permitted by law, no full-time employee of the State of New York or any agency, department, authority or public benefit Corporation thereof shall be eligible to receive assistance under this Program.*

#### **Section 4252.12 Non-Discrimination and Affirmative Action**

*The Corporation's affirmative action and non-discrimination policies and programs are grounded in both public policy and applicable law, including but not limited to, Section 2879 of the Public Authorities Law, Article 15-A of the Executive Law and Section 6254(11) of the Unconsolidated Laws. These laws mandate the Corporation to take affirmative action in implementing programs. The Corporation has charged the affirmative action department with overall responsibility to ensure that the spirit of these mandates is incorporated into the Corporation's policies and projects. Where applicable, the affirmative action department will work with applicants in developing an appropriate Affirmative Action Program for business and employment opportunities generated by the Corporation's participation of the Program.*

**This notice is intended** to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires December 9, 2012.

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

#### **Regulatory Impact Statement**

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

Section 16-u of the Act provides for the creation of the Innovate NY Fund (the "Program") and authorizes the New York State Urban Development Corporation d/b/a Empire State Development (the "Corporation"), within available appropriations, to fund investments in small businesses engaged in one or more emerging technology fields and demonstrating a potential for substantial growth and job development. These businesses shall be in the pre-revenue, recently established revenue stream phase or not yet in receipt of institutional investments. The investments will be made in these small businesses through investment entities that are selected by and are under contract with the Corporation.

2. **Legislative Objectives:** Section 16-u of the Act (Uncon. Laws section 6266-u, added by Chapter 103 of the Laws of 2011) sets forth the legislative objective of authorizing the Corporation, within available appropriations, to provide funds to investment entities, including regional and local development organizations, technology development organizations, research universities and investment funds that provide seed-stage investments to support emerging New York state businesses that have demonstrated potential for substantial growth and job development in an emerging technology field and have the potential to generate additional economic activity in New York State. The adoption of 21 NYCRR Part 4252 will further these goals by setting forth the types of available assistance, evaluation criteria, the application process and related matters for the Program.

3. **Needs and Benefits:** The State has allocated \$25,922,157 of federal funds for this program. Innovate NY will provide investments to investment entities, in order to provide funding for those organizations' equity and quasi equity investments in New York's eligible small businesses. Small businesses have been determined to be a major source of employment throughout New York State. Small businesses have historically had difficulties obtaining financing or refinancing in order to remain competitive and grow their operations, and the current economic difficulties have exacerbated this problem. Providing loans to small businesses should sustain and potentially increase the employment provided by such businesses, especially during this period of historically high unemployment and underemployment. The Program allows the Corporation to use investment entities contracted through a competitive process by the Corporation to invest Program funds. The rule further facilitates the administration of the Program by defining eligible and ineligible small businesses and eligible uses of the proceeds of loans to small businesses and other criteria to be applied by the institutions in making loans to small businesses.

4. **Costs:** The Program is funded by a State appropriation of federal

funds in the amount of \$25,922,157 dollars. Pursuant to the rule, the principal amount of Program funds invested will not be greater than \$500,000 (or greater than \$750,000 in the case of any individual biotechnology-related beneficiary) at any one time, unless the beneficiary company can demonstrate to the satisfaction of the Corporation that exceeding the applicable investment limit significantly increases the potential of the investment to result in substantially greater growth, job development, and additional economic activity in New York State and the Corporation consents to such investment in writing. The costs to investment entities that participate in the Program would depend on the size of their existing fund and their particular structure for sourcing, evaluating, and monitoring investments. The investment entities will propose a compensation structure for administering the Innovate NY funds, and that structure is likely to include both a management fee and a component of carried interest on capital gains. While industry standard is 20% carried interest in capital gains and a 2.5% yearly management fee that declines over time, we expect that respondents may be more competitive.

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

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

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

8. Alternatives: While larger financial institutions can potentially provide small business financing and the investment entities already provide small business financing, the access of seed-stage businesses to capital is very limited. The State has established the Program in order to enhance the access of small businesses to such financing, and the proposed rule provides the regulatory basis for providing investment entities for lending to small businesses in accordance with the statutory requirements of the Program.

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

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

#### **Regulatory Flexibility Analysis**

1. Effects of Rule: In the rule: "Small business" is defined as a business that is resident and authorized to do business in the State, independently owned and operated, not dominant in its field, and employs one hundred or fewer persons on a full time basis; "Investment Entity" is defined a regional and local economic development organization, technology development organization, research university, or investment fund that provides or is otherwise qualified to make seed-stage investments in companies located in the State of New York and "Seed-Stage Business" is defined as a small business, located in New York State and working in one or more emerging technology fields, which demonstrates a potential for substantial growth and job development, has the potential to generate additional economic activity in New York State, and that is pre-revenue, has only begun to earn revenue, or has not yet received institutional investments. The rule will facilitate the statutory Program's purpose of having New York State Urban Development Corporation d/b/a Empire State Development (the "Corporation") make investments in investment entities in order to provide funding in principal amounts equal to or less than five hundred thousand dollars to small businesses, or seven-hundred fifty thousand to biotechnology-related small businesses, with the possibility of additional funding under prescribed circumstances, located within the State, that are engaged in one or more emerging technology fields and demonstrating a potential for substantial growth and job development. These businesses shall be in the pre-revenue, recently established revenue stream phase or not yet in receipt of institutional investments.

2. Compliance Requirements: There are no compliance requirements for local governments in these regulations. Small businesses must comply with the compliance requirements applicable to all participating lending institutions regardless of size. Eligible small businesses receiving funds must use the funds for a business purpose and remain in the State for a period acceptable to the Corporation. Penalties will be imposed for any failure to meet requirements. This is a voluntary program. Entities not wishing to undertake the compliance obligations need not participate.

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

4. Compliance Costs: There are no compliance costs for small businesses and local governments in these regulations.

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

6. Minimizing Adverse Impact: This rule has no adverse impacts on small businesses or local governments because it is designed to provide funds to investment entities in order to enhance the ability of such organizations to invest in small businesses.

7. Small Business and Local Government Participation: A number of investment entities that provide equity or quasi-equity investing in small businesses were surveyed by the Corporation and were supportive of the Fund and its structure. A number of roundtable discussions were held as part of the 2009 Small Business Task Force as well as Legislature-sponsored sessions, where various stakeholders supported and advocated for such a fund. Creation of such a seed fund was one of the primary recommendations of the 2009 Small Business Task Force.

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

1. Types and Estimated Numbers of Rural Areas: Investment entities serving all of the 44 counties defined as rural by the Executive Law § 481(7), are eligible to apply for the Innovate NY Fund (the "Program") assistance pursuant to a State-wide request for proposals.

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

3. Costs: The costs to investment entities that participate in the Program would depend on the size of their existing fund and their particular structure for sourcing, evaluating, and monitoring investments. The investment entities will propose a compensation structure for administering the Innovate NY funds, and that structure is likely to include both a management fee and a component of carried interest on capital gains. While industry standard is 20% carried interest in capital gains and a 2.5% yearly management fee that declines over time, we expect that respondents may be more competitive.

4. Minimizing Adverse Impact: The purpose of the Program is to provide funds to investment entities which will invest in seed-stage companies. This rule provides a basis for cooperation between the State and investment entities, including investment entities that serve rural areas of the State, in order to maximize the Program's effectiveness and minimize any negative impacts for such investment entities and the small businesses, including small businesses located in rural areas of the State, that such investment entities serve.

5. Rural Area Participation: This rule maximizes geographic participation by not limiting applicants to those located only in urban areas or only in rural areas.

#### **Job Impact Statement**

These regulations will not adversely affect jobs or employment opportunities in New York State. The regulations are intended to improve the economy of New York by providing greater access to capital for small businesses working in one or more emerging technology fields. The Program includes minorities, women and other New Yorkers who have difficulty accessing regular credit markets.

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

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## Workers' Compensation Board

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### EMERGENCY RULE MAKING

#### Pharmacy and Durable Medical Equipment Fee Schedules and Requirements for Designated Pharmacies

I.D. No. WCB-39-12-00001-E

Filing No. 920

Filing Date: 2012-09-07

Effective Date: 2012-09-10

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

**Action taken:** Addition of Parts 440 and 442 to Title 12 NYCRR.

**Statutory authority:** Workers' Compensation Law, sections 117, 13 and 13-o

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

**Specific reasons underlying the finding of necessity:** This rule provides pharmacy and durable medical equipment fee schedules, the process for payment of pharmacy bills, and rules for the use of a designated pharmacy or pharmacies. Many times claimants must pay for prescription drugs and medicines themselves. It is unduly burdensome for claimants to pay out-of-pocket for prescription medications as it reduces the amount of benefits available to them to pay for necessities such as food and shelter. Claimants also have to pay out-of-pocket many times for durable medical equipment. Adoption of this rule on an emergency basis, thereby setting pharmacy and durable medical equipment fee schedules will help to alleviate this burden to claimants, effectively maximizing the benefits available to them. Benefits will be maximized as the claimant will only have to pay the fee schedule amount and his or her reimbursement from the carrier will not be delayed. Further, by setting these fee schedules, pharmacies and other suppliers of durable medical equipment will be more inclined to dispense the prescription drugs or equipment without requiring claimants to pay up front, rather they will bill the carrier. Adoption of this rule further advances pharmacies directly billing by setting forth the requirements for the carrier to designate a pharmacy or network of pharmacies. Once a carrier makes such a designation, when a claimant uses a designated pharmacy he cannot be asked to pay out-of-pocket for causally related prescription medicines. This rule sets forth the payment process for pharmacy bills which along with the set price should eliminate disputes over payment and provide for faster payment to pharmacies. Finally, this rule allows claimants to fill prescriptions by the internet or mail order thus aiding claimants with mobility problems and reducing transportation costs necessary to drive to a pharmacy to fill prescriptions. Accordingly, emergency adoption of this rule is necessary.

**Subject:** Pharmacy and durable medical equipment fee schedules and requirements for designated pharmacies.

**Purpose:** To adopt pharmacy and durable medical equipment fee schedules, payment process and requirements for use of designated pharmacies.

**Substance of emergency rule:** Chapter 6 of the Laws of 2007 added Section 13-o to the Workers' Compensation Law ("WCL") mandating the Chair to adopt a pharmaceutical fee schedule. WCL Section 13(a) mandates that the Chair shall establish a schedule for charges and fees for medical care and treatment. Part of the treatment listed under Section 13(a) includes medical supplies and devices that are classified as durable medical equipment. The proposed rule adopts a pharmaceutical fee schedule and durable medical equipment fee schedule to comply with the mandates. This rule adds a new Part 440 which sets forth the pharmacy fee schedule and procedures and rules for utilization of the pharmacy fee schedule and a new Part 442 which sets forth the durable medical equipment fee schedule.

Section 440.1 sets forth that the pharmacy fee schedule is applicable to prescription drugs or medicines dispensed on or after the most recent effective date of § 440.5 and the reimbursement for drugs dispensed before that is the fee schedule in place on the date dispensed.

Section 440.2 provides the definitions for average wholesale price, brand name drugs, controlled substances, generic drugs, independent pharmacy, pharmacy chain, remote pharmacy, rural area and third party payor.

Section 440.3 provides that a carrier or self-insured employer may designate a pharmacy or pharmacy network which an injured worker must use to fill prescriptions for work related injuries. This section sets forth the requirements applicable to pharmacies that are designated as part of a pharmacy network at which an injured worker must fill prescriptions. This section also sets forth the procedures applicable in circumstances under which an injured worker is not required to use a designated pharmacy or pharmacy network.

Section 440.4 sets forth the requirements for notification to the injured worker that the carrier or self-insured employer has designated a pharmacy or pharmacy network that the injured worker must use to fill prescriptions. This section provides the information that must be provided in the notice to the injured worker including time frames for notice and method of delivery as well as notifications of changes in a pharmacy network.

Section 440.5 sets forth the fee schedule for prescription drugs. The fee schedule in uncontroverted cases is average wholesale price minus twelve percent for brand name drugs and average wholesale price

minus twenty percent for generic drugs plus a dispensing fee of five dollars for generic drugs and four dollars for brand name drugs, and in controverted cases is twenty-five percent above the fee schedule for uncontroverted claims plus a dispensing fee of seven dollars and fifty cents for generic drugs and six dollars for brand-name drugs. This section also addresses the fee when a drug is repackaged.

Section 440.6 provides that generic drugs shall be prescribed except as otherwise permitted by law.

Section 440.7 sets forth a transition period for injured workers to transfer prescriptions to a designated pharmacy or pharmacy network. Prescriptions for controlled substances must be transferred when all refills for the prescription are exhausted or after ninety days following notification of a designated pharmacy. Non-controlled substances must be transferred to a designated pharmacy when all refills are exhausted or after 60 days following notification.

Section 440.8 sets forth the procedure for payment of prescription bills or reimbursement. A carrier or self-insured employer is required to pay any undisputed bill or portion of a bill and notify the injured worker by certified mail within 45 days of receipt of the bill of the reasons why the bill or portion of the bill is not being paid, or request documentation to determine the self-insured employer's or carrier's liability for the bill. If objection to a bill or portion of a bill is not received within 45 days, then the self-insured employer or carrier is deemed to have waived any objection to payment of the bill and must pay the bill. This section also provides that a pharmacy shall not charge an injured worker or third party more than the pharmacy fee schedule when the injured worker pays for prescriptions out-of-pocket, and the worker or third party shall be reimbursed at that rate.

Section 440.9 provides that if an injured worker's primary language is other than English, that notices required under this part must be in the injured worker's primary language.

Section 440.10 provides penalties for failing to comply with this Part and that the Chair will enforce the rule by exercising his authority pursuant to Workers' Compensation Law § 111 to request documents.

Part 442 sets forth the fee schedule for durable medical equipment.

Section 442.1 sets forth that the fee schedule is applicable to durable medical goods and medical and surgical supplies dispensed on or after July 11, 2007.

Section 442.2 sets forth the fee schedule for durable medical equipment as indexed to the New York State Medicaid fee schedule, except the payment for bone growth stimulators shall be made in one payment. This section also provides for the rate of reimbursement when Medicaid has not established a fee payable for a specific item and for orthopedic footwear. This section also provides for adjustments to the fee schedule by the Chair as deemed appropriate in circumstances where the reimbursement amount is grossly inadequate to meet a pharmacies or providers costs and clarifies that hearing aids are not durable medical equipment for purposes of this rule.

Appendix A provides the form for notifying injured workers that the claim has been contested and that the carrier is not required to reimburse for medications while the claim is being contested.

Appendix B provides the form for notification of injured workers that the self-insured employer or carrier has designated a pharmacy that must be used to fill prescriptions.

**This notice is intended** to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires December 5, 2012.

**Text of rule and any required statements and analyses may be obtained from:** Heather MacMaster, Workers' Compensation Board, 328 State Street, Office of General Counsel, Schenectady, NY 12305-2318, (518) 486-9564, email: regulations@wcb.ny.gov

#### **Summary of Regulatory Impact Statement**

Section 1 provides the statutory authority for the Chair to adopt a pharmacy fee schedule pursuant to Workers' Compensation Law Section (WCL) 13-o as added to the WCL by Chapter 6 of the Laws of 2007 which requires the Chair to adopt a pharmaceutical fee schedule. Chapter 6 also amended WCL Section 13(a) to mandate that the Chair establish a schedule for charges and fees for medical care and treatment. Such medical care and treatment includes supplies and devices that are classified as durable medical equipment (hereinafter referred to as DME).

Section 2 sets forth the legislative objectives of the proposed regulations which provide the fee schedules to govern the cost of prescription medicines and DME. This section provides a summary of the overall purpose of the proposed regulation to reduce costs of workers' compensation and the scope of the regulation with regard to process and guidance to implement the rule.

Section 3 explains the needs and benefits of the proposed regulation. This section provides the explanation of the requirement of the Chair to adopt a pharmacy fee schedule as mandated by Chapter 6 of the Laws of 2007. The legislation authorizes carriers and self-insured employers to voluntarily decide to designate a pharmacy or pharmacy network and require claimants to obtain their prescription medicines from the designated pharmacy or network. This section explains how prescriptions were filled prior to the enactment of the legislation and the mechanisms by which prescriptions were reimbursed by carriers and self-insured employers. This section also provides the basis for savings under the proposed regulation. The cost savings realized by using the pharmacy fee schedule will be approximately 12 percent for brand name drugs and 20 percent for generic drugs from the average wholesale price. This section explains the issues with using the Medicaid fee schedule. The substantive requirements are set forth that carriers must follow to notify a claimant of a designated pharmacy or network. This includes the information that must be included in the notification as well as the time frames within which notice must be provided. This section also describes how carriers and self-insured employers will benefit from a set reimbursement fee as provided by the proposed regulation. This section provides a description of the benefits to the Board by explaining how the proposed regulation will reduce the number of hearings previously necessary to determine proper reimbursement of prescription medications by using a set fee schedule.

Section 4 provides an explanation of the costs associated with the proposed regulation. It describes how carriers are liable for the cost of medication if they do not respond to a bill within 45 days as required by statute. This section describes how carriers and self-insured employers which decide to require the use of a designated network will incur costs for sending the required notices, but also describes how the costs can be offset to a certain degree by sending the notices listed in the Appendices to the regulation with other forms. Pharmacies will have costs associated with the proposed regulation due to a lower reimbursement amount, but the costs are offset by the reduction of administrative costs associated with seeking reimbursement from carriers and self-insured employers. Pharmacies will be required to post notice that they are included in a designated network and a listing of carriers that utilize the pharmacy in the network. This section describes how the rule benefits carriers and self-insured employers by allowing them to contract with a pharmacy or network to provide drugs thus allowing them to negotiate for the lowest cost of drugs.

Section 5 describes how the rule will affect local governments. Since a municipality of governmental agency is required to comply with the rules for prescription drug reimbursement the savings afforded to carriers and self-insured employers will be substantially the same for local governments. If a local government decides to mandate the use of a designated network it will incur some costs from providing the required notice.

Section 6 describes the paperwork requirements that must be met by carriers, employers and pharmacies. Carriers will be required to provide notice to employers of a designated pharmacy or network, and employers in turn will provide such notice to employees so that employees will know to use a designated pharmacy or network for prescription drugs. Pharmacies will be required to post notice that they are part of a designated network and a listing of carriers that utilize the pharmacy within the network. This section also specifies the requirement of a carrier or self-insured employer to respond to a bill within 45 days of receipt. If a response is not given within the time frame, the carrier or self-insured employer is deemed to have waived any objection and must pay the bill. This section sets forth the requirement of carriers to certify to the Board that designated pharmacies within a network meet compliance requirements for inclusion in the network. This section sets forth that employers must post notification of a designated pharmacy or network in the workplace and the procedures

for utilizing the designated pharmacy or network. This section also sets forth how the Chair will enforce compliance with the rule by seeking documents pursuant to his authority under WCL § 111 and impose penalties for non-compliance.

Section 7 states that there is no duplication of rules or regulations.

Section 8 describes the alternatives explored by the Board in creating the proposed regulation. This section lists the entities contacted in regard to soliciting comments on the regulation and the entities that were included in the development process. The Board studied fee schedules from other states and the applicability of reimbursement rates to New York State. Alternatives included the Medicaid fee schedule, average wholesale price minus 15% for brand and generic drugs, the Medicare fee schedule and straight average wholesale price.

Section 9 states that there are no applicable Federal Standards to the proposed regulation.

Section 10 provides the compliance schedule for the proposed regulation. It states that compliance is mandatory and that the proposed regulation takes effect upon adoption.

#### **Regulatory Flexibility Analysis**

##### **1. Effect of rule:**

Approximately 2511 political subdivisions currently participate as municipal employers in self-insured programs for workers' compensation coverage in New York State. As part of the overall rule, these self-insured local governments will be required to file objections to prescription drug bills if they object to any such bills. This process is required by WCL § 13(i)(1) - (2). This rule affects members of self-insured trusts, some of which are small businesses. Typically a self-insured trust utilizes a third party administrator or group administrator to process workers' compensation claims. A third party administrator or group administrator is an entity which must comply with the new rule. These entities will be subject to the new rule in the same manner as any other carrier or employer subject to the rule. Under the rule, objections to a prescription bill must be filed within 45 days of the date of receipt of the bill or the objection is deemed waived and the carrier, third party administrator, or self-insured employer is responsible for payment of the bill. Additionally, affected entities must provide notification to the claimant if they choose to designate a pharmacy network, as well as the procedures necessary to fill prescriptions at the network pharmacy. If a network pharmacy is designated, a certification must be filed with the Board on an annual basis to certify that the all pharmacies in a network comply with the new rule. The new rule will provide savings to small businesses and local governments by reducing the cost of prescription drugs by utilization of a pharmacy fee schedule instead of retail pricing. Litigation costs associated with reimbursement rates for prescription drugs will be substantially reduced or eliminated because the rule sets the price for reimbursement. Additional savings will be realized by utilization of a network pharmacy and a negotiated fee schedule for network prices for prescription drugs.

##### **2. Compliance requirements:**

Self-insured municipal employers and self-insured non-municipal employers are required by statute to file objections to prescription drug bills within a forty five day time period if they object to bills; otherwise they will be liable to pay the bills if the objection is not timely filed. If the carrier or self-insured employer decides to require the use of a pharmacy network, notice to the injured worker must be provided outlining that a network pharmacy has been designated and the procedures necessary to fill prescriptions at the network pharmacy. Certification by carriers and self-insured employers must be filed on an annual basis with the Board that all the pharmacies in a network are in compliance with the new rule. Failure to comply with the provisions of the rule will result in requests for information pursuant to the Chair's existing statutory authority and the imposition of penalties.

##### **3. Professional services:**

It is believed that no professional services will be needed to comply with this rule.

##### **4. Compliance costs:**

This proposal will impose minimal compliance costs on small business or local governments which will be more than offset by the sav-

ings afforded by the fee schedule. There are filing and notification requirements that must be met by small business and local governments as well as any other entity that chooses to utilize a pharmacy network. Notices are required to be posted in the workplace informing workers of a designated network pharmacy. Additionally, a certification must be filed with the Board on an annual basis certifying that all pharmacies within a network are in compliance with the rule.

#### 5. Economic and technological feasibility:

There are no additional implementation or technology costs to comply with this rule. The small businesses and local governments are already familiar with average wholesale price and regularly used that information prior to the adoption of the Medicaid fee schedule. Further, some of the reimbursement levels on the Medicaid fee schedule were determined by using the Medicaid discounts off of the average wholesale price. The Red Book is the source for average whole sale prices and it can be obtained for less than \$100.00. Since the Board stores its claim files electronically, it has provided access to case files through its eCase program to parties of interest in workers' compensation claims. Most insurance carriers, self-insured employers and third party administrators have computers and internet access in order to take advantage of the ability to review claim files from their offices.

#### 6. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impacts to all insurance carriers, employers, self-insured employers and claimants. The rule provides a process for reimbursement of prescription drugs as mandated by WCL section 13(i). Further, the notice requirements are to ensure a claimant uses a network pharmacy to maximize savings for the employer as any savings for the carrier can be passed on to the employer. The costs for compliance are minimal and are offset by the savings from the fee schedule. The rule sets the fee schedule as average wholesale price (AWP) minus twelve percent for brand name drugs and AWP minus twenty percent for generic drugs. As of July 1, 2008, the reimbursement for brand name drugs on the Medicaid Fee Schedule was reduced from AWP minus fourteen percent to AWP minus sixteen and a quarter percent. Even before the reduction in reimbursement some pharmacies, especially small ones, were refusing to fill brand name prescriptions because the reimbursement did not cover the cost to the pharmacy to purchase the medication. In addition the Medicaid fee schedule did not cover all drugs, include a number that are commonly prescribed for workers' compensation claims. This presented a problem because WCL § 13-o provides that only drugs on the fee schedule can be reimbursed unless approved by the Chair. The fee schedule adopted by this regulation eliminates this problem. Finally, some pharmacy benefit managers were no longer doing business in New York because the reimbursement level was so low they could not cover costs. Pharmacy benefit managers help to create networks, assist claimants in obtaining first fills without out of pocket costs and provide utilization review. Amending the fee schedule will ensure pharmacy benefit managers can stay in New York and help to ensure access for claimants without out of pocket cost.

#### 7. Small business and local government participation:

The Assembly and Senate as well as the Business Council of New York State and the AFL-CIO provided input on the proposed rule.

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

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

This rule applies to all carriers, employers, self-insured employers, third party administrators and pharmacies in rural areas. This includes all municipalities in rural areas.

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

Regulated parties in all areas of the state, including rural areas, will be required to file objections to prescription drug bills within a forty five day time period or will be liable for payment of a bill. If regulated parties fail to comply with the provisions of Part 440 penalties will be imposed and the Chair will request documentation from them to enforce the provision regarding the pharmacy fee schedule. The new requirement is solely to expedite processing of prescription drug bills or durable medical bills under the existing obligation under Section 13 of the WCL. Notice to the injured worker must be provided outlining that a network pharmacy has been designated and the procedures nec-

essary to fill prescriptions at the network pharmacy. Carriers and self-insured employers must file a certification on an annual basis with the Board that all the pharmacies in a network are in compliance with the new rule.

##### 3. Costs:

This proposal will impose minimal compliance costs on carriers and employers across the State, including rural areas, which will be more than offset by the savings afforded by the fee schedule. There are filing and notification requirements that must be met by all entities subject to this rule. Notices are required to be posted and distributed in the workplace informing workers of a designated network pharmacy and objections to prescription drug bills must be filed within 45 days or the objection to the bill is deemed waived and must be paid without regard to liability for the bill. Additionally, a certification must be filed with the Board on an annual basis certifying that all pharmacies within a network are in compliance with the rule. The rule provides a reimbursement standard for an existing administrative process.

##### 4. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impact for small businesses and local government from imposition of new fee schedules and payment procedures. This rule provides a benefit to small businesses and local governments by providing a uniform pricing standard, thereby providing cost savings reducing disputes involving the proper amount of reimbursement or payment for prescription drugs or durable medical equipment. The rule mitigates the negative impact from the reduction in the Medicaid fee schedule effective July 1, 2008, by setting the fee schedule at Average Wholesale Price (AWP) minus twelve percent for brand name prescription drugs and AWP minus twenty percent for generic prescription drugs. In addition, the Medicaid fee schedule did not cover many drugs that are commonly prescribed for workers' compensation claimants. This fee schedule covers all drugs and addresses the potential issue of repackagers who might try to increase reimbursements.

##### 5. Rural area participation:

Comments were received from the Assembly and the Senate, as well as the Business Council of New York State and the AFL-CIO regarding the impact on rural areas.

#### **Job Impact Statement**

The proposed amendment will not have an adverse impact on jobs. This amendment is intended to provide a standard for reimbursement of pharmacy and durable medical equipment bills.