

# RULE MAKING ACTIVITIES

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

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

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

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## Department of Civil Service

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### NOTICE OF ADOPTION

#### Jurisdictional Classification

**I.D. No.** CVS-44-11-00005-A

**Filing No.** 850

**Filing Date:** 2012-08-21

**Effective Date:** 2012-09-05

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

**Action taken:** Amendment of Appendix 2 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To add a subheading and classify a position in the non-competitive class.

**Text or summary was published** in the November 2, 2011 issue of the Register, I.D. No. CVS-44-11-00005-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us

#### Assessment of Public Comment

The agency received no public comment.

### NOTICE OF ADOPTION

#### Jurisdictional Classification

**I.D. No.** CVS-44-11-00006-A

**Filing No.** 856

**Filing Date:** 2012-08-21

**Effective Date:** 2012-09-05

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

**Action taken:** Amendment of Appendix 1 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To classify positions in the exempt class.

**Text or summary was published** in the November 2, 2011 issue of the Register, I.D. No. CVS-44-11-00006-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us

#### Assessment of Public Comment

The agency received no public comment.

### NOTICE OF ADOPTION

#### Jurisdictional Classification

**I.D. No.** CVS-44-11-00007-A

**Filing No.** 854

**Filing Date:** 2012-08-21

**Effective Date:** 2012-09-05

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

**Action taken:** Amendment of Appendix 2 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To delete a position from and to classify a position in the non-competitive class.

**Text or summary was published** in the November 2, 2011 issue of the Register, I.D. No. CVS-44-11-00007-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us

#### Assessment of Public Comment

The agency received no public comment.

## NOTICE OF ADOPTION

**Jurisdictional Classification****I.D. No.** CVS-44-11-00008-A**Filing No.** 857**Filing Date:** 2012-08-21**Effective Date:** 2012-09-05

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

**Action taken:** Amendment of Appendix 2 of Title 4 NYCRR.**Statutory authority:** Civil Service Law, section 6(1)**Subject:** Jurisdictional Classification.**Purpose:** To classify a position in the non-competitive class.

**Text of final rule:** Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Agriculture and Markets, be and hereby is amended by adding thereto the position of Food Laboratory Scientist (Seed) (1).

When previously submitted as NOP - there were two positions being added: Food Laboratory Scientist (1) and Food Laboratory Scientist (Seed) (1). The Food Laboratory Scientist (1) was withdrawn. Therefore, only the Food Laboratory Scientist (Seed) (1) position is being adopted.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in Appendix 2.

**Text of rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us  
**Revised Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement**

Changes made to the last published rule do not necessitate revision to the previously published Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement statements.

**Assessment of Public Comment**

The agency received no public comment.

## NOTICE OF ADOPTION

**Jurisdictional Classification****I.D. No.** CVS-44-11-00009-A**Filing No.** 853**Filing Date:** 2012-08-21**Effective Date:** 2012-09-05

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

**Action taken:** Amendment of Appendixes 1 and 2 of Title 4 NYCRR.**Statutory authority:** Civil Service Law, section 6(1)**Subject:** Jurisdictional Classification.

**Purpose:** To delete and substitute a subheading and classify and delete positions in the exempt and non-competitive classes.

**Text or summary was published** in the November 2, 2011 issue of the Register, I.D. No. CVS-44-11-00009-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

## NOTICE OF ADOPTION

**Jurisdictional Classification****I.D. No.** CVS-44-11-00010-A**Filing No.** 852**Filing Date:** 2012-08-21**Effective Date:** 2012-09-05

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

**Action taken:** Amendment of Appendix 2 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)**Subject:** Jurisdictional Classification.

**Purpose:** To delete positions from and to classify positions in the non-competitive class.

**Text or summary was published** in the November 2, 2011 issue of the Register, I.D. No. CVS-44-11-00010-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

## NOTICE OF ADOPTION

**Jurisdictional Classification****I.D. No.** CVS-46-11-00001-A**Filing No.** 855**Filing Date:** 2012-08-21**Effective Date:** 2012-09-05

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

**Action taken:** Amendment of Appendix 1 of Title 4 NYCRR.**Statutory authority:** Civil Service Law, section 6(1)**Subject:** Jurisdictional Classification.

**Purpose:** To add a subheading and to classify a position in the exempt class.

**Text or summary was published** in the November 16, 2011 issue of the Register, I.D. No. CVS-46-11-00001-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

## NOTICE OF ADOPTION

**Jurisdictional Classification****I.D. No.** CVS-50-11-00008-A**Filing No.** 858**Filing Date:** 2012-08-21**Effective Date:** 2012-09-05

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

**Action taken:** Amendment of Appendix 2 of Title 4 NYCRR.**Statutory authority:** Civil Service Law, section 6(1)**Subject:** Jurisdictional Classification.

**Purpose:** To classify positions in the non-competitive class.

**Text or summary was published** in the December 14, 2011 issue of the Register, I.D. No. CVS-50-11-00008-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

## NOTICE OF ADOPTION

**Jurisdictional Classification****I.D. No.** CVS-50-11-00009-A**Filing No.** 859**Filing Date:** 2012-08-21**Effective Date:** 2012-09-05

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

**Action taken:** Amendment of Appendix 1 of Title 4 NYCRR.  
**Statutory authority:** Civil Service Law, section 6(1)  
**Subject:** Jurisdictional Classification.  
**Purpose:** To delete a position from the exempt class.  
**Text or summary was published in** the December 14, 2011 issue of the Register, I.D. No. CVS-50-11-00009-P.  
**Final rule as compared with last published rule:** No changes.  
**Text of rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us  
**Assessment of Public Comment**  
 The agency received no public comment.

**NOTICE OF ADOPTION**

**Jurisdictional Classification**

**I.D. No.** CVS-50-11-00010-A  
**Filing No.** 862  
**Filing Date:** 2012-08-21  
**Effective Date:** 2012-09-05

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:  
**Action taken:** Amendment of Appendix 2 of Title 4 NYCRR.  
**Statutory authority:** Civil Service Law, section 6(1)  
**Subject:** Jurisdictional Classification.  
**Purpose:** To classify positions in the non-competitive class.  
**Text or summary was published in** the December 14, 2011 issue of the Register, I.D. No. CVS-50-11-00010-P.  
**Final rule as compared with last published rule:** No changes.  
**Text of rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us  
**Assessment of Public Comment**  
 The agency received no public comment.

**NOTICE OF ADOPTION**

**Jurisdictional Classification**

**I.D. No.** CVS-50-11-00011-A  
**Filing No.** 851  
**Filing Date:** 2012-08-21  
**Effective Date:** 2012-09-05

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:  
**Action taken:** Amendment of Appendixes 1 and 2 of Title 4 NYCRR.  
**Statutory authority:** Civil Service Law, section 6(1)  
**Subject:** Jurisdictional Classification.  
**Purpose:** Delete subheadings in exempt and non-competitive classes; classify and delete positions in exempt and non-competitive classes.  
**Text or summary was published in** the December 14, 2011 issue of the Register, I.D. No. CVS-50-11-00011-P.  
**Final rule as compared with last published rule:** No changes.  
**Text of rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us  
**Assessment of Public Comment**  
 The agency received no public comment.

**NOTICE OF ADOPTION**

**Jurisdictional Classification**

**I.D. No.** CVS-50-11-00012-A  
**Filing No.** 860  
**Filing Date:** 2012-08-21  
**Effective Date:** 2012-09-05

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

**Action taken:** Amendment of Appendix 2 of Title 4 NYCRR.  
**Statutory authority:** Civil Service Law, section 6(1)  
**Subject:** Jurisdictional Classification.  
**Purpose:** To delete positions from the non-competitive class.  
**Text or summary was published in** the December 14, 2011 issue of the Register, I.D. No. CVS-50-11-00012-P.  
**Final rule as compared with last published rule:** No changes.  
**Text of rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us  
**Assessment of Public Comment**  
 The agency received no public comment.

**NOTICE OF ADOPTION**

**Jurisdictional Classification**

**I.D. No.** CVS-06-12-00001-A  
**Filing No.** 863  
**Filing Date:** 2012-08-21  
**Effective Date:** 2012-09-05

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:  
**Action taken:** Amendment of Appendix 1 of Title 4 NYCRR.  
**Statutory authority:** Civil Service Law, section 6(1)  
**Subject:** Jurisdictional Classification.  
**Purpose:** To classify a position in the exempt class.  
**Text or summary was published in** the February 8, 2012 issue of the Register, I.D. No. CVS-06-12-00001-P.  
**Final rule as compared with last published rule:** No changes.  
**Text of rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us  
**Assessment of Public Comment**  
 The agency received no public comment.

**NOTICE OF ADOPTION**

**Jurisdictional Classification**

**I.D. No.** CVS-06-12-00002-A  
**Filing No.** 864  
**Filing Date:** 2012-08-21  
**Effective Date:** 2012-09-05

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:  
**Action taken:** Amendment of Appendix 1 of Title 4 NYCRR.  
**Statutory authority:** Civil Service Law, section 6(1)  
**Subject:** Jurisdictional Classification.  
**Purpose:** To classify a position in the exempt class.  
**Text or summary was published in** the February 8, 2012 issue of the Register, I.D. No. CVS-06-12-00002-P.  
**Final rule as compared with last published rule:** No changes.  
**Text of rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us  
**Assessment of Public Comment**  
 The agency received no public comment.

**NOTICE OF ADOPTION**

**Jurisdictional Classification**

**I.D. No.** CVS-06-12-00003-A  
**Filing No.** 861  
**Filing Date:** 2012-08-21  
**Effective Date:** 2012-09-05

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

**Action taken:** Amendment of Appendix 2 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To classify a position in the non-competitive class.

**Text or summary was published** in the February 8, 2012 issue of the Register, I.D. No. CVS-06-12-00003-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

## NOTICE OF ADOPTION

### Jurisdictional Classification

**I.D. No.** CVS-06-12-00005-A

**Filing No.** 865

**Filing Date:** 2012-08-21

**Effective Date:** 2012-09-05

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

**Action taken:** Amendment of Appendix 1 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To classify positions in the exempt class.

**Text or summary was published** in the February 8, 2012 issue of the Register, I.D. No. CVS-06-12-00005-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

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## Education Department

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### EMERGENCY RULE MAKING

#### Charter School Public Hearings

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

**Filing No.** 866

**Filing Date:** 2012-08-21

**Effective Date:** 2012-08-21

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 of Title 8 NYCRR.

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

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

**Specific reasons underlying the finding of necessity:** The purpose of the proposed technical amendment is to conform section 3.16(b) of the Regents Rules to the Department's existing practice of having the Commissioner, on behalf of the Board of Regents, hold public hearings required by article 56 of the Education Law to solicit comments from the community on charter school matters, such as hearings in connection with the issuance, revision or renewal of a charter pursuant to Education Law section 2857(1-a) and hearings to discuss the location of a charter school pursuant to Education Law section 2853(3)(a). Having the Board of Regents personally conduct and hold such hearings is not practical, considering the scope of duties of the Board, the limited number of times that the Board meets during the year, and the time demands placed on individual Board members, and having the Commissioner, through Department staff, hold

such hearings provides for the most efficient and expeditious means to conduct such hearings.

The proposed amendment was adopted as an emergency rule at the May Regents meeting, effective May 22, 2012. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on June 6, 2012. Because the Board of Regents meets at fixed intervals, and generally does not meet in the month of August, the earliest the proposed amendment can be presented for permanent adoption, after expiration of the 45-day public comment period provided for in State Administrative Procedure Act (SAPA) section 202(1) and (5), is the September 10-11, 2012 Regents meeting. Furthermore, pursuant to SAPA, the earliest effective date of the proposed amendment, if adopted at the September meeting, would be October 3, 2012, the date a Notice of Adoption would be published in the State Register. However, the May emergency action will expire on August 20, 2012, ninety days after its filing with the Department of State on May 22, 2012. A lapse in the effective date of the rule may disrupt the Department's conduct of public hearings in accordance with article 56 of the Education Law. Emergency action is therefore necessary for the preservation of the general welfare to ensure that the emergency rule adopted at the May 2012 Regents meeting remains continuously in effect until the effective date of its adoption as a permanent rule.

It is anticipated that the proposed rule will be presented to the Board of Regents for adoption as a permanent rule at their September 10-11, 2012 meeting, which is the first scheduled meeting after expiration of the 45 day public comment period mandated by the State Administrative Procedure Act.

**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 of emergency rule:** Subdivision (b) of section 3.16 of the Rules of the Board of Regents is amended, effective August 21, 2012, as follows:

(b) Hearings. The Board of Regents delegates to the Commissioner of Education the authority to conduct and hold public hearings as required pursuant to article 56 of the Education Law to solicit comments from the community including, but not limited to, hearings in connection with the issuance, revision or renewal of a charter pursuant to Education Law section 2857(1-a) and hearings to discuss the location of a charter school pursuant to Education Law section 2853(3)(a).

**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-23-12-00011-EP, Issue of June 6, 2012. The emergency rule will expire October 19, 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

#### Regulatory Impact Statement

##### STATUTORY AUTHORITY:

Education Law section 101 continues the existence of the Education Department, with the Board of Regents as its head, and authorizes the Board of Regents to appoint the Commissioner of Education as the chief administrative officer of the Department, which is charged with the general management and supervision of public schools and the educational work of the State.

Education Law section 206 authorizes the Regents, any committee thereof, the Commissioner, the deputy and any associate and assistant commissioner of education and the counsel of the State Education Department to take testimony or hear proofs relating to their official duties, or in any matter which they may lawfully investigate.

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

Education Law section 305(1) provides that the Commissioner is the chief executive officer of the State system of education and of the Board of Regents, and charged with the enforcement of all general and special laws relating to the educational system of the State and the

execution of all educational policies determined by Regents. Section 305(2) provides that the Commissioner shall have general supervision over all schools and institutions subject to the Education Law or any statute relating to education. Section 305(20) provides that the Commissioner shall have and execute such further powers and duties as he shall be charged with by the Regents.

Education Law section 2853(3)(a) provides that before a charter school may be located in part of an existing public school building, the charter entity shall provide notice to the parents or guardians of the students then enrolled in the existing school building and shall hold a public hearing for purposes of discussing the location of the charter school.

Education Law section 2857(1) requires, among other things, school districts in which charter schools are located to hold public hearings to solicit comments from the community in connection with the issuance, revision, or renewal of a charter school's charter. Section 2857(1-a) provides that in the event the school district fails to conduct a public hearing, the Board of Regents shall conduct a public hearing to solicit comments from the community in connection with the issuance, revision, or renewal of a charter.

#### LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the above statutory authority and is necessary to conform section 3.16(b) of the Regents Rules to the Department's existing practice of having the Commissioner, on behalf of the Board of Regents, hold public hearings required by article 56 of the Education Law to solicit comments from the community on charter school matters.

#### NEEDS AND BENEFITS:

The proposed amendment is necessary to conform section 3.16(b) of the Regents Rules to the Department's existing practice of having the Commissioner, on behalf of the Board of Regents, hold public hearings required by article 56 of the Education Law to solicit comments from the community on charter school matters, such as hearings in connection with the issuance, revision or renewal of a charter pursuant to Education Law section 2857(1-a) and hearings to discuss the location of a charter school pursuant to Education Law section 2853(3)(a).

Having the Board of Regents personally conduct and hold such hearings is not practical, considering the scope of duties of the Board, the limited number of times that the Board meets during the year, and the time demands placed on individual Board members. It has been determined that having the Commissioner conduct such hearings, on behalf of the Board of Regents, will provide for the most efficient and expeditious means to conduct such hearings.

#### COSTS:

- (a) Costs to State government: none.
- (b) Costs to local government: none.
- (c) Cost to private regulated parties: none. The proposed amendment does not affect any private regulated parties.
- (d) Cost to regulating agency for implementation and continued administration of this rule: none.

The proposed amendment merely conforms section 3.16(b) of the Regents Rules to the Department's existing practice of having the Commissioner, on behalf of the Board of Regents, hold public hearings required by article 56 of the Education Law to solicit comments from the community on charter school matters. The proposed amendment will not impose any additional costs on the State, school districts and charters schools, or the State Education Department beyond those inherent in the statute.

#### LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any program, service, duty or responsibility upon school districts, charter schools or other local governments. It merely conforms section 3.16(b) of the Regents Rules to the Department's existing practice of having the Commissioner, on behalf of the Board of Regents, hold public hearings required by article 56 of the Education Law to solicit comments from the community on charter school matters, such as hearings in connection with the issuance, revision or renewal of a charter pursuant to

Education Law section 2857(1-a) and hearings to discuss the location of a charter school pursuant to Education Law section 2853(3)(a).

#### PAPERWORK:

The proposed amendment does not impose any additional reporting, record keeping or other paperwork requirements upon school districts or charter schools. It merely conforms section 3.16(b) of the Regents Rules to the Department's existing practice of having the Commissioner, on behalf of the Board of Regents, hold public hearings required by article 56 of the Education Law to solicit comments from the community on charter school matters.

#### DUPLICATION:

The proposed amendment does not duplicate any existing State or Federal requirements.

#### ALTERNATIVES:

Having the Board of Regents personally conduct and hold public hearings to solicit comments from the community, such as hearings in connection with the issuance, revision, or renewal of a charter school's charter or hearings to discuss the location of a charter school, is not practical, considering the scope of duties of the Board, the limited number of times that the Board meets during the year, and the time demands placed on individual Board members. It has been determined that having the Commissioner conduct such hearings, on behalf of the Board of Regents, provides for the most efficient and expeditious means to conduct such hearings.

#### FEDERAL STANDARDS:

There are no applicable Federal standards.

#### COMPLIANCE SCHEDULE:

The proposed amendment does not impose any compliance requirements or costs on charter schools, but merely conforms section 3.16(b) of the Regents Rules to the Department's existing practice of having the Commissioner, on behalf of the Board of Regents, hold public hearings required by article 56 of the Education Law to solicit comments from the community on charter school matters.

#### *Regulatory Flexibility Analysis*

##### Small Businesses:

The proposed amendment applies to school districts and charter schools, and will conform section 3.16(b) of the Regents Rules to the Department's existing practice of having the Commissioner, on behalf of the Board of Regents, hold public hearings required by article 56 of the Education Law to solicit comments from the community on charter school matters, such as hearings in connection with the issuance, revision or renewal of a charter pursuant to Education Law section 2857(1-a) and hearings to discuss the location of a charter school pursuant to Education Law section 2853(3)(a).

The proposed amendment does not impose any economic impact, or other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

##### Local Governments:

#### EFFECT OF RULE:

The proposed rule applies to all school districts and charter schools in the State. At present, there are 695 school districts (including New York City) and 37 BOCES. There are currently 189 operating charter schools.

#### COMPLIANCE REQUIREMENTS:

The proposed amendment does not establish any reporting, record-keeping or other compliance requirements on school districts or charter schools. It merely conforms section 3.16(b) of the Regents Rules to the Department's existing practice of having the Commissioner, on behalf of the Board of Regents, hold public hearings required by article 56 of the Education Law to solicit comments from the community on charter school matters, such as hearings in connection with the issuance, revision or renewal of a charter pursuant to Education Law section 2857(1-a) and hearings to discuss the location of a charter school pursuant to Education Law section 2853(3)(a).

**PROFESSIONAL SERVICES:**

The proposed amendment does not impose any additional professional services requirements on school districts or charter schools.

**COMPLIANCE COSTS:**

The proposed amendment merely conforms section 3.16(b) of the Regents Rules to the Department's existing practice of having the Commissioner, on behalf of the Board of Regents, hold public hearings required by article 56 of the Education Law to solicit comments from the community on charter school matters. The proposed amendment does not impose any compliance costs on school districts or charter schools beyond those inherent in article 56 of the Education Law.

**ECONOMIC AND TECHNOLOGICAL FEASIBILITY:**

The proposed amendment does not impose any compliance costs or new technological requirements on school districts or charter schools.

**MINIMIZING ADVERSE IMPACT:**

The proposed amendment does not impose any compliance requirements or compliance costs on school districts or charter schools. It merely conforms section 3.16(b) of the Regents Rules to the Department's existing practice of having the Commissioner, on behalf of the Board of Regents, hold public hearings required by article 56 of the Education Law to solicit comments from the community on charter school matters, such as hearings in connection with the issuance, revision or renewal of a charter pursuant to Education Law section 2857(1-a) and hearings to discuss the location of a charter school pursuant to Education Law section 2853(3)(a).

Having the Board of Regents personally conduct and hold such hearings is not practical, considering the scope of duties of the Board, the limited number of times that the Board meets during the year, and the time demands placed on individual Board members. It has been determined that having the Commissioner conduct such hearings, on behalf of the Board of Regents, will provide for the most efficient and expeditious means to conduct such hearings.

**LOCAL GOVERNMENT PARTICIPATION:**

Comments on the proposed amendment were solicited from school districts through the offices of the district superintendents of each supervisory district in the State. Copies of the proposed amendment have been provided to each charter school for review and comment.

**Rural Area Flexibility Analysis****TYPES AND ESTIMATED NUMBER OF RURAL AREAS:**

The proposed amendment applies to all school districts and charter schools within the State, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less. There is currently one charter school located in a rural area.

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

The proposed amendment does not establish any reporting, record-keeping or other compliance requirements, or impose any additional professional services requirements on school districts or charter schools in rural areas. It merely conforms section 3.16(b) of the Regents Rules to the Department's existing practice of having the Commissioner, on behalf of the Board of Regents, hold public hearings required by article 56 of the Education Law to solicit comments from the community on charter school matters, such as hearings in connection with the issuance, revision or renewal of a charter pursuant to Education Law section 2857(1-a) and hearings to discuss the location of a charter school pursuant to Education Law section 2853(3)(a).

**COSTS:**

The proposed amendment merely conforms section 3.16(b) of the Regents Rules to the Department's existing practice of having the Commissioner, on behalf of the Board of Regents, hold public hearings required by article 56 of the Education Law to solicit comments from the community on charter school matters. The proposed amendment does not impose any compliance costs on school districts or charter schools in rural areas beyond those inherent in article 56 of the Education Law.

**MINIMIZING ADVERSE IMPACT:**

The proposed amendment does not impose any compliance requirements or compliance costs on school districts or charter schools. It merely conforms section 3.16(b) of the Regents Rules to the Department's existing practice of having the Commissioner, on behalf of the Board of Regents, hold public hearings required by article 56 of the Education Law to solicit comments from the community on charter school matters, such as hearings in connection with the issuance, revision or renewal of a charter pursuant to Education Law section 2857(1-a) and hearings to discuss the location of a charter school pursuant to Education Law section 2853(3)(a).

Having the Board of Regents personally conduct and hold such hearings is not practical, considering the scope of duties of the Board, the limited number of times that the Board meets during the year, and the time demands placed on individual Board members. It has been determined that having the Commissioner conduct such hearings, on behalf of the Board of Regents, will provide for the most efficient and expeditious means to conduct such hearings.

**RURAL AREA PARTICIPATION:**

Comments on the proposed rule were solicited from the Department's Rural Advisory Committee. Comments on the proposed amendment were also solicited from school districts through the offices of the district superintendents of each supervisory district in the State. In addition, copies of the proposed rule have been provided to each charter school for review and comment.

**Job Impact Statement**

The proposed amendment applies to school districts and charter schools, and will conform section 3.16(b) of the Regents Rules to the Department's existing practice of having the Commissioner, on behalf of the Board of Regents, hold public hearings required by article 56 of the Education Law to solicit comments from the community on charter school matters, such as hearings in connection with the issuance, revision or renewal of a charter pursuant to Education Law section 2857(1-a) and hearings to discuss the location of a charter school pursuant to Education Law section 2853(3)(a).

The proposed amendment will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the proposed amendment that it will have a positive impact, or 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.

**EMERGENCY  
RULE MAKING****Dignity for All Students Act (L. 2010, Ch. 482)**

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

**Filing No.** 867

**Filing Date:** 2012-08-21

**Effective Date:** 2012-08-21

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) and (2), 801-a(not subdivided) and 2854(1)(b); and L. 2010, ch. 482

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

**Specific reasons underlying the finding of necessity:** The proposed amendment is necessary to implement the Dignity for All Students Act (L. 2010, ch. 482) to ensure that all public school students, including those attending charter schools, are provided 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.

The proposed amendment was adopted as an emergency rule at the May Regents meeting, effective May 22, 2012. A Notice of Emergency Adoption and Proposed Rule Making was published in the State

Register on June 6, 2012. Because the Board of Regents meets at fixed intervals, and generally does not meet in the month of August, the earliest the proposed amendment can be presented for permanent adoption, after expiration of the 45-day public comment period provided for in State Administrative Procedure Act (SAPA) section 202(1) and (5), is the September 10-11, 2012 Regents meeting. Furthermore, pursuant to SAPA, the earliest effective date of the proposed amendment, if adopted at the September meeting, would be October 3, 2012, the date a Notice of Adoption would be published in the State Register. However, the May emergency action will expire on August 20, 2012, ninety days after its filing with the Department of State on May 22, 2012. A lapse in the effective date of the rule may disrupt the provision of instruction in the 2012-2013 school year that supports development of a school environment free of discrimination and harassment, as required by the Dignity for All Students Act.

Emergency action is therefore necessary for the preservation of the general welfare to ensure that the emergency rule adopted at the May 2012 Regents meeting remains continuously in effect until the effective date of its adoption as a permanent rule.

It is anticipated that the proposed rule will be presented to the Board of Regents for adoption as a permanent rule at their September 10-11, 2012 meeting, which is the first scheduled meeting after expiration of the 45 day public comment period mandated by the State Administrative Procedure Act.

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

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

**Text of emergency rule:** 1. The amendment of subdivision (c) of section 100.2 of the Regulations of the Commissioner of Education, which was adopted by the Board of Regents on March 20, 2012 and for which a Notice of Adoption was published in the State Register on April 11, 2012 (EDU-04-12-00002-A), is repealed, effective August 21, 2012.

2. Subdivision (c) of section 100.2 of the Regulations of the Commissioner of Education is amended, effective August 21, 2012, as follows:

(c) Instruction in certain subjects. Pursuant to articles 2, 17 and 65 of the Education Law, instruction in certain subjects in elementary and secondary school shall be provided as follows:

(1) for all students, instruction in patriotism and citizenship, as required by section 801 of the Education Law;

(2) for all public school students, instruction that supports development of a school environment free of discrimination and harassment, as required by the Dignity For All Students Act (article 2 of the Education Law), 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; provided that in public schools other than charter schools, such instruction shall be provided as part of a component on civility, citizenship and character education in accordance with section 801-a of the Education Law;

(2)] (3) for all students in the eighth and higher grades, instruction in the history, meaning, significance and effect of the provisions of the Constitution of the United States and the amendments thereto, the Declaration of Independence, the Constitution of the State of New York and the amendments thereto, as required by section 801 of the Education Law;

(3)] (4) for all students, health education regarding alcohol, drugs and tobacco abuse, as required by section 804 of the Education Law;

(4)] (5) for all students, instruction in highway safety and traffic regulation, as required by section 806 of the Education Law;

(5)] (6) for all students, instruction in fire drills and in fire and arson prevention, injury prevention and life safety education, as required by sections 807 and 808 of the Education Law. Such course of instruction shall include materials to educate children on the dangers of falsely reporting a criminal incident or impending explosion or fire emergency involving danger to life or property or impending catastrophe, or a life safety emergency;

(6)] (7) for all students in grades one through eight, instruction

in New York State history and civics as required by section 3204(3) of the Education Law;

(7)] (8) for public school students, instruction relating to the flag and certain legal holidays, as required by section 802 of the Education Law;

(8)] (9) for all public elementary school students, instruction in the humane treatment of animals and birds, as required by section 809 of the Education Law; and

(9)] (10) for all public school students, instruction relating to the conservation of the natural resources of the State, as required by section 810 of the Education 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. EDU-23-12-00012-EP, Issue of June 6, 2012. The emergency rule will expire October 19, 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

#### Regulatory Impact Statement

##### 1. 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 grants general rule-making authority to the Board of Regents to carry into effect the laws and policies of the State relating to education.

Education Law section 305(1) empowers the Commissioner of Education to be the chief executive officer of the State system of education and the Board of Regents and authorizes the Commissioner to enforce laws relating to the educational system and to execute educational policies determined by the Board of Regents. Education Law section 305(2) authorizes the Commissioner to have general supervision over all schools subject to the Education Law.

Education Law section 801-a requires the Regents to ensure that the course of instruction in grades kindergarten through twelve includes a component on civility, citizenship and character education and instruct students on the principles of honesty, tolerance, personal responsibility, respect for others, observance of laws and rules, courtesy, dignity and other traits that will enhance the quality of their experiences in, and contributions to, the community.

Education Law section 2854(1)(b) provides that charter schools shall 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.

Chapter 482 of the Laws of 2010 added a new Article 2 to the Education Law, relating to Dignity for All Students ("Dignity Act") to afford all students in public schools an environment free of discrimination and harassment and foster civility in public schools and to prevent and prohibit conduct which is inconsistent with a school's educational mission. Section 3 of Chapter 482 amended Education Law section 801-a to provide that instruction regarding "tolerance", "respect for others" and "dignity" shall include awareness and sensitivity to discrimination or harassment and civility in the relations of people of different races, weights, national origins, ethnic groups, religions, religious practices, mental or physical abilities, sexual orientations, genders, and sexes.

##### 2. LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the above statutory authority and is necessary to implement the instructional requirements of the Dignity Act, including provisions to conform the Commissioner's regulations to Education Law section 801-a, as amended by the Act.

##### 3. NEEDS AND BENEFITS:

At their March 19-20, 2012 meeting, the Board of Regents adopted an amendment to section 100.2(c) of the Commissioner's Regulations

to add language requiring that courses of instruction in civility, citizenship and character education provided pursuant to Education Law section 801-a include instruction relating to awareness and sensitivity to discrimination or harassment and civility in the relations of people of different races, weights, national origins, ethnic groups, religions, religious practices, mental or physical abilities, sexual orientations, genders, and sexes. This was necessary to conform section 100.2(c) to section 3 of the Dignity Act, which expanded section 801-a to include such instruction relating to the principles of the Dignity Act. Because it has been the Department's interpretation since the enactment of section 801-a in 2000 that charter schools are exempt from the statute's required instruction on civility, citizenship and character education, the March amendment included language excluding charter schools from the requirements of section 801-a.

However, concerns have been expressed by many parties, including the Assembly sponsor of the Dignity Act and the Dignity for All Students Task Force, that an exclusion of charter schools from any instructional requirement relating to prevention of harassment and discrimination would be inconsistent with the intent of Article 2, which is to afford all students in public schools an environment free of discrimination and harassment. It was pointed out that even if charter schools are not required to provide the component on civility, citizenship and character education prescribed under section 801-a, in order to carry out the intent of the Dignity Act and protect the civil rights and the health and safety of charter school students, charter school students must receive instruction targeted at prevention of harassment and discrimination.

The Department finds that argument persuasive and recommends the regulation be amended to clarify that while charter schools are not required to provide a curriculum component on civility, citizenship and character education in accordance with § 801-a, they must nonetheless provide instruction targeted at preventing harassment and discrimination in charter schools to comply with the requirements of the Dignity Act and protect the civil rights and health and safety of their students.

Accordingly, the proposed amendment 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. The proposed amendment further provides that in public schools other than charter schools, such instruction shall be provided as part of a component on civility, citizenship and character education in accordance with section 801-a of the Education Law.

#### 4. COSTS:

- (a) Costs to State government: None.
- (b) Costs to local government: None.
- (c) Costs to private regulated parties: None.
- (d) Costs to regulating agency for implementation and continued administration of this rule: None.

The proposed amendment is necessary to implement the Dignity Act and will not impose any additional costs beyond those imposed by the statute.

#### 5. LOCAL GOVERNMENT MANDATES:

The proposed amendment is necessary to implement the Dignity Act and will not impose any additional program, service, duty or responsibility beyond those by the statute. The proposed amendment 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. The proposed amendment further provides that in public schools other than charter schools, such instruction shall be provided as part of a component on civility, citizenship and character education in accordance with section 801-a of the Education Law.

#### 6. PAPERWORK:

The proposed amendment will not impose any additional reporting requirements, forms or other paperwork, beyond those imposed by the Dignity Act.

#### 7. DUPLICATION:

The proposed amendment does not duplicate existing State or Federal regulations, and is necessary to implement the Dignity Act and protect the civil rights and the health and safety of charter school students.

#### 8. ALTERNATIVES:

There are no viable alternatives and none were considered. The proposed amendment is necessary to implement the Dignity Act and protect the civil rights and the health and safety of charter school students.

#### 9. FEDERAL STANDARDS:

There are no related Federal standards.

#### 10. COMPLIANCE SCHEDULE:

The proposed amendment is necessary to implement the Dignity Act and protect the civil rights and the health and safety of charter school students, and will not impose any additional compliance requirements or costs on regulated parties beyond those imposed by the statute. It is anticipated that regulated parties will be able to achieve compliance with proposed amendment by its effective date.

#### *Regulatory Flexibility Analysis*

##### Small Businesses:

The proposed amendment is applicable to school districts, boards of cooperative educational services and charter schools and is necessary to implement the instructional requirements of the Dignity for All Students Act (L. 2010, Ch 452). The proposed amendment does not impose any adverse economic impact, reporting, record keeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

##### Local Governments:

#### 1. EFFECT OF RULE:

The proposed amendment applies to each school district, board of cooperative educational services (BOCES) and charter school in the State. At present, there are 695 school districts (including New York City) and 37 BOCES. There are currently 189 operating charter schools.

#### 2. COMPLIANCE REQUIREMENTS:

The proposed amendment is necessary to implement the instructional requirements of the Dignity for All Students Act (L. 2010, ch. 482), including provisions to conform the Commissioner's regulations to Education Law section 801-a, as amended by the Act. The proposed amendment 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. The proposed amendment further provides that in public schools other than charter schools, such instruction shall be provided as part of a component on civility, citizenship and character education in accordance with section 801-a of the Education Law.

#### 3. PROFESSIONAL SERVICES:

The proposed amendment will not impose any additional professional services requirements.

#### 4. COMPLIANCE COSTS:

The proposed amendment is necessary to conform the Commissioner's Regulations with the Dignity Act and will not impose any additional costs beyond those imposed by the statute.

#### 5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any additional costs or technological requirements.

#### 6. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to implement the instructional requirements of the Dignity for All Students Act (L. 2010, ch. 482), including provisions to conform the Commissioner's regulations to Education Law section 801-a, as amended by the Act. The proposed amendment will not impose any additional compliance requirements or costs beyond those imposed by the statute. Because these statutory requirements specifically apply, it is not possible to provide exemptions from the proposed amendment's requirements or impose a lesser standard. The proposed amendment has been carefully drafted to meet statutory requirements and Regents policy while minimizing its the impact.

Consistent with the Dignity Act, the proposed amendment 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. The proposed amendment further provides that in public schools other than charter schools, such instruction shall be provided as part of a component on civility, citizenship and character education in accordance with section 801-a of the Education Law.

#### 7. LOCAL GOVERNMENT PARTICIPATION:

The proposed amendment was developed in cooperation with the Dignity Act Task Force State Policy Work Group which is comprised of other State agencies, the New York City Department of Education, and several not-for-profit organizations. Comments on the proposed amendment were solicited from school districts through the offices of the district superintendents of each supervisory district in the State.

#### *Rural Area Flexibility Analysis*

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

The proposed amendment applies to all school districts, boards of cooperative educational services (BOCES) and charter 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 a population density of 150 per square mile or less. There is currently one charter school located in a rural area.

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

The proposed amendment is necessary to implement the instructional requirements of the Dignity for All Students Act (L. 2010, ch. 482), including provisions to conform the Commissioner's regulations to Education Law section 801-a, as amended by the Act. The proposed amendment 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. The proposed amendment further provides that in public schools other than charter schools, such instruction shall be provided as part of a component on civility, citizenship and character education in accordance with section 801-a of the Education Law.

The proposed amendment will not impose any additional professional services requirements.

##### 3. COSTS:

The proposed amendment is necessary to conform the Commissioner's Regulations with the Dignity Act and will not impose any additional costs beyond those imposed by the statute.

##### 4. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to implement the instructional requirements of the Dignity for All Students Act (L. 2010, ch. 482), including provisions to conform the Commissioner's regulations to Education Law section 801-a, as amended by the Act. The proposed

amendment will not impose any additional compliance requirements or costs on entities in rural areas beyond those imposed by the statute. Because these statutory requirements specifically apply, it is not possible to provide an exemption from the proposed amendment's requirements or impose a lesser standard. The proposed amendment has been carefully drafted to meet statutory requirements and Regents policy while minimizing its impact on entities in rural areas.

Consistent with the Dignity Act, the proposed amendment 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. The proposed amendment further provides that in public schools other than charter schools, such instruction shall be provided as part of a component on civility, citizenship and character education in accordance with section 801-a of the Education Law.

The statute which the proposed amendment implements applies to all school districts and BOCES throughout the State, including those in rural areas. Therefore, it was not possible to establish different requirements for entities in rural areas, or to exempt them from the rule's provisions.

#### 5. RURAL AREA PARTICIPATION:

Comments on the proposed amendment were solicited from the Department's Rural Advisory Committee, whose membership includes school districts located in rural areas. The proposed amendments were developed in cooperation with the Dignity Act Task Force State Policy Work Group which is comprised of other State agencies, the New York City Department of Education, and several not-for-profit organizations.

#### *Job Impact Statement*

The proposed amendment is applicable to school districts, boards of cooperative educational services and charter schools and is necessary to implement the instructional requirements of the Dignity for All Students Act (L. 2010, Ch 452). The proposed amendment will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the proposed amendment that it will have a positive impact, or 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.

## EMERGENCY RULE MAKING

### Educational Requirements for Licensure As a Physical Therapist

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

**Filing No.** 845

**Filing Date:** 2012-08-17

**Effective Date:** 2012-08-17

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); and L. 2011, ch. 410

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

**Specific reasons underlying the finding of necessity:** The proposed amendment is necessary to conform the Regulations of the Commissioner of Education to the educational requirements for licensure as a physical therapist made by Chapter 410 of the Laws of 2011, which will take effect on August 17, 2012. Education Law § 6734(b), as amended by Chapter 410, requires applicants for licensure as a physical therapist in New York State to have completed a master's degree or higher in physical therapy. The proposed regulation implements this new law.

To preserve the public health and general welfare, emergency action is necessary to conform the Commissioner's regulations to Education Law

§ 6734(b) and to ensure the Department implements these new educational requirements for licensure in a timely manner.

It is anticipated that the proposed amendment will be presented for adoption as a permanent rule at the September 2012 Regents meeting, after publication in the State Register and expiration of the 45-day public comment period on proposed rule making, as required by the State Administrative Procedure Act.

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

**Purpose:** To conform the Regulations of the Commissioner of Education to chapter 410 of the Laws of 2011, which raised the educational requirements for licensure in the profession of physical therapy from a bachelor's degree to a master's degree in physical therapy.

**Text of emergency rule:** 1. The Regulations of the Commissioner of Education are amended, effective August 17, 2012, by the addition of a new section 52.41 to read as follows:

**52.41 Physical therapy.**

(a) Definitions. As used in this section:

(1) "Basic health sciences content area" shall mean coursework which includes, but is not limited to, the following curricular areas:

- (i) human anatomy specific to physical therapy;
- (ii) human physiology specific to physical therapy;
- (iii) neuroscience;
- (iv) kinesiology or functional anatomy; and
- (v) pathology.

(2) "Medical sciences content area" shall mean coursework in clinical medicine pertinent to physical therapy which includes, but is not limited to, the following curricular areas:

- (i) neurology;
- (ii) orthopedics;
- (iii) pediatrics;
- (iv) geriatrics;
- (v) cardiopulmonary;
- (vi) pharmacology; and
- (vii) general medical/surgical metabolic conditions.

(3) "Clinical sciences: examination and evaluation content area" shall mean coursework in examination and evaluation which includes, but is not limited to, the following curricular areas:

- (i) integumentary system;
- (ii) musculoskeletal system;
- (iii) neuromuscular system;
- (iv) cardiopulmonary system; and
- (v) metabolic problems.

(4) "Clinical sciences: interventions content area" shall mean coursework in interventions which includes, but is not limited to, the following curricular areas:

- (i) integumentary interventions;
- (ii) musculoskeletal interventions;
- (iii) neuromuscular interventions; and
- (iv) cardiopulmonary interventions.
- (v) airway clearance techniques;
- (vi) debridement and wound care;
- (vii) electrotherapeutic modalities;
- (viii) functional training in community and work, job, school, or play reintegration, including instrumental activities of daily living, work hardening, and work conditioning;

(ix) functional training in self-care and home management, including activities of daily living and instrumental activities of daily living;

- (x) manual therapy techniques;
- (xi) patient-related instruction;
- (xii) physical agents and mechanical modalities;
- (xiii) prescription, application, and, as appropriate, fabrication of assistive, adaptive, orthotic, protective, supportive, and prosthetic devices and equipment; and

(xiv) therapeutic exercise, including aerobic conditioning.

(5) "Related professional content area" shall mean coursework which includes, but is not limited to, the following curricular areas:

- (i) professional behaviors;
- (ii) administration;
- (iii) community health;
- (iv) research and clinical decision making;
- (v) educational techniques;
- (vi) medical terminology;
- (vii) communication related to client/patient care;
- (viii) legal and ethical aspects of physical therapy practice;
- (ix) psychosocial aspects in physical therapy practice;
- (x) emergency procedures;
- (xi) cultural competency; and
- (xii) consultation, screening and delegation.

(6) "Clinical education content area" shall mean clinical practice experiences under the following conditions:

(i) Such clinical practice experiences shall consist of no less than 800 total hours of clinical education supervised by a physical therapist that include at least 560 hours of full-time clinical internships. For purposes of this subparagraph full-time shall mean no less than 35 hours per week.

(ii) Clinical education shall include physical therapist-supervised application of physical therapy theory, examination, evaluation, and intervention.

(b) Curriculum. In addition to meeting all applicable provisions of this Part, to be registered as a program leading to licensure in physical therapy which meets the requirements of section 77.1 of this Chapter, the program shall result in a master's or higher degree, or its equivalent, and shall require the student to have completed at least 150 semester credit hours or its equivalent of postsecondary study, including a total of at least 90 semester credit hours, or their equivalent, in the following content areas:

- (1) basic health sciences;
- (2) medical sciences;
- (3) clinical sciences: examination and evaluation;
- (4) clinical sciences: interventions;
- (5) related professional; and
- (6) clinical education.

2. Section 77.1 of the Regulations of the Commissioner of Education is amended, effective August 17, 2012, as follows:

**77.1 Professional study of physical therapy.**

(a) As used in this section, acceptable accrediting agency shall mean an organization accepted by the department as a reliable authority for the purpose of accrediting physical therapy programs, having accreditation standards that are substantially equivalent to the requirements for programs registered as leading to licensure in physical therapy pursuant to section 52.41 of this Title, and applying its criteria for granting accreditation of programs in a fair, consistent, and nondiscriminatory manner, such as an agency recognized for this purpose by the United States Department of Education.

(b) To meet the professional education requirement for licensure in this State, the applicant shall present evidence of:

[(a)] (1) a [bachelor's] master's or higher degree in physical therapy from a program registered by the department or accredited by [a national accreditation] an acceptable accrediting agency [which is satisfactory to the department]; or

[(b)] a certificate in physical therapy from a program registered by the department or accredited by a national accreditation agency which is satisfactory to the department following the completion of a bachelor's degree from an institution acceptable to the department; or]

[(c)] (2) completion of a program satisfactory to the department [of not less than four years of postsecondary study which includes the professional study of physical therapy] which is substantially equivalent to a [certificate] master's degree program in physical therapy registered by the department and which culminates in the degree or diploma accepted by the civil authorities of the country in which the studies were completed as [preparation in] satisfying the educational requirements for the practice of physical therapy in that country.

3. The Regulations of the Commissioner of Education are amended, effective August 17, 2012, by the addition of a new section 77.11, to read as follows:

**77.11 Endorsement.**

An applicant for endorsement of a license to practice physical therapy issued by another jurisdiction shall satisfy all requirements of section 59.6 of this Title, except as herein provided.

(a) The applicant shall present evidence satisfactory to the State Board for Physical Therapy of at least three years of professional practice of physical therapy acceptable to the State Board for Physical Therapy following initial licensure and within the seven years immediately preceding application for licensure by endorsement; and

(b) In lieu of the professional study requirements set forth in section 77.1 of this Part, the applicant shall have completed an education that meets standards acceptable to the Department, which may include the standards of an acceptable accrediting agency, as defined in section 77.1(a) of this Part, in effect at the time the applicant graduated from his or her physical therapy program.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-27-12-00009-P, Issue of July 3, 2012. The emergency rule will expire November 14, 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

**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 authorizes the Board of Regents to supervise the admission to and regulation of the practice of the professions.

Subdivision (1) of section 6506 of the Education Law authorizes the Board of Regents to promulgate rules regarding the admission to and practice of the professions.

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

Subdivision (b) of Education Law section 6734, as amended by Chapter 410 of the Laws of 2011 as of August 17, 2012, raises the educational requirements for licensure as a physical therapist in this State from a bachelor's degree to a master's degree in physical therapy or as determined to be equivalent in accordance with the Regulations of the Commissioner of Education.

Chapter 410 of the Laws of 2011 amends Education Law § 6734(b), effective August 17, 2012, to increase the educational requirements for licensure as a physical therapist from a bachelor's degree to a master's degree in physical therapy. Chapter 410 further provides that the amendments made to Education Law § 6734(b) by Chapter 410 will not apply to physical therapists who have attained licensure in this State prior to such effective date.

**2. LEGISLATIVE OBJECTIVES:**

The proposed amendment implements the intent of the aforementioned statutes, which collectively provide the State Education Department ("Department") with the authority to supervise the practice of the professions for the benefit and protection of the public. The proposed amendment will conform the Regulations of the Commissioner of Education to Chapter 410 of the Laws of 2011, which raised the educational requirements for licensure in the profession of physical therapy from a bachelor's degree to a master's degree in physical therapy. The proposed amendment is necessary to ensure that the Department implements these new educational requirements in a timely manner.

**3. NEEDS AND BENEFITS:**

The proposed amendment is necessary to conform the Commissioner's regulations to Education Law § 6734(b), as amended by Chapter 490 of the Laws of 2011, which increased the educational requirements to practice as a physical therapist in this State to a master's degree or higher. In particular, the proposed amendment would amend section 77.1 of the Commissioner's regulations to replace the minimum educational requirements of a bachelor's degree with a master's degree or equivalent and would eliminate a certificate in physical therapy, together with a bachelor's degree, as acceptable education. Section 77.1, as amended, would allow for the completion of a foreign professional physical therapy program that is substantially equivalent to a master's degree program registered by the Department to satisfy the educational requirements for licensure.

The proposed amendment would add a new section 52.41 to the Commissioner's regulations to establish the educational program requirements for registration by the Department as a licensure-qualifying program in physical therapy. The proposed amendment would also add a new section 77.11 to the Commissioner's regulations to establish requirements for the endorsement of a license issued by another jurisdiction to practice physical therapy in New York State.

**4. COSTS:**

(a) There are no additional costs to state government. Although the proposed amendment will require the Department to expend time and resources in ensuring programs qualify for licensure and ensuring applicants for licensure meet the new educational requirements, it is anticipated that the fees for licensure will cover a substantial portion of such costs and the Department will not incur any significant additional expenses.

(b) There are no additional costs to local government.

(c) Cost to private regulated parties. The proposed amendment is not expected to increase costs. The amendment is necessary to conform the Commissioner's regulations to Education Law § 6734(b).

(d) There are no additional costs to the regulating agency. As previously stated, it is anticipated that any costs associated with implementing these new requirements will be absorbed by existing resources.

**5. LOCAL GOVERNMENT MANDATES:**

The proposed amendment strictly relates to the educational qualifications required of applicants for licensure as physical therapists. The amendment does not impose any additional program, service, duty, or responsibility upon local governments.

**6. PAPERWORK:**

The proposed amendment will not impose any new reporting requirements.

**7. DUPLICATION:**

The amendment does not duplicate any existing state or federal requirement.

**8. ALTERNATIVES:**

There are no viable alternatives to the proposed amendment to section 77.1 of the Regulations of the Commissioner of Education, as the amendment is necessary to conform the regulations to the recent changes made in law. With regard to the proposed addition of section 52.41 of the Regulations of the Commissioner of Education, alternative educational requirements were discussed by the State Board for Physical Therapy and with interested parties, and the proposed addition was the result of those discussions. Similarly, there were discussions concerning the proposed endorsement provisions in the addition of section 77.11 of the Commissioner's regulations with regard to the educational requirements and experience requirements.

**9. FEDERAL STANDARDS:**

Federal standards do not apply, nor does the proposal exceed federal standards.

**10. COMPLIANCE SCHEDULE:**

It is expected that the Department will be able to comply with the effective date of the statute, August 17, 2011. Applicants for licensure will need to comply with the new statute and corresponding regulations on and after August 17, 2011.

**Regulatory Flexibility Analysis**

The proposed amendment conforms the Commissioner's regulations to Education Law § 6734(b), which was amended by Chapter 410 of the Laws of 2011, effective August 17, 2012. Effective August 17, 2012, Education Law § 6734(b), will increase the educational requirements for licensure as a physical therapist in New York State from a bachelor's degree to a master's degree in physical therapy or the equivalent. The proposed amendment amends the regulations to conform to Education Law § 6734(b) and makes related changes regarding the educational requirements for licensure and the endorsement of licenses issued by other jurisdictions.

The proposed amendment will not impose any additional reporting, recordkeeping, or other compliance requirement, or any adverse economic impact on small businesses or local governments. Because it is evident from the nature of the proposed amendment that it will 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 amendment will apply to all applicants for licensure to practice in New York State as of August 17, 2012 and accordingly, will apply to 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 proposed amendment is necessary to conform the Commissioner's regulations to Education Law § 6734(b), as amended by Chapter 410 of the Laws of 2011, which increased the educational requirements for licensure to practice as a physical therapist in New York State to a master's degree or higher. In particular, the proposed amendment would amend section 77.1 of the Commissioner's regulations to replace the minimum educational requirements of a bachelor's degree with a master's degree or equivalent and would eliminate a certificate in physical therapy, together with a bachelor's degree, as acceptable education. Section 77.1, as amended, would allow for the completion of a foreign professional physical therapy program that is substantially equivalent to a master's degree program registered by the Department to satisfy the educational requirements for licensure. The proposed amendment would also add a new section 52.41 to the Commissioner's regulations to establish the educational program requirements for registration by the Department as a licensure-qualifying program in physical therapy. Currently, all licensure-qualifying physical therapy programs in the State offer doctoral-level programs.

**3. COSTS:**

The proposed amendment does not impose any additional cost on regulated parties.

**4. MINIMIZING ADVERSE IMPACT:**

The proposed amendment merely conforms the Commissioner's regulations to State statute. Because of the nature of the proposed rule, alternative approaches for rural areas were not considered.

**5. RURAL AREA PARTICIPATION:**

Comments on the proposed amendment were solicited statewide from organizations representing all parties having an interest in the practice of physical therapy. Included in this group were members of the State Board for Physical Therapy, educational institutions, and professional associa-

tions representing the profession. These groups, which have representation in rural areas, have been provided notice of the proposed rule making and opportunity to comment on the proposed amendment.

#### **Job Impact Statement**

The proposed amendment implements Education Law § 6734(b), as amended by Chapter 490 of the Laws of 2011, effective August 17, 2012, by increasing the educational qualifications required to become licensed as a physical therapist in this State from a bachelor's to a master's degree. The proposed amendment is necessary to conform the Commissioners' regulations to the new statute, which will take effect on August 17, 2012. Chapter 410 provides that the amendments made to Education Law § 6734(b) by Chapter 410 will not apply to physical therapists who have attained licensure in this State prior to such effective date. Additionally, all physical therapy programs in the State offer physical therapy programs at the doctorate level.

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

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## Department of Environmental Conservation

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### NOTICE OF ADOPTION

#### **Recreational and Commercial Harvest of River Herring (Anadromous Alewife and Blueback Herring) in New York**

**I.D. No.** ENV-22-12-00004-A

**Filing No.** 868

**Filing Date:** 2012-08-21

**Effective Date:** 2012-09-05

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

**Action taken:** Amendment of Parts 10, 11, 18, 19, 35, 36 and 40 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 03-0301, 11-0303, 11-0305, 11-0315, 11-0317, 11-0319, 11-1301, 11-1303, 11-1305, 11-1501, 11-1503, 13-0105 and 13-0339

**Subject:** Recreational and commercial harvest of river herring (anadromous alewife and blueback herring) in New York.

**Purpose:** Reduce fishing mortality of river herring stocks in New York to achieve sustainable fisheries required by ASMFC Amendment 2.

**Substance of final rule:** 1. DEC proposes to amend 6 NYCRR Part 10 "Sport fishing" as follows:

1.1 Adopt a new section 10.10 "Taking of anadromous river herring (alewife and blueback herring) in the Hudson River and its tributaries and embayments." Definitions of the Hudson River, tributaries and embayments are described.

1.2 Possession of river herring is not allowed in the Delaware River and its tributaries above Port Jervis New York.

1.3 The following restrictions apply to the Hudson River, its tributaries and embayments:

a. A season will be adopted from March 15 to June 15.

b. The daily possession limit will change from unlimited take to 10 fish per individual angler OR a maximum boat limit of 50 per day for a group of boat anglers, whichever is lower. Party or charter boat operators can qualify for possessing in excess of the individual recreational possession limit prior to their charter trips; see (e) below.

c. Manner of take will be adopted as follows: In the Hudson River, manner of take is by angling or by personal use nets; in a Hudson River tributary or embayment, manner of take is by angling only.

d. The size of personal use nets remains the same for dip nets (14 inches round or 13 inches by 13 inches square), cast net (10 feet in diameter), and seine nets (36 square feet or smaller). Scap/lift net size is reduced from 36 square feet to 16 square feet. Personal use nets must be stowed in a close container when entering a tributary or embayment.

e. To be eligible to possess more than an individual daily limit, operators of party or charter boats must register with the department and provide a copy of their U.S. Coast Guard license and period of expected operation to the NYSDEC, Hudson River Fisheries Unit, New Paltz, New York. Operators possessing a marine and coastal district party and charter boat license need to provide their permit number and the period of expected operation to the NYSDEC.

f. Registered party and charter boat operators shall display a valid Hudson River river herring decal provided by the department on their vessel, whenever the vessel is operating as a party or charter fishing boat.

2. DEC proposes to amend 6 NYCRR Part 11, "More than one species" as follows:

Possession and commercial take for sale of anadromous river herring is not allowed in the Delaware River and its tributaries above Port Jervis NY.

3. DEC proposes to amend 6 NYCRR Part 18, "Taking Bait" as follows:

Allows the taking of river herring as bait by use of nets in the Hudson River as defined in Part 10.

4. DEC proposes to amend 6 NYCRR Part 19, "Use of bait" as follows:

Identifies the water bodies where anadromous alewife and blueback herring may be used as bait: in the Hudson River, its tributaries and embayments, as defined in Part 10.

5. DEC proposes to amend 6 NYCRR Part 35, "Licenses" to:

Remove anadromous river herring from the commercial bait list. A note indicates that the taking of anadromous river herring for all purposes is regulated pursuant to Parts 10 and 36 of Title 6.

6. DEC proposes to amend 6 NYCRR Part 36, "Gear and Operation Of Gear" as follows:

6.1 Requires that licensed commercial net gear to be marked with the licensee's permit number in visible black numbers on an orange background. A net shall have attached a marked floating buoy; a scoop, scap or dip net shall be marked on the fixed handle to the net.

6.2 Adds the Hudson River tributaries and embayments to the restricted areas where nets are not allowed to be used.

6.3 Changes the area where only a drift gill net can be used or possessed from the area between the Bear Mountain Bridge and the Newburgh-Beacon Bridge to the area between the Bear Mountain Bridge and the Castleton-on-Hudson (Interstate 90 spur and railroad) bridges.

6.4 During the Escapement period, the exception of commercially licensed fyke, scap and minnow trap nets is removed. The Escapement period will apply to all commercially licensed nets.

7. DEC proposes to amend 6 NYCRR Part 40, "Marine Fish" as follows:

7.1 Adds the new species Anadromous river herring to 40.1(f) Table A Recreational Fishing. Possession of anadromous river herring is prohibited, except north of the George Washington Bridge at river mile 11 in the Hudson River. The general provisions in subdivision 40.1(b) apply; anadromous river herring may not be possessed in the waters anywhere inland from such shores (of the marine and coastal district of New York) in the counties of Suffolk, Nassau, Queens, Kings, Richmond, New York, Bronx, and those portions of Westchester County within the marine and coastal district bordering on Long Island Sound.

7.2 Adds the new species Anadromous river herring to 40.1(i) Table B Commercial Fishing. No open season is allowed. No possession of anadromous river herring is allowed except that vessels fishing exclusively in the federal ocean waters of the Exclusive Economic Zone, while operating under a valid federal permit for Atlantic mackerel and/or Atlantic herring, may possess river herring up to a maximum of five percent, by weight, of all species possessed. A person shall not barter, sell, offer for sale, or expose for sale, any river herring so possessed.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in sections 10.5 and 40.1.

**Text of rule and any required statements and analyses may be obtained from:** Kathryn A. Hattala, Department of Environmental Conservation, 21 South Putt Corners Road, New Paltz, NY 12561, (845) 256-3071, email: kahattal@gw.dec.state.ny.us

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

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

Changes made to the last published rule do not necessitate revision to the Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement previously published on May 30, 2012. Non-substantive changes were made to clarify the formatting directions for the text of the rule.

**Assessment of Public Comment**

Regulation change affecting the Hudson River and its tributaries.

Twelve individuals sent in written comments on the regulation change proposed for the Hudson River Estuary and its tributaries. Comments ranged from full support of the regulation change to individuals taking issue with a particular section of the proposed regulation.

- Comment: Creel limit: Most anglers (5 of 8 anglers including two charter operators) specifically supported the creel limit implementation. One angler said we did not go far enough and suggested a two day moratorium per week during the season. One charter fisher was against the creel limit.

Response: Most anglers understand that in order to provide for a sustainable fishery, as defined in the Atlantic States Marine Fisheries Commission (ASMFC) Amendment 2 to the shad and river herring plan, New York proposed the creel limit to reduce mortality on the Hudson spawning stock. Individual anglers will be limited to 10 fish per day. Charter boat businesses have an additional allowance for up to a maximum of 50 fish per day. DEC recognizes that as a business, charter boat businesses need to be prepared for fishing when fares arrived. The department will only require that charters register with the department and carry a decal onboard their boat to aid law enforcement officers to identify charters versus individual anglers.

- Comment: Two recreational anglers and one charter fisher were opposed to the net ban in the tributaries. One recreational and one charter fisher supported the net ban in the tributaries.

Response: The primary purpose of the regulations is to reduce mortality on spawning fish. Many river herring spawn in the Hudson's tributaries; they often concentrate in large numbers near or below obstructions (most are dams) making them an easy target for netters. Netters also can capture many fish at one time; numbers caught can be much higher than the proposed 10 fish creel limit increasing the possibilities for bycatch mortality, injury and poaching. A fishery-wide ban on the use of nets in the tributaries will equally affect both commercial and recreational fishers. However, recreational anglers will be allowed to continue to fish in the tributaries using hook and line.

- Comment: Four anglers commented that they do not want a reduction in size of scap nets.

Response: Both commercial and recreational netters can use the same size net. The proposed regulation will impose a recreational creel limit of 10 fish per angler; a smaller recreational net size will not greatly reduce the ability to catch fish but will most likely reduce the numbers of fish caught, aiding in compliance with the proposed creel limit. Commercial netters currently do not have a limit on take numbers. The distinction of gear size will also aid law enforcement officers in recognizing recreational and commercial fishers at a distance.

- Comment: One charter and one bait shop owner opposed the tributary closure to commercial gears as they stated the proposed regulation would affect their business by eliminating their supply of bait. The charter fisher mistakenly thought that commercial fishers will have to use smaller size gear to catch fish.

Response: Commercial netters, along with recreational netters, were excluded from the tributaries where river herring concentrate in order to reduce mortality on the stock (the numbers of fish caught where they are spawning). Commercial fishers can continue to fish in the main-stem river to supply bait to bait shops and/or for charter fishing.

Commercial fishers have no limit on the amount of fish they can catch, in addition to being able to use larger size nets. The intent of the proposed regulations is to reduce mortality. No other bait shop owners or charter operators had an issue with the net closure in the tributaries.

- Comment: One charter boat operation, a bait shop owner and an angler commented on the possible negative economic and tourism impacts that the river herring regulations would have on the Hudson's existing spring striped bass recreational fishery.

Response: River herring are used as bait in the spring striped bass fishery. The objective of the regulation is to reduce mortality on the herring stock; the regulations will not eliminate their use as bait in this fishery. The department recognizes that fishers will have to make an adjustment to their fishing behavior in response to the new regulations; a decrease in participation in the striped bass fishery is not expected.

No comments were received regarding the new regulations affecting the Delaware River and its tributaries, Bronx, Kings, Manhattan, Nassau, Richmond, Suffolk, and Queens Counties and Westchester County streams that empty into the East River or Long Island Sound.

## AMENDED NOTICE OF ADOPTION

### Model Environmental Assessment Forms

**I.D. No.** ENV-47-10-00015-AA

**Filing No.** 871

**Filing Date:** 2012-08-21

**Effective Date:** 2013-04-01

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

**Action taken:** Amendment of section 617.20 of Title 6 NYCRR.

**Amended action:** This action amends the rule that was filed with the Secretary of State on January 25, 2012, to be effective October 1, 2012, File No. 00056. The notice of adoption, I.D. No. ENV-47-10-00015-A, was published in the February 15, 2012 issue of the *State Register*.

**Statutory authority:** Environmental Conservation Law, section 8-0113(2)(l)

**Subject:** Model environmental assessment forms.

**Purpose:** To provide model forms that may be used to conduct environmental assessments under the State Environmental Quality Review Act.

**Substance of amended rule:** The environmental assessment forms ("EAF") are model forms promulgated by the Department of Environmental Conservation ("DEC") and appended to the State Environmental Quality Review Act ("SEQR") regulations as required by the SEQR (see ECL § 8-0113). The EAFs are used by agencies and boards involved in the SEQR process to assess the environmental significance of actions they may be undertaking, funding or approving. The "Full EAF" has not been substantially revised since 1978 while its sister form, the "Short EAF," was last substantially revised in 1987. In the years since the EAFs were first created, DEC and other SEQR practitioners have gathered a great deal of experience with environmental analyses under SEQR. DEC has brought this experience to bear by preparing modern Full and Short EAFs. The forms, which replace the existing ones set out at 6 NYCRR 617.20, appendices A, B, and C, now include consideration of emerging environmental issues such as climate change. The revised EAFs have been changed to better address planning, policy and local legislative actions, which can have greater impacts on the environment than individual physical changes.

In addition to these substantive changes, the structure of the forms has been updated, to make them more straightforward to use. DEC has merged the substance of the Visual EAF Addendum (6 NYCRR 617.20, former Appendix B) into the Full EAF and then eliminated the Visual EAF Addendum. This will help reduce the multiplicity of forms. The determination of significance has been merged into Part 3 of the forms. Part 2 of the Short Form has been conformed to the structure of Part 2 of the Full EAF.

Both forms have been reworked and modified in response to public comment. The forms as adopted are available on the DEC's website at the following address: <http://www.dec.ny.gov/permits/6061.html>. The effective date of the new forms is April 1, 2013.

**Text of amended rule and any required statements and analyses may be obtained from:** Robert Ewing, Environmental Analyst, Department of Environmental Conservation, 625 Broadway, Albany, New York 12233, (518) 402-9167, email: [depprmt@gw.dec.state.ny.us](mailto:depprmt@gw.dec.state.ny.us)

**Revised Regulatory Impact Statement, Regulatory Flexibility Analysis and Rural Area Flexibility Analysis**

SEQR Environmental Assessment Forms, 6 NYCRR 617.20, repeal of appendices A, B and C and adoption of appendices A and B

Revised regulatory impact and flexibility analyses are required when a rule as adopted includes a substantial change from the rule as proposed and the change requires modification of the statements. A revised regulatory impact statement and flexibility analyses are not required here as the information presented in the previously filed statements are adequate and complete as to the environmental assessment forms as revised through the public comment process. The forms do not contain any substantial revisions and the revisions do not necessitate that such statement be modified. Revisions to the forms were made based on public comments. The changes substantially reduced the length and complexity of completing the forms.

The changes reduced rather than increased any regulatory burden as follows:

DEC reduced the length of Part I of the Full EAF by, among other ways, eliminating DEC centric and redundant questions (except where they are fundamental to environmental analysis).

DEC reduced the complexity of questions that would require even a more sophisticated applicant to hire a consultant to answer the question such as on traffic impacts.

Under the revised forms, lead agencies will not have to discuss small impacts in Part 3 (which was not the intent) by reinserting an improved table into Part 2 of the Full EAF that allows the project sponsor to categorize impacts as “no, or small impact” or “moderate to large impact.” If an impact is judged to be not present or small, no further analysis is required. If the lead agency determines that an impact may be moderate to large, then it must explain the impact as being not significant or significant in Part 3. The new table strikes a balance that allows lead agencies to dismiss small impacts and ones that should require a more detailed explanation as to why they are or are not significant. The Short EAF has been conformed to the Full EAF so both forms have the same method of analysis.

**Revised Job Impact Statement**

No change is made to the following statement that appeared in the State Register on November 24, 2010, in connection with the revised environmental assessment forms. The updating of the State Environmental Quality Review Act (SEQR) environmental assessment forms (EAF) should have no impact on existing or future jobs and employment opportunities. EAFs are expected to be completed in part by project sponsors and ultimately by lead agencies to determine whether a particular action may have a potentially significant, adverse impact on the environment. If the lead agency answers in the affirmative, then it must prepare or cause to be prepared an environmental impact statement the purpose of which is to evaluate the identified impacts and how to avoid or mitigate them. Local governments using EAFs or businesses who may fill in portions of the forms would be required to continue to do this, whether DEC revises the forms or continues to use the existing forms. While there may be a small increase in time to complete the new EAFs, this time should be offset by the decrease in time that is now spent in back-and-forth discussions or correspondence between project sponsors and governmental agencies to answer additional questions and clarify points that a new, more comprehensive EAF would include from the beginning. DEC also expects to make greater use of electronic information technologies with the new forms which may help to hasten the information gathering process, which is the object of the forms. DEC proposes to merge the substance of the Visual EAF Addendum (6 NYCRR 617.20, Appendix B) into the full EAF (6 NYCRR 617.20, Appendix A), and then eliminate the Visual EAF form. This will help reduce the multiplicity of forms.

A Job Impact Statement is not submitted with this rulemaking proposal because the proposal will not have a “substantial adverse impact on jobs or employment opportunities,” which is defined in the State Administrative Procedure Act Section 201-a to mean “a decrease of more than one hundred full-time annual jobs and employment opportunities, including opportunities for self-employment, in the state, or the equivalent in part-time or seasonal employment, which would be otherwise available to the residents of the state in the two-year period commencing on the date the rule takes effect.” The proposed changes to the EAFs are not expected to have any such effect and most likely will have no impact on jobs or employment opportunities.

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

**Conforming the Requirement for Best Available Retrofit Technology to Recent Statutory Changes and Court Decisions**

**I.D. No.** ENV-50-11-00003-RP

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

**Proposed Action:** Amendment of Part 248 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 1-0101, 3-0301, 19-0103, 19-0105, 19-0301, 19-0303, 19-0305, 19-0323, 71-2103 and 71-2105

**Subject:** Conforming the requirement for best available retrofit technology to recent statutory changes and court decisions.

**Purpose:** To make Part 248 consistent with the amendments to New York ECL section 19-0323 and recent Court decisions.

**Text of revised rule:** Subdivision 248-1.1(a) through Paragraph 248-1.1(b)(9) remain unchanged.

Paragraph 248-1.1(b)(10) is revised as follows:

(10) “Contractor” means [any person or entity that contracts directly or indirectly with a regulated entity to provide labor, services, materials and/or equipment on behalf of the regulated entity. Contractor includes but is not limited to prime contractor, subcontractor, and any contractor(s) hired by such subcontractor] *prime contractor*.

Paragraphs 248-1.1(b)(11) through (19) remain unchanged.

Paragraphs 248-1.1(b)(20) is revised as follows:

(20) “On behalf of” means: [to provide, by a contractor, labor, services, materials and/or equipment to a regulated entity which are integral to the performance of regulated entity work by a regulated entity.] *all heavy duty vehicles used to perform regulated entity work by a prime contractor. Those vehicles include, but are not limited to, heavy duty vehicles owned, operated or leased by a prime contractor.*

Paragraphs 248-1.1(b)(21) through (22) remain unchanged.

Paragraph 248-1.1(b)(23) is revised as follows:

(23) “Prime contractor” means any person or entity [which] *that contracts directly with [a] the regulated entity to perform regulated entity work (“prime contract”) and who is responsible for the completion of the contract with the regulated entity. This definition shall not include subcontractors.*

Paragraphs 248-1.1(b)(24) through (25) remain unchanged.

Paragraph 248-1.1(b)(26) is revised as follows:

(26) “Regulated entity work” means [work or services performed or provided by the regulated entity.] *labor, services, material and/or equipment that is provided by the regulated entity through its employees or prime contractors except it does not include labor, services, materials and/or equipment provided by:*

- (i) *a shipping company (including overnight delivery companies);*
- or
- (ii) *a manufacturer or delivery company that does not deliver materials or equipment to the regulated entity on a regular and frequent basis.*

Paragraph 248-1.1(b)(27) through Subdivision 248-3.1(d) remain unchanged.

Subdivisions 248-3.1(e) through Paragraph 248-3.1(f)(1) are revised as follows:

(e) *On or after December 31, 2013, [All] all diesel powered heavy duty vehicles owned by, operated by, or leased by each BART regulated entity or which are owned by, operated by, or leased by a contractor and used to provide labor, services, materials and/or equipment on behalf of a BART regulated entity to perform the regulated entity work shall utilize and maintain [the best available retrofit technology according to the following schedule:*

(1) at least 33 percent of all such vehicles shall have BART by December 31, 2008;

(2) at least 66 percent of all such vehicles shall have BART by December 31, 2009;

(3) all such vehicles shall have BART by December 31, 2010.]

*BART.*

(f) In order to comply with the requirements of Subdivision 248-3.1(e), the BART regulated entity or contractor shall first perform a HDV inventory according to a department prescribed format. The BART regulated entity or contractor shall then select one of the following [two] *three* options for each of its inventoried HDVs:

(1) Option 1 - Replacement or Retirement

Paragraph 248-3.1(f)(1) through Clause 248-3.1(f)(2)(ii) (“i”) remain unchanged.

A new Paragraph 248-3.1(f)(3) is added as follows:

(3) *Option 3 - Heavy Duty Vehicle/Engine Useful Life Waiver*  
*Provisions for obtaining a heavy duty vehicle/engine useful life waiver are described in Subdivision 248-4.1(c) of this Part.*

Subdivision 248-3.1(g) through Paragraph 248-4.1(a)(1) remain unchanged.

Paragraph 248-4.1(b)(1) through 248-7.1(a) are revised as follows:

(b) Application for Waiver of BART Requirements

(1) Regulated entities and contractors may apply for a waiver from the BART requirements of this Part. All waiver applications submitted to the department shall be provided in a format as prescribed by the

department. Such application shall be submitted by the state agency commissioner or other responsible person of the regulated entity or contractor. If, through the BART evaluation and selection process noted in Paragraph 248-3.1(f)(2) of this Part above, it is determined by the BART regulated entity or contractor that none of the PM reduction classification level technologies are applicable or available for a specific covered vehicle, such BART regulated entity or contractor may submit an application for a waiver for the commissioner's approval. *A copy of the department's approval of a vehicle waiver shall be kept with the vehicle and provided to the department upon request.* Any application for a waiver of BART requirements shall contain the following information:

(i) the name and address of the BART regulated entity or contractor applying for approval of the waiver including the name and phone number of the responsible party;

(ii) the name and identification number of the subject contract, if applicable;

(iii) identification of the specific heavy duty covered vehicle or engine that is the subject of the waiver application;

(iv) the name of the engine manufacturer, engine model year, engine family, and engine series;

(v) VIN, if applicable;

(vi) identification of the required BART; and

(vii) an explanation as to why the BART is not available or not applicable. Such explanation shall include all documentation generated in the BART evaluation and selection process described in Paragraph 248-3.1(f)(2) of this Part.

(c) *Heavy Duty Vehicle/Engine Useful Life Waiver*

(1) *The department shall issue a waiver of the requirements of this part to a BART regulated entity or contractor upon receipt of request from such entity or contractor provided that such vehicle will be permanently taken out of service in New York State on or before December 31, 2013. The waiver form will be prescribed by the department. A copy of a department issued waiver for a vehicle shall be kept with the vehicle and provided to the department upon request.*

[(c)] (d) *Applications and forms shall be sent to:*

Director, Bureau of Mobile Sources & Technology Development

Division of Air Resources

New York State Department of Environmental Conservation

625 Broadway

Albany, NY 12233-3255

[(d)] (e) The commissioner will make a determination whether to approve the waiver of BART or ULSD requirements no later than 90 days after receipt of the application.

[(e)] (f) *Waivers issued by the department pursuant to Subdivisions 248-4.1(a) and 248-4.1(b) shall expire one year after issuance, unless the BART or ULSD regulated entity or contractor submits a renewal application and the commissioner approves such application, in accordance with the provisions set forth in this subdivision. Any such application for renewal shall be submitted no later than 30 days prior to the expiration date of the approval.*

248-5.1 *Vehicle and Equipment Labeling Requirements*

(a) For each covered vehicle that has BART installed or that received a [BART] waiver pursuant to Subdivisions 248-4.1(b) and 248-4.1(c), a label shall be affixed to the vehicle in plain view in the form of a legible and durable label. Each label shall contain the following information:

(1) for those vehicles that have BART installed:

(i) name of the BART regulated entity or contractor whose vehicle received BART;

(ii) vehicle identification number (if appropriate) and engine serial number;

(iii) specific BART product name installed on the vehicle;

(iv) date of installation of the BART product;

(v) PM reduction classification level number;

(vi) vehicle or engine model year;

(vii) name of the engine manufacturer, family and series;

(viii) engine horsepower; and

(ix) if CARB verified technology, the CARB designated diesel emission control strategy family name.

(2) for those vehicles that have received a [BART] waiver pursuant to Subdivisions 248-4.1(b) and 248-4.1(c):

(i) name of the BART regulated entity or contractor receiving the waiver;

(ii) date waiver issued;

(iii) vehicle identification number (if appropriate) and engine serial number;

(iv) vehicle or engine model year; and

(v) name of the engine manufacturer.

*In lieu of a waiver label, a copy of the department issued waiver can be kept with the vehicle.*

(3) the label shall be maintained in a manner that retains its legibility for the entire life of the vehicle.

(b) For each vehicle that has BART installed, a label shall be placed on/near the fuel fill line of such vehicle stating "use ULSD fuel only" unless the selected BART does not require the use of ULSD.

248-6.1 *Reporting Requirements*

(a) On or before November 1, 2008 and every year thereafter, regulated entities subject to the requirements of this Part shall report to the department on the use of ULSD and BART as described in Subdivision 248-6.1(b) of this Part for all vehicles, including covered vehicles operated on behalf of regulated entities. Contractors shall report required information as described in Subdivision 248-6.1(b) of this Part to the regulated entity on a schedule to be determined by the regulated entity.

(b) *Regulated Entity Reporting*

(1) Regulated entities shall report to the department on an annual basis. The regulated entity shall perform a HDV inventory to be submitted with the annual report for the regulated entity fleet. [An] *A vehicle inventory format and an annual report format will be prescribed by the department. The inventory shall be performed within 30 days after the effective date of this Part and updated in order to determine compliance with the BART requirements of Subdivision 248-3.1(e) of this Part. Based on the information contained in the inventory, the regulated entity shall submit the first annual report to the department by November 1, 2008. Thereafter, and based on updated inventory information, annual reports shall be submitted to the department by November 1st of each year. The regulated entity submittal to the department shall include the regulated entity's vehicle inventory and annual report, along with the regulated entity's contractors' annual reports. [The annual report shall distinguish between the regulated entity vehicles and the contractor vehicles.] The information contained in the annual report submitted by the regulated entity shall include, but not be limited to:*

(i) contact information

(a') For the regulated entity, include the name of the regulated entity, contact person and work phone number;

(b') For the contractor, include the name of the contractor, contact person and work phone number;

(ii) For the regulated entity vehicles and certain contractor vehicles. For vehicles owned or operated by contractors, the following only applies to covered vehicles that perform work on the contract site. *Contractors shall submit their vehicle inventory and annual report to their contracting agency (regulated entity) on a schedule to be determined by the regulated entity.*

(a') the number of diesel fuel-powered motor vehicles owned or operated;

(b') the number of such motor vehicles that were powered by ULSD;

(c') the total number of on road diesel fuel-powered motor vehicles owned or operated having a GVWR of more than 8,500 pounds;

(d') the total number of off road vehicles owned or operated;

(e') the number of such on road and off road vehicles that utilized BART, including a breakdown by BART installation date, vehicle model, VIN (if applicable), engine year and the type and classification level of technology used for each vehicle including the CARB designated diesel emission control strategy family name, if applicable;

(f') the number of such motor vehicles that are originally equipped or have been replaced/repowered with an engine certified to the applicable 2007 USEPA standard for particulate matter as set forth in section 86.007-11 of Title 40 of the Code of Federal Regulations (see Table 1, Section 200.9 of this Title) or to any subsequent USEPA standard for particulate matter that is at least as stringent;

(g') the number of such vehicles that have been replaced with alternative fuel vehicles;

(h') the number of inventoried HDVs retired;

(i') identification of all ULSD waivers, findings, and renewals of such findings, which, for each waiver, shall include, but not be limited to, the quantity of diesel fuel needed to power diesel fuel-powered motor vehicles owned or operated by such regulated entity; and specific information concerning the availability of ULSD;

(j') the identification of BART waivers and useful life waivers issued by the department to the regulated entity and contractor;

(k') the quantity of ULSD used;

(l') a statement of compliance indicating the percent of inventoried HDVs with option 1 or option 2 technologies installed by the indicated compliance dates so as to determine compliance with Subdivision 248-3.1(e) of this Part requirements; and]

[(m')] (l') any other such information or report format that the department deems necessary.

248-7.1 *Record Keeping Requirements*

(a) BART regulated entities and contractors subject to the requirements of this Part shall maintain the following records in hard-copy format or as electronic records where the vehicle is primarily located/garaged. *The department's inventory form may be used for this purpose.* The BART

regulated entity or contractor shall provide the following records where applicable for each inventoried HDV upon request by the department or an authorized representative for all HDVs subject to compliance with this Part:

Paragraphs 248-7.1(a)(1) through (10) remain unchanged.

Paragraph 248-7.1(a)(11) through Subdivision 248-7.1(a)(13) are revised as follows:

(11) *useful life waiver and date issued, if applicable:*

(i) *a copy of the issued waiver shall be kept with the vehicle to which it is applicable.*

[(11)] (12) fuel characteristic type including biodiesel, on road specification diesel, non road diesel, other; and

[(12)] (13) the quantity of ULSD used.

The remainder of Part 248 remains unchanged.

**Revised rule compared with proposed rule:** Substantial revisions were made in section 248-3.1(e).

**Text of revised proposed rule and any required statements and analyses may be obtained from** James Bologna, P.E., NYSDEC, Division of Air Resources, 625 Broadway, Albany, NY 12233-3255, (518) 402-8292, email: 248DERA@gw.dec.state.ny.us

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

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

**Additional matter required by statute:** Pursuant to Article 8 of the State Environmental Quality Review Act, a Short Environmental Assessment Form, a Negative Declaration and a Coastal Assessment Form have been prepared and are on file.

#### **Summary of Revised Regulatory Impact Statement**

In 2006, the Legislature passed and the Governor enacted the “Diesel Emissions Reduction Act of 2006” (DERA). The legislation charged the Department with implementing a regulatory program that would require the use of ULSD fuel and BART for any diesel powered heavy duty vehicle (HDV) that is owned by, operated by or on behalf of, or leased by a state agency and state and regional public authority. The Department subsequently promulgated Part 248, effective as of July 30, 2009, to implement DERA. The Department’s initial part 248 regulation included within the program requirements trucks owned by sub-contractors (to contractors) that provided services to State agencies and authorities.

That aspect of the regulation was subsequently challenged in a CPLR Article 78 proceeding. Although Supreme Court (Saratoga County) initially upheld the regulations, the Appellate Division reversed, finding that the Legislature “did not intend to impose DERA’s requirements on vehicles other than those used by prime contractors under direct contract with State agencies and public authorities.” *Matter of N.Y. Constr. Material Ass’n v. DEC*, 83 A.D.2d 1323, 1328 (3d Dep’t 2011); see also *Riccelli Enterprises, Inc. v. Grannis*, 30 Misc. 3d 573, 579 (Sup. Ct. Onondaga Co., 2010) (regulations are ‘ultra vires’... due to the improper expansion of the meaning of the term “on behalf of” in the regulations).

Additionally, the Legislature amended ECL section 19-0323 in calendar years 2010, 2011 and 2012, in three ways: (i) to provide an extended time frame until December 31, 2013 for all applicable vehicles to comply with the DERA BART requirement; (ii) to allow for a waiver of the DERA requirements to otherwise applicable vehicles that are permanently taken out of service in New York State on or before December 31, 2013; and (iii) to eliminate the 33 percent and 66 percent phase-in deadlines for BART compliance of December 31, 2008 and December 31, 2009 respectively. ‘See’ L.2010, ch. 59, pt. C. Section 1, Enacted Budget SFY 2011-2012, S2810-C/A 4010-C, Part BB and Enacted Budget SFY 2012-2013, S6258-D/A 9058-D, Part EE. This proposed rulemaking is being revised as a result of the extension of the compliance deadline included in the state budget bill passed in March 2012. Although the Legislature extended the BART compliance date and added the waiver provision, it nevertheless maintained the retrofit requirement for existing vehicles, making plain its continued interest in reducing emissions from heavy duty vehicles owned by or operated on behalf of the State. The Department is seeking comments on the revision to the compliance deadline.

Although the Legislature extended the BART compliance date and added the waiver provision, it nevertheless maintained the retrofit requirement for existing vehicles, making plain its continued interest in reducing emissions from heavy duty vehicles owned by or operated on behalf of the State.

The purpose of this rulemaking is to make Part 248 consistent with both the court decisions in *Matter of N.Y. Constr. Material Ass’n and Riccelli Enterprises, Inc.* and the amendments to DERA signed into law in 2010, 2011 and 2012.

These revisions to Part 248 would make it consistent with the amendments to ECL section 19-0323 and recent court decisions by changing the definition of “prime contractor”, “on behalf of”, and “regulated entity work”; and further by changing the existing BART compliance schedule

and adding a useful life waiver provision. “Prime contractor” will mean a person or entity that contracts directly with the regulated entity to perform regulated entity work and who is responsible for the completion of the contract with the regulated entity. As noted, recent court decisions require the Department to exclude subcontractors from applicability. This rulemaking will revise the BART compliance schedule and include a useful life waiver provision as permitted by ECL section 19-0323. The Department will include a useful life waiver provision which allows the Department to issue a waiver of the requirements of this Part to a BART regulated entity or contractor upon receipt of request from such entity or contractor provided that such vehicle will be permanently taken out of service in New York State on or before December 31, 2013. The addition of a useful life waiver will provide additional regulatory flexibility to subject entities. The Department is also proposing several minor clarifications to the BART waiver application requirements, the vehicle and equipment labeling requirements, and the reporting and record keeping requirements. These clarifications should assist the regulated entity and contractor in complying with the Part 248 requirements.

The Department has continued to evaluate the costs of various retrofit devices and recently assessed several sources to update cost information. Included in this analysis was actual cost data obtained by the Department from certain state agencies. The Department also considered cost data included in the October 2009 report entitled “Retrofitting Emission Controls for Diesel Powered Vehicles,” issued by the Manufacturers of Emission Controls Association (MECA). A more detailed discussion relating to costs can be found in the Regulatory Impact Statement. Prime contractors will incur costs associated with the purchase of the retrofit device and administrative costs similar to many of those costs for state agencies and public authorities. Only the contractor’s vehicles which are actually used on behalf of the state agency/public authority work (not necessarily the contractor’s entire fleet) and while in use on the state project whether on or off state property are subject to the Part 248 requirements. Subcontractors will no longer be required to comply with DERA and are therefore no longer required to incur costs for this regulation. No additional costs are expected to be incurred by the Department for the administration of the proposed revision to Part 248.

It is important to note that this rulemaking, which proposes to maintain existing requirements except as to subcontractors and to the extent waived (as allowed under the 2010 DERA amendments), would if anything have a positive direct economic effect as compared to the effect that was anticipated from the existing requirements under Part 248. Indeed, although Part 248 would remain applicable to those heavy duty vehicles used by or on behalf of a state agency, state public authority, or regional public authority, requirements as to subcontractors would be removed. Of course, prime contractors like state government entities, would remain subject to both the ULSD requirements effective February 12, 2007 and the BART requirements.

As noted in the 2009 rulemaking, the population of prime contractor vehicles affected by the proposed amended regulation is unknown. As with that rulemaking, the Department remains unable to provide a specific estimate of the number of contract solicitations or awards that will occur because of the difficulty in predicting the number of affected prime contractors at this time. Additionally, the Department expects the cost impact to those affected contractors to be similar to the impacts on government entities which, in turn, may result in somewhat higher bids proposed by prime contractors on state and public authority contract work to compensate for increased costs due to these regulatory requirements. Nevertheless, this rulemaking maintains existing requirements on prime contractors and thus is not expected to have any negative impact on such prime contractors.

Because this rulemaking maintains existing requirements as to State agencies and authorities, as well as to prime contractors, the rulemaking itself would not be expected to have a negative impact on businesses or employment. Indeed, as already noted, the rulemaking proposes to remove trucks owned or operated by sub-contractors from coverage and thus, if anything, may have a positive direct impact on subcontractors.

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

##### **1. Effect of rule:**

As defined in the proposed regulation, “on behalf of” means “all heavy duty vehicles used to perform regulated entity work by a prime contractor. Those vehicles include, but are not limited to, heavy duty vehicles owned, operated or leased by a prime contractor.”

As defined in the regulation, “Prime contractor means any person or entity that contracts directly with the regulated entity to perform regulated entity work (“prime contract”) and who is responsible for the completion of the contract with the regulated entity. This definition shall not include subcontractors.” Prime contractors could include affected small businesses and some local governments. Prime contractors include anyone that performs work for the state or public authority whether on or off state/public authority property. Regulated entities include affected state agencies and state and regional public authorities.

## 2. Compliance requirements:

Affected small businesses and contracted local governments continue to be required to comply with the ULSD and BART. The ULSD requirement was effective February 12, 2007. Affected small businesses and contracted local governments will be required to install BART on their applicable HDV's on or before December 31, 2013. A useful life waiver provision will be included in the regulation which allows the Department to issue a waiver of the requirements of this part to a BART regulated entity or prime contractor upon receipt of request from such entity or prime contractor provided that such vehicle will be permanently taken out of service in New York State on or before December 31, 2013 pursuant to recent revisions to ECL Section 19-0323.

## 3. Professional services:

No specific professional services are required by this revision to Part 248.

## 4. Compliance costs:

The Regulatory Impact Statement addresses compliance costs in detail on a per vehicle basis. We adopt those costs for purpose of this document.

## 5. Economic and technological feasibility:

The economic feasibility for both affected small businesses and contracted local governments to comply with the proposed regulatory requirements is difficult to determine and unknown since the total cost to comply with the proposed regulation is unknown. Total cost is based on the number of affected HDVs and the specific retrofit device to be installed on those HDVs which are currently unknown. Affected small businesses and contracted local governments also have the option to replace an existing HDV with a 2007 or newer HDV, replace with an alternative fuel HDV, or retire the HDV in lieu of retrofitting the HDV with a BART device, or obtain a useful life waiver or BART device waiver for the vehicle, which adds more uncertainty as to the total cost to comply with the regulation. The specific option that affected small businesses and contracted local governments will choose to comply with the regulatory requirements is unknown. The proposed revisions to Part 248 may reduce the cost for small businesses given that subcontractors will no longer be subject to the regulation. There are specific capital costs for the retrofit devices as mentioned in the RIS. As a result of incurred costs by affected small businesses to comply with the regulatory requirements, businesses may elect to reduce the number of their employees to cover the costs of purchasing/installing BART devices on their affected HDVs or place higher bids on state contracts. Affected local governments may also elect to reduce the number of their employees to cover the costs of the BART devices. Affected small businesses may also choose not to bid on state agency/public authority projects and local governments may choose not to enter or renew contracts with state agencies/public authorities.

## 6. Minimizing adverse impacts:

The legislation and proposed revised regulation include provisions for an HDV owner/operator to apply for a waiver from the ULSD or BART requirement in certain instances. If specified criteria are met as proposed in the regulation, the department will issue a waiver.

## 7. Small business and local government participation:

There will be a public comment period in which interested parties can submit written comments on the proposed revisions to the regulation. One stakeholder meeting was held on July 7, 2011 with those representing regulatory affected entities including various contractor associations and state agencies/public authorities to discuss the legislation and proposed revised regulatory requirements.

## 8. Cure period:

Pursuant to NYS State Administrative Procedures Act (SAPA) Section 202-b, this rulemaking does not include a cure period because the Department is undertaking this rulemaking to comply with changes to state legislation and recent court decisions. The court decisions required the Department to remove a class of entities previously subject to Part 248, specifically subcontractors, thereby removing those entities from any penalties for violations of Part 248. In addition, changes are being made to conform with more generous deadlines imposed upon the program by State legislation.

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

No changes were made to previously published Rural Area Flexibility Analysis.

### **Revised Job Impact Statement**

#### 1. Nature of impact:

We are revising 6 NYCRR Part 248, "Use of Ultra Low Sulfur Diesel Fuel and Best Available Retrofit Technology for Heavy Duty Vehicles" (Part 248). This rule will continue to potentially impact job and employment opportunities, both negatively and positively.

#### 2. Categories and numbers affected:

The revised regulation requires that covered vehicles have best available retrofit technology (BART) installed on or before December 31, 2013. This proposed revision will eliminate subcontractors from regulatory applicability.

BART refers to retrofit equipment, verified by EPA or the California Air Resources Board (CARB), including diesel particulate filters (DPFs), diesel oxidation catalysts (DOCs), or other devices that reduce particulate matter contained in diesel exhaust. In lieu of retrofitting HDVs, regulated entities and contractors have the option to comply with BART by replacing a HDV engine/vehicle with either a MY 2007 heavy duty vehicle (or subsequent model year vehicle), or replace with an alternative fuel vehicle, or retire the vehicle/engine. Other BART compliance options include obtaining a useful life waiver or a BART device waiver for the vehicle. Contractors may include affected small businesses and local governments. We are proposing to revise the definition "on behalf of" to read: "all heavy duty vehicles used to perform regulated entity work by a prime contractor. Those vehicles include, but are not limited to, heavy duty vehicles owned, operated or leased by a prime contractor." The regulatory requirements will continue to affect several categories of businesses and employment including BART device (DPF and DOC) manufacturers, device substrate manufacturers, authorized installers/distributors of verified BART devices, new engine/vehicle (post model year 2006) manufacturers, and contractors of state agencies/public authorities.

This rulemaking maintains existing requirements as to prime contractors (i.e., prime contractors like state government entities, would remain subject to both the ULSD requirements effective February 12, 2007 and the BART requirements) and thus is not expected to have any negative impacts on such prime contractors. It is conceivable that prime contractors may elect to reduce the number of their employees to cover the costs of purchasing/installing BART devices on their affected HDVs. As noted in the 2009 rulemaking, the population of prime contractor vehicles affected by the proposed amended regulation is unknown. As with that rulemaking, the Department remains unable to provide a specific estimate of the number of contract solicitations or awards that will occur because of the difficulty in predicting the number of affected prime contractors at this time. The Department expects the cost impact to those affected contractors to be similar to the impacts on government entities which, in turn, may result in somewhat higher bids proposed by prime contractors on state and public authority contract work to compensate for the increased cost to comply with the ULSD and BART requirements on their affected vehicles. But such increased costs will primarily occur only until December 31, 2013, when all affected HDVs are required to be BART compliant. Costs associated with regulatory compliance may preclude or prevent some businesses from bidding on state agency/public authority contracts. Again, there would be no reason to expect these impacts to change from those associated with the existing regulation.

As noted in the 2009 rulemaking, businesses and employment expected to continue to be positively impacted as a result of the existing regulation include BART device manufacturers, device substrate manufacturers, authorized installers/ distributors of verified BART devices, new engine/vehicle manufacturers and alternative fuel engine/vehicle manufacturers. However, these positive impacts may be reduced by this rulemaking. Both the addition of useful life waivers and the subtraction of subcontractors from applicability will reduce the number of vehicles required to retrofit. Businesses that may be created or continue to expand include those that manufacture, install, repair, or clean retrofit technologies. Again, since the proposed revised regulation deletes subcontractors from applicability, the degree to which these businesses are positively impacted may be slightly less appreciable as there is the potential for less retrofits which could negatively impact those BART device manufacturers and vendors.

The rulemaking proposes to remove trucks owned or operated by subcontractors from applicability and therefore should have a positive direct impact on subcontractors.

#### 3. Regions of adverse impact:

Statewide.

#### 4. Minimizing adverse impact:

DERA, including recent amendments, provides for waivers related to BART devices. In addition to the previously permitted waiver where BART is not applicable or available for a specific engine application, Part 248 is being revised to allow the department to issue a useful life waiver for a specific vehicle/engine upon request in lieu of retrofitting a vehicle pursuant to amended ECL 19-0323. However, the applicant must certify that the vehicle will be taken out of service in New York State by December 31, 2013. Waivers may be issued by the department only if specific regulatory criteria are met. This will reduce the number of vehicles required to be retrofit.

#### 5. Self employment opportunities:

Entrepreneurial opportunities will continue to exist for those willing to become authorized representatives of BART device manufacturers in order to provide technical support for and any required maintenance of the device.

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

There were a total of forty (40) comments received from eight individual commentors. The commentors were: Marilyn Stern; Barry Panicola,

Sprague Operating Resources, LLC; Joseph A. Foglietta III, P.E., New York State Department of Transportation; Joseph Stelling, New York Public Interest Research Group; Thomas Miller, New York State Department of Environmental Conservation; David S. Hamling, New York Construction Materials Association; Kendra Adams, New York State Motor Truck Association; and Russell Mendell.

Two commentors questioned the scope of applicability and considered the regulation too broad. The Department responded by saying the Diesel Emission Reduction Act of 2006 (DERA) states that those Heavy Duty Vehicles (HDVs) operating "on behalf of" state agencies and public authorities are subject to the use of Ultra Low Sulfur Diesel Fuel (ULSD) and Best Available Retrofit Technology (BART) requirements. Pursuant to two court decisions, the proposed revisions to this regulation remove the applicability of Part 248 to subcontractors and limit applicability to prime contractors' vehicles. 'See' *Matter of N.Y. Constr. Material Ass'n v. DEC*, 83 A.D.2d 1323, 1328 (3d Dep't 2011) (*Matter of N.Y. Construction Materials*) and *Riccelli Enterprises, Inc. v. Grannis*, 30 Misc. 3d 573, 579 (Sup. Ct. Onondaga Co. 2010) (*Riccelli*). Paragraph 248-1.1(b)(14), pursuant to DERA, defines subject vehicles, and specifically excludes certain HDVs from applicability. This is not being changed in this rulemaking. Section 248-2.1 also continues to include additional exemptions from applicability for certain heavy duty vehicles and is also not being changed in this rulemaking. Moreover, the prime contractors' vehicles operating on behalf of a state agency or affected public authority, continue to be subject to the regulatory requirements. Prime contractor is defined in the regulation as:

any person or entity that contracts directly with the regulated entity to perform regulated entity work ("prime contract") and who is responsible for the completion of the contract with the regulated entity. This definition shall not include subcontractors.

The decision in *Riccelli* directed the DEC to define prime contractor in Part 248 as noted above. Prime contractor HDVs which are associated with a state contract are covered under the regulation. The prime contractor's entire fleet of HDVs is not necessarily subject to the regulatory requirements, but only those vehicles which are used in support of the relevant state contract.

One commentor was concerned about companies that do not do enough business with the state to amortize the cost of compliance, and therefore will not quote and/or work on state contracts and that there should be a monetary threshold for applicability. The Department responded it recognizes that the regulation may impact different fleets in different ways and that this may result in changes in the way various entities compete for state contracts. DERA does not provide for a threshold dollar amount for applicability and therefore neither does Part 248.

Two commentors suggested that the proposed revised regulation will result in increased costs and create an unnecessary economic burden for those required to comply. Commentors went on to say the regulations as currently drafted drastically underestimate the potentially severe direct and indirect effects on the State's economy. Additionally, commentors suggested the Part 248 regulations go beyond the intent of the Legislature and recent court decisions and are in direct conflict with the goals of the current administration. The Department responded by stating that the Department identified the anticipated costs of the program to the best of our ability in the Regulatory Impact Statement (RIS) and other supporting documents and understands that there may be significant economic impact to some businesses, including those related to the trucking industry, state agencies and public authorities when complying with the retrofit requirements. However, under DERA, the Legislature directed the Department to develop and promulgate regulations to implement the BART requirements. Two recent court decisions, *Riccelli* and *Matter of N.Y. Construction Materials*, have narrowed the scope of applicability by removing subcontractors from applicability and these revisions are being proposed in order to comply with said decisions. The Department believes that the proposed regulation conforms to DERA and the recent court decisions regarding prime and subcontractors. Even if these regulations were not in place, the provisions of DERA, enacted in 2006, require the retrofit of vehicles owned and operated by state agencies and authorities, as well as prime contractors to those agencies and authorities, by date certain.

Three commentors requested clarification regarding the rulemaking language "regular and frequent basis". The Department responded with the following statement. The provisions to which the commentors refer exempt those manufacturing or delivery companies who only infrequently do business with state agencies and authorities, and shipping companies such as Federal Express. According to the *American Heritage College Dictionary*, Third Edition (2000), regular means customary, usual or normal. *Ballentine's Law Dictionary* (2010) defines regular as conforming to an established rule, principle or custom...consistent...following a fixed procedure or schedule...acting or happening at uniform intervals. *Black's Law Dictionary*, Sixth Edition (1990) defines regular as... steady or uniform in course, practice or occurrence. *American Heritage* defines

frequent as occurring or appearing quite often or at close intervals. *Webster's New World College Dictionary*, Fourth Edition (2005), defines frequent as occurring often, happening repeatedly at brief intervals. Each agency and authority must determine what is regular and frequent for its own business model and is in the best position to make that determination.

One commentor wanted clarification regarding the term "contracts" and the same commentor wanted clarification regarding whether "regulated entity work" only applied to construction. The Department responded that broadly speaking, a contract is an agreement between two parties which defines the rights and responsibilities of the parties. Each agency and authority must determine the types of contracts it uses in the course of its regular business. The Department stated that regulated entity work applies broadly, not simply to construction related work.

Two commentors requested clear and defined language regarding the difference between a shipping and a manufacturer or delivery company. The Department responded that these provisions exempt those manufacturing or delivery companies who only infrequently do business with state agencies or authorities, and shipping companies such as Federal Express. For example, a material supplier, under a prime contract with an agency or authority which delivers regularly and frequently is subject to applicability. Conversely, a material supplier who does not deliver regularly or frequently is not subject to applicability. Each agency and authority must determine what is frequent for its own business model and is in the best position to make that determination.

Two commentors questioned the legality of the labeling requirements described in the regulation. They indicated the requirements were not only burdensome, but in violation of federal law which prohibits state specific decals with few exceptions. The Department responded that the label requirements are described in Section 248-5.1 of the proposed regulation. Information required on the label will assist the Department in determining the compliance status of the covered vehicle. The provisions requiring appropriate labels is not a new provision, and it is not being revised during this rulemaking. Such requirement was included in the initial adoption of this regulation and commentors did not make these comments at that time. This comment is outside the scope of these revisions to Part 248.

Two commentors suggested that the proposed regulations fail to satisfy the court orders or the Legislative intent of the statute. They went on to comment that the regulations should apply to state vehicles only. The Department responded that it believes that the New York State Legislature clearly intended that DERA and any subsequent implementing regulations include both state and prime contractor owned and operated vehicles. Revisions to Part 248 concerning applicability conform to the intent of the legislature as determined by two courts. Both '*Matter of N.Y. Construction Materials Association*' and '*Riccelli*' court decisions specifically mention prime contractors with reference to applicability. The court in '*Riccelli*' went so far as to provide the exact regulatory language for use in revising Part 248 concerning prime contractors in its decision including "all heavy duty vehicles used to perform entity work by a prime contractor. Those vehicles include, but not limited to, heavy duty vehicles owned, operated or leased by a prime contractor..." Further, the court stated "[p]rime contractor means any person or entity that contracts directly with the regulated entity to perform regulated entity work ("prime contract") and who is responsible for the completion of the contract with the regulated entity. This definition shall not include subcontractors".

One commentor indicated that in the future, please give more advanced notice of public hearings. The Department responded that the notice of public hearings was published in the Department's Environmental Notice Bulletin, the State Register and several newspapers on December 14, 2011 allowing adequate notice and time to submit public comments to the Department by the January 26, 2012 deadline.

There were three general commentors who supported the regulation with one applauding the Department for its efforts. The Department thanked them for their support.

One commentor indicated that while they understand the concerns associated with diesel emissions, they remain opposed to the proposed regulation. The Department responded that DERA, enacted in 2006, requires the use of BART on affected HDVs including those HDVs used "on behalf of" state agencies and public authorities. Part 248 is the implementing regulation for DERA and is required pursuant to DERA.

Regarding record keeping and reporting requirements, two commentors suggested the requirements were too burdensome. They also failed to see the need to report the consumption of Ultra-Low Sulfur Diesel fuel on an annual basis since ULSD is currently being used on a universal basis. Lastly, the commentors thought that contractors should report directly to the Department, rather than to the agency they contracted with. The Department's response notes that DERA requires the Department to report on the use of ULSD. The record keeping requirements noted in Section 248-7 of the proposed regulation are necessary to ensure compliance, and will assist the regulated entity and prime contractors in meeting the reporting requirements listed in Section 248-6 of the proposed regulation. In or-

der for the Department to report on the use of ULSD, it must receive information from the agencies and prime contractors, and determine compliance. DEC has no way to determine who is a prime contractor to each agency and therefore has no way to determine compliance with the reporting requirement and therefore compliance with DERA. Requiring agencies to keep track of their contractors reporting is a reasonable way to ensure compliance. This requirement is not a new requirement; it was included in the initial rulemaking adopted in 2009.

Two commentors thought that eliminating subcontractors from applicability creates a competitive disadvantage for those carriers that choose to make their own deliveries rather than sub-contract to another carrier. In response, the Department recognizes the regulations may impact different fleets in different ways and that this may result in changes in the way various entities compete for state contracts. The Department, however, is obligated by DERA to promulgate regulations requiring BART for state agencies/public authorities and their contractors pursuant to a specific timeframe. As a result of two previously mentioned court decisions, the Department is removing subcontractors from applicability and believes that the proposed regulation conforms to the recent court decisions regarding prime and subcontractors.

Three commentors were concerned about the compliance deadline and felt the proposed regulations mandate was unrealistic and impracticable. One suggested a process of phasing out older equipment, rather than being forced to purchase expensive retrofits. The Department responded by stating the BART compliance schedule is mandated by DERA and therefore cannot be amended in this regulation. Only the Legislature can amend DERA and its included deadlines. The BART compliance deadline was extended by one year to December 31, 2013 in this year's budget bill. Therefore, the Department will extend the BART compliance deadline in accordance with the statute and will issue a notice of revised rulemaking for the deadline change. Before adopting a final regulation, the Department will accept public comments on the extended BART compliance deadline.

Finally, two commentors discussed waivers. Again, the commentors requested additional time, suggesting the expiration date of useful life waivers be extended to December 31, 2015. The Department responded by stating the BART compliance schedule is mandated by DERA and therefore cannot be amended in this regulation. DERA specifically requires the December 31, 2013 expiration date for HDVs operating in New York State that have been issued useful life waivers.

## REVISED RULE MAKING NO HEARING(S) SCHEDULED

### Sale of Black Bass

**I.D. No.** ENV-18-12-00002-RP

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

**Proposed Action:** Repeal of section 155.1; and addition of new section 155.1 to Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 11-0507(1), 11-1319 and 11-1909(2)

**Subject:** Sale of Black Bass.

**Purpose:** Expanding the sale of black bass for human consumption purposes.

**Text of revised rule:** Existing section 155.1 is repealed and a new section 155.1 is added to read as follows:

*155.1 Special regulations for the transport of black bass raised by private hatcheries*

(a) *Definitions. For the purposes of this Part, the following definitions shall apply:*

(1) *Black Bass Hatchery means any in-state or out-of-state facility permitted pursuant to ECL 11-1909 in which black bass are bred, propagated, or otherwise cultured for wholesale, retail sale or trade in New York State for stocking purposes, for exhibition purposes, for food purposes, or for any combinations of these three purposes. Facilities applying for a permit must demonstrate through the permit application that they possess appropriate hatchery rearing equipment including but not limited to ponds, buildings, tanks, raceways, or other structures.*

(2) *Black bass shall mean largemouth bass and smallmouth bass.*

(3) *Whole black bass shall mean black bass carcasses that are complete or that have had only the gills and viscera removed and remain recognizable.*

(4) *Retail sale shall mean the selling or offering for sale of black bass to any person who will consume the black bass, prepare the black bass for consumption, sell the black bass for scientific or exhibition purposes, or who will stock the black bass.*

(5) *Wholesale commerce shall mean the selling or offering for sale of black bass to any person other than those defined in retail sale of this Part.*

(b) *Black Bass Hatchery Permits.*

(1) *Only black bass originating from a black bass hatchery or otherwise as permitted by the Fish and Wildlife Law may be purchased or offered for sale in New York. Only largemouth black bass originating from a black bass hatchery or otherwise permitted by the Fish and Wildlife Law may be purchased or offered for sale for human consumption purposes in New York.*

(2) *Any permit issued pursuant to article 11-1909 of the Environmental Conservation Law or this Part may be issued with conditions. Conditions may be attached as necessary to assure that wild black bass are protected and that the intent and purposes of this Part will be carried out.*

(3) *Every permit issued pursuant to article 11-1909 of the Environmental Conservation Law or this Part shall contain the following conditions:*

(i) *The Commissioner or authorized department staff may enter and inspect a black bass facility, premises, books, papers, documents, or records of that facility, at all reasonable times, locations, and hours, whether announced or unannounced and to take representative samples, without payment, of any black bass for the purpose of ascertaining compliance or noncompliance with a permit, the ECL, and this Title. A receipt will be issued to the permittee documenting any black bass taken pursuant to this subparagraph.*

(ii) *The permittee shall keep copies of all black bass purchase receipts, black bass sales receipts and black bass fish health inspection reports. All purchase or sales receipts must contain the name and address of the seller and purchaser as well as the date of sale, the species, size, and number sold. Permittee shall make such records and fish health inspection reports readily available for inspection by the department for two years after each sale of black bass.*

(iii) *The permittee shall complete and send to the Bureau of Fisheries an annual report by January 31st of each year, indicating the name and address of each person from whom they purchased black bass, each person to whom they sold black bass, the species, size, number and date of each sale of black bass during the prior calendar year. No black bass hatchery permit will be renewed until this annual report is received by the Bureau of Fisheries.*

(c) *Transportation of Black Bass from a Private Black Bass Hatchery.*

(1) *Black bass that are sold by a black bass hatchery or sold in wholesale commerce originating from a black bass hatchery may be transported within the state in any number and in any size subject to the following conditions:*

(i) *All shipments of live or whole black bass must be accompanied by an original bill of sale that contains the name and address of the source black bass hatchery and the name and address of the buyer, the date of shipment, the size, number and species of black bass being shipped and the point of destination.*

(ii) *All shipments of live or whole black bass shall be in a container or containers marked black bass. Live black bass may be sold from a container or tank on the transporting vehicle provided the transporter retains a copy of all black bass bills of sale for black bass delivered that trip.*

(iii) *Any person engaged in retail sale of black bass that owns more than one retail location may divide black bass shipments into unmarked containers for distribution only to other retail locations owned by them provided they are the transporter and each shipment is accompanied by a copy of the original bill of sale.*

(iv) *All black bass hatchery permittees and persons engaged in the wholesale commerce of black bass must retain copies of any bill of sale and make such records readily available for inspection by the Department for two years after each sale of black bass.*

(d) *Additional requirements for persons engaged in the wholesale commerce of black bass.*

(1) *Black bass purchased from different black bass hatcheries by a wholesaler may be combined into one tank or container for sale but the wholesaler must generate a new original bill of sale that contains the name and address of the wholesaler and the name and address of the buyer, the date of shipment, the size, number and species of black bass being shipped, and the point of destination.*

(2) *Persons engaged in the wholesale commerce of black bass must maintain a bound book, or use other methods approved by the department, at their place of business listing the name, address and telephone number of all black bass hatcheries or other black bass wholesalers that they purchase black bass from and the name and address of all black bass wholesalers or black bass retailers to whom they sell black bass. The list must include the date of transaction, number and species of black bass bought and or sold and if the black bass were live or whole black bass. All required records must be completed by the end of the business day in which the transaction occurred.*

*(e) Retail sale of black bass; requirements.*

(1) Any person selling black bass in retail sale must issue a receipt to the purchaser containing the name of the retail seller, the date of the retail sale, the name of the species of black bass sold and the quantity of each species sold. This section does not apply to on premises human consumption of black bass.

(2) Any person selling largemouth bass in retail sale for human consumption must retain a copy of the bill of sale for all black bass purchased by them during the preceding two years and must make those records readily available for inspection by the department during normal business hours.

(3) Any person selling black bass in retail sale, for purposes other than for human consumption, must retain a copy of the bill of sale for all black bass purchased and sold by them during the preceding two years and must make those records readily available for inspection by the department during normal business hours.

(4) Any person who buys black bass in retail sale must retain the issued receipt while in possession of the black bass. Any person who buys largemouth bass in retail sale for human consumption purposes must retain the issued receipt while in possession of the largemouth bass until it is prepared for human consumption.

(5) Live largemouth bass sold in retail sale for human consumption shall be killed by the retail seller before transferring possession of the fish.

*(f) General prohibitions.*

(1) No person shall operate a black bass hatchery except under permit from the department.

(2) No person shall operate a black bass hatchery except in compliance with all the hatchery permit terms and conditions.

(3) No person shall buy, sell, import, export, offer for sale, possess or transport black bass from a black bass hatchery except as authorized by this Part.

(4) No person shall buy, sell, import, export, offer for sale, possess or transport black bass from a person engaged in the wholesale commerce of black bass except as authorized by this Part.

(5) No person shall possess or transport black bass unless accompanied by an original bill of sale, or copy of original bill of sale that contains the information as required in this Part, or as otherwise permitted by the Fish and Wildlife Law.

(6) No person engaged in the retail sale of black bass for human consumption shall sell or offer for sale any black bass other than the species largemouth bass.

(7) No person engaged in the retail sale of black bass for human consumption shall fail to kill a largemouth bass prior to transferring possession of the fish to the retail purchaser.

(8) No person shall purchase, sell or offer for sale black bass unless the black bass originated from a permitted black bass hatchery.

(9) No person shall sell or offer for sale a largemouth bass with the head removed, skin removed or filleted. This section does not apply to largemouth bass prepared for on site consumption.

(10) No person shall fail to maintain complete and accurate records of all black bass transactions as required by this Part.

**Revised rule compared with proposed rule:** Substantial revisions were made in section 155.1(a)(2), (b)(1), (e)(2), (3), (4) and (f)(6).

**Text of revised proposed rule and any required statements and analyses may be obtained from** Phil Hulbert, New York State Department of Environmental Conservation, 625 Broadway, Albany, NY 12233, (518) 402-8894, email: pxhulber@gw.dec.state.ny.us

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

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

**Revised Regulatory Impact Statement**

## 1. Statutory Authority

Section 11-0507-1 empowers the department to provide for the liberation and stocking of fish by permit. Section 11-1319 empowers the department to provide for the sale of black bass by permit, while taking measures through permitting to guard against the exploitation of wild black bass. Section 11-1909 empowers the department, at its discretion to issue hatchery permits for the purposes of propagating, raising and selling black bass, as well as establishing regulations governing the transportation of black bass raised under permit.

## 2. Legislative Objectives

Regulating black bass raised in licensed private hatcheries achieves providing for the raising of black bass sold for stocking purposes, and as now being proposed, to be sold as food fish in live fish markets. The purpose is to provide aquaculturists increased opportunity for live fish sales for human food in New York and largemouth bass is the species identified by aquaculturists for sales for human consumption in New York.

To do so, and to prevent the exploitation of wild black bass, existing

regulations need to be amended to provide a means of identifying black bass reared in hatcheries during transportation, and follow those fish through the supply chain. Such action will facilitate sales and distribution of largemouth bass to food markets, as occurs for example with trout that are sold for food.

Section 11-1909 maintains that “the department shall establish by order, regulations governing the transportation of black bass raised under such a permit.” This proposed rule adjusts existing black bass transportation provisions to clearly provide for the retail sale of fish raised under a department issued hatchery permit while including provisions to minimize the potential infiltration and marketing of wild caught black bass in the food industry.

## 3. Needs and Benefits

Black bass raised in licensed private hatcheries are widely sold for stocking purposes, but are also sold as food fish in live fish markets in some states. Aquaculturists seek to increase the opportunity for live fish sales for human food in New York. To do so, existing regulations need to be amended to provide a means of identifying black bass reared in hatcheries during transportation, and follow those fish through the supply chain. Such action will facilitate sales and distribution of largemouth bass to food markets, as occurs for example with trout that are sold for food.

## 4. Costs:

No cost to DEC or local governments. Aquaculturists will incur minor costs associated with maintaining routine business records, plus costs to purchase tags if they elect to utilize tags to identify hatchery-reared black bass (tags not required however).

## 5. Local Government Mandates

These amendments 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

The additional recordkeeping for the purposes of tracking the transportation and sale of black bass should be a part of existing business practices for those engaged in the sale of black bass.

## 7. Duplication

There are no Federal regulations which govern the transportation of black bass raised in private hatcheries.

## 8. Alternatives

Do not amend existing Part 155. Existing Part 155 does not provide for secondary sales of hatchery reared largemouth bass in commercial food markets. Without the amendment, only licensed hatchery operators are clearly eligible to sell black bass, a situation which has persisted for over a decade, and which is not conducive to the development of an active market in urban areas. The proposed rule elaborates on transportation labeling requirements and specifically addresses retail sales for food purposes of properly identified hatchery reared largemouth bass by persons other than hatchery operators.

## 9. Federal Standards

There are no minimum Federal standards that apply to the transportation of black bass raised in private hatcheries.

## 10. Compliance Schedule

These regulations, if adopted, will become effective immediately. It is anticipated that the regulated parties will be able to comply as soon as their businesses are able to make black bass available for sale, including largemouth bass for human consumption.

**Revised Regulatory Flexibility Analysis**

The purpose of this rule making is to amend and update the Department of Environmental Conservation’s (department) general regulations governing the transportation and sale of hatchery reared black bass (largemouth bass and smallmouth bass) in New York State to primarily facilitate marketing largemouth bass for human consumption purposes. Under current law (ECL), black bass may only be sold by holders of a Black Bass Hatchery or Fishing Preserve License. Regulations pertaining to the transportation of hatchery-reared bass must be expanded to provide for proper identification of these fish through retail markets while minimizing the opportunity for wild New York largemouth bass to enter the food market.

The department has determined that the proposed rules will not impose an adverse impact as far as additional reporting, recordkeeping, or other compliance requirements on small businesses or local governments. There will be no impacts to local governments. For small businesses, the additional recordkeeping for the purposes of tracking the transportation and sale of black bass should be a part of existing business practices from those engaged in the sale of black bass.

Those that become engaged in the sale of black bass, wholesale or retail, are likely the only entities and small businesses directly affected and impacted by changes to regulations pertaining to the transportation and sale of hatchery reared black bass in New York State (for facilitating marketing largemouth bass for human consumption purposes). Positive impacts are anticipated for these businesses because the proposed regulations would enhance the likelihood for the sale of black bass.

Since the department's proposed rule making will not impose an adverse impact on small businesses or local governments, including little effect on current reporting, recordkeeping, or other compliance requirements, the department has concluded that a regulatory flexibility analysis is not required for this regulatory proposal.

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

The purpose of this rule making is to amend and update the Department of Environmental Conservation's (department) general regulations governing the transportation and sale of hatchery reared black bass (largemouth bass and smallmouth bass) in New York State to primarily facilitate marketing largemouth bass for human consumption purposes. Under current law (ECL), black bass may only be sold by holders of a Black Bass Hatchery or Fishing Preserve License. Regulations pertaining to the transportation of hatchery-reared bass must be expanded to provide for proper identification of these fish through retail markets while minimizing the opportunity for wild New York largemouth bass to enter the food market.

The department has determined that the proposed rules will not impose an adverse impact as far as additional reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas. The additional recordkeeping for the purposes of tracking the transportation and sale of black bass should be a part of existing business practices for those engaged in the sale of black bass.

Those that become engaged in the sale of black bass, wholesale or retail, are likely the only entities directly affected and impacted by changes to regulations pertaining to the transportation and sale of hatchery reared black bass in New York State (for facilitating marketing largemouth bass for human consumption purposes). Positive impacts are anticipated for these businesses because the proposed regulations would enhance the likelihood for the sale of black bass.

Since the department's proposed rule making will not impose an adverse impact on public or private entities in rural areas and will have little effect on current reporting, recordkeeping, or other compliance requirements, the department has concluded that a rural area flexibility analysis is not required for this regulatory proposal.

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

The purpose of this rule making is to amend and update the Department of Environmental Conservation's (department) general regulations governing the transportation and sale of hatchery reared black bass (largemouth bass and smallmouth bass) in New York State to primarily facilitate marketing largemouth bass for human consumption purposes. Under current law (ECL), black bass may only be sold by holders of a Black Bass Hatchery or Fishing Preserve License. Regulations pertaining to the transportation of hatchery-reared bass must be expanded to provide for proper identification of these fish through retail markets while minimizing the opportunity for wild New York largemouth bass to enter the food market.

The proposed regulations will provide additional opportunities for the wholesale and retail sale of hatchery raised black bass. Positive impacts are anticipated for these businesses because the proposed regulations will provide for additional opportunities for the sale of black bass. Not only will this not result in any anticipated loss of jobs, it will provide for additional business opportunities which may likely include an increase in jobs. While the current allowance for selling smallmouth bass for human consumption directly from licensed hatcheries will no longer be provided for, communication with members of the industry indicates that this is of little concern in New York as largemouth bass are the black bass species conducive to being raised for food (versus smallmouth bass).

Based on the above, the department has concluded that the proposed regulatory changes will not have an adverse impact on jobs or employment opportunities in New York, and that a job impact statement is not required.

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

The following comments were received by the Department of Environmental Conservation (DEC or department) during the public comment period associated with the proposed rule making. Some comments have been grouped together because they are related or for convenience in providing an efficient response. The department's response is provided for each comment or group of comments.

**Comment:** Black bass should not be sold in New York as this provides an opportunity for fish disease to be introduced into wild, healthy populations.

**Response:** Under current regulations all fish that are to be stocked into the waters of New York are required to come from sources that have been inspected and found free of serious fish pathogens. The proposed regulation does not diminish that requirement. Under the proposed regulation fish that are to be sold for food purposes must be killed before being transferred to the final retail customer purchasing them for food, further reducing the likelihood that fish diseases will be transferred to wild populations via retail sales for human consumption.

**Comment:** The proposed regulation will foster development of a black market for wild black bass and those fish will be illegally sold.

**Response:** The recordkeeping requirements incorporated into the proposed regulation are intended to aid enforcement of the regulation and limit the entry of wild fish into the market for food. Sellers of wild fish will not have the required records that trace farm reared bass back to a licensed black bass hatchery. Enforcement efforts will include checking to make sure that sellers of black bass can produce documentation indicating the origin from a lawful source. With compliance, expanding the opportunity for farm reared bass to be sold should not impact wild bass populations.

**Comment:** Some people will keep more than the lawful daily limit of angler caught bass, and will sell the extra fish to establishments that do not follow the requirements in the proposed regulation.

**Response:** Establishments that will be selling black bass must be able to document the lawful origin of the fish they sell, and anglers will not be able to produce that documentation. Enforcement efforts across the state will include spot checks to determine compliance with daily harvest limits for bass, as currently occurs.

**Comment:** Wild fish cannot be distinguished from hatchery reared fish and this will make it easier for wild fish to be exploited for commercial purposes. Mandatory tagging of individual fish should be required as a means of identifying hatchery or farm reared fish.

**Response:** The department recognizes that external appearance will not provide a reliable means of distinguishing wild bass from hatchery reared bass. Bass being sold in the wholesale or retail food market must be traceable via records to a legal source. Requirements to tag individual live fish were not included in the proposed regulation due to industry concerns that tagging would be harmful to fish being sold live and that tagging would be costly. There are other states that allow for black bass to be sold for food, without a requirement for tagging, and those states have not reportedly experienced any adverse impacts to wild bass populations.

**Comment:** Consumers may unintentionally increase their health risks by eating wild caught bass from waters with fish consumption advisories that are sold as farm reared bass.

**Response:** The department does not anticipate that large numbers of wild bass will enter food markets. Additionally, most waters in New York have fish consumption advisories that follow the general recommendation to eat up to four meals per month.

**Comment:** Proponents of this regulation are only interested in selling largemouth bass for food, not smallmouth bass. Therefore, remove the provision for smallmouth bass to be sold for human food.

**Response:** The department contacted the New York Aquaculture Association and New York Farm Bureau to more fully assess interest in the species to be sold for human food. Their responses indicated that sales of smallmouth bass for human food could be prohibited without adverse impact to aquaculture interests. Based on that information, the department will revise the regulation and limit sales for human consumption to largemouth bass only. Both smallmouth bass and largemouth bass may continue to be sold for other purposes, such as stocking, as current regulations allow.

**Comment:** DEC does not have adequate resources to conduct effective enforcement of regulations that will allow hatchery reared bass to be sold for food.

**Response:** DEC law enforcement personnel have assisted in the development of the proposed regulation and recognize the high value placed on New York's black bass fishery resources. Resources will be directed to enforcement of the proposed regulations.

**Comment:** Allowing for the sale of commercially raised black bass will decimate wild bass populations in New York. DEC does not have the means to replace any wild bass populations that might be depleted due to illegal exploitation, therefore do not allow the sale of either hatchery reared or wild black bass for consumption.

**Response:** The sale of wild black bass will continue to be prohibited, and DEC does not anticipate wild populations will be depleted if the proposed regulations are adopted. It is already legal for hatchery reared black bass to be sold for stocking or for food purposes in New York by hatchery license holders. Such sales must be direct to retail customers or to other black bass hatchery license holders. Under the proposed regulations, hatchery reared bass may also be sold by wholesale distributors and in food markets.

**Comment:** Fishery resources in and around New York City and on Long Island are very fragile and the proposed regulation will harm those resources as people will illegally sell bass to the many restaurants in and around the city.

**Response:** Enforcement efforts will take specific geographic concerns into consideration and step up efforts as needed.

**Comment:** The reporting requirements of the proposed regulation are onerous and small operators will not be able to keep up with the necessary recordkeeping. Use your DEC website for permit holders to log all of their purchases and sales.

Response: Recordkeeping is necessary for enforcement purposes to establish the origin of bass being sold. The proposed regulation requires paper sales slips and receipts to document purchases and sales. Currently a web-based reporting system is not available and not all individuals have ready access to computers and internet connections. At a future time though, development of such capability may be a desirable option for some businesses.

Comment: Quarterly or annual audits of the required paperwork must be conducted to ensure compliance.

Response: Black bass hatchery permit holders are currently required to report sales to the department. This reporting requirement will also be required in the proposed regulation, and enforcement efforts will also include spot checks of those selling bass to reinforce the compliance requirements.

Comment: DNA testing of bass shipments and bass inventories of purchasers should be required to identify hatchery versus wild caught fish.

Response: The proposed regulation authorizes department staff to enter and inspect a black bass facility and take representative samples of fish for the purpose of ascertaining compliance or noncompliance. Specific techniques that would be used to ascertain compliance are not identified in the proposed regulation, thus the department would have the flexibility to use any technology deemed useful and appropriate.

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## Department of Health

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### EMERGENCY RULE MAKING

#### Medicaid Managed Care Programs

**I.D. No.** HLT-43-11-00019-E

**Filing No.** 874

**Filing Date:** 2012-08-21

**Effective Date:** 2012-08-21

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

**Action taken:** Repeal of Subparts 360-10 and 360-11 and sections 300.12 and 360-6.7; and addition of new Subpart 360-10 to Title 18 NYCRR.

**Statutory authority:** Public Health Law, sections 201 and 206; and Social Services Law, sections 363-a, 364-j and 369-ee

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

**Specific reasons underlying the finding of necessity:** Chapter 59 of the laws of 2011 enacted a number of proposals recommended by the Medicaid Redesign Team established by the Governor to reduce costs and increase quality and efficiency in the Medicaid program. The changes to Social Services Law section 364-j to expand mandatory enrollment into Medicaid managed care by eliminating many of the prior exemptions and exclusions from enrollment take effect April 1, 2011. Paragraph (t) of section 111 of Part H of Chapter 59 authorizes the Commissioner to promulgate, on an emergency basis, any regulations needed to implement such law. The Commissioner has determined it necessary to file these regulations on an emergency basis to achieve the savings intended to be realized by the Chapter 59 provisions regarding expansion of Medicaid managed care enrollment.

**Subject:** Medicaid Managed Care Programs.

**Purpose:** To repeal old and outdated regulations and to consolidate all managed care regulations to make them consistent with statute.

**Substance of emergency rule:** The proposed rule repeals various sections of Title 18 NYCRR that contain managed care regulations and replaces them with a new Subpart 360-10 that consolidates all managed care regulations in one place and makes the regulations consistent with Section 364-j of the Social Services Law (SSL). Section 364-j of the SSL contains the Medicaid managed care program standards. The new Subpart 360-10 will also apply to the Family Health Plus (FHP) program authorized in Section 369-ee of the Social Services Law. FHP-eligible individuals must enroll in a managed care organization (MCO) to receive services and FHP MCOs must comply with most of the programmatic requirements of Section 364-j of the SSL.

The new Subpart 360-10 identifies the Medicaid populations required to enroll and those that are exempt or excluded from enrollment, defines good cause reasons for changing/disenrolling from an MCO, or changing primary care providers (PCPs), adds enrollee fair hearing rights, adds

marketing/outreach and enrollment guidelines, and identifies unacceptable practices and the actions to be taken by the State when an MCO commits an unacceptable practice.

The proposed rule repeals the existing Subparts 360-10 and 360-11 and Sections 300.12 and 360-6.7 of Title 18 NYCRR. Section 300.12 applied to the Monroe County Medicaid program, a managed care demonstration project that was undertaken in the mid-1980s and that no longer exists. Section 360-6.7 addresses processes and timeframes for disenrollment from the various types of MCOs and these provisions are included in the new Subpart 360-10. Subpart 360-11 implemented provisions relating to special care plans formerly contained in SSL Section 364-j; these provisions were added by Chapter 165 of the Laws of 1991 and later removed by Chapter 649 of the Laws of 1996.

#### 360-10.1 Introduction

This section provides an introduction to the managed care program. Section 364-j of Social Services Law provides the framework for the Statewide Medicaid managed care program. Certain Medicaid recipients are required to receive services from Medicaid managed care organizations. Section 369-ee added the Family Health Plus (FHP) program to Social Services Law. Individuals eligible for FHP are required to receive services from a managed care plan unless they are participating in the Family Health Plus premium assistance program.

#### 360-10.2 Scope

This section identifies the topics addressed by the Subpart.

#### 360-10.3 Definitions

This section includes definitions necessary to understand the regulations.

**360-10.4 Individuals required to enroll in a Medicaid managed care organization**

This section identifies the individuals who will be required to enroll in an MCO.

**360-10.5 Individuals exempt or excluded from enrolling in a Medicaid mandatory managed care organization**

This section identifies the good cause reasons for a Medicaid recipient to be exempt or excluded from enrollment in a mandatory managed care program. The section also includes the procedures for requesting an exemption or exclusion and the timeframes for processing the request. This section also describes the notices that must be provided to a Medicaid recipient if his/her request is denied.

#### 360-10.6 Good cause for changing or disenrolling from an MCO

This section describes the good cause reasons for an enrollee to change MCOs and the process for requesting a change or disenrollment. This section also identifies the timeframes for processing the request and the notices that must be provided to the enrollee regarding his/her request.

#### 360-10.7 Good cause for changing primary care providers

This section describes the good cause reasons for a managed care enrollee to change primary care providers, the process through which the enrollee may request such a change and the timeframes for processing the request.

#### 360-10.8 Fair Hearing Rights

This section identifies the circumstances under which a Medicaid or FHP enrollee may request a fair hearing. Enrollees may request a fair hearing for enrollment decisions made by the local social services district and decisions made by an MCO or its utilization review agent about services. The section describes the notices that must be sent to advise the enrollee of his/her of her fair hearing rights. The section also explains when aid continuing is available for managed care issues and how the enrollee requests it when requesting a fair hearing.

#### 360-10.9 Appeal Rights for Recipients Enrolled in Medicaid Advantage

This section identifies the Medicaid and Medicare appeal rights that are available for recipients enrolled in a Medicaid Advantage plan.

#### 360-10.10 Marketing/Outreach

This section defines marketing/outreach and establishes marketing/outreach guidelines for MCOs including requiring MCOs to submit a marketing/outreach plan, requiring MCOs to get approval of materials before distribution, and establishing limits for marketing/outreach representative reimbursement.

#### 360-10.11 MCO unacceptable practices

This section identifies additional unacceptable practices for MCOs. These are generally related to marketing/outreach.

#### 360-10.12 MCO sanctions and due process

This section identifies the actions the Department is authorized to take when an MCO commits an infraction.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. HLT-43-11-00019-P, Issue of October 26, 2011. The emergency rule will expire October 19, 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:**

Social Services Law (SSL) section 363-a and Public Health Law section 201(1)(v) provide that the Department is the single state agency responsible for supervising the administration of the State's medical assistance ("Medicaid") program and for adopting such regulations, not inconsistent with law, as may be necessary to implement the State's Medicaid program.

**Legislative Objectives:**

Section 364-j of the SSL governs the Medicaid managed care program, under which certain Medicaid recipients are required or allowed to enroll in and receive services through managed care organizations (MCOs). Section 369-ee of Social Services Law authorized the State to implement the Family Health Plus (FHP) program, a managed care program for individuals aged 19 to 64 who have income too high to qualify for Medicaid. The intent of the Legislature in enacting these programs was to assure that low-income citizens of the State receive quality health care and that they obtain necessary medical services in the most effective and efficient manner.

Chapter 59 of the Laws of 2011 amended SSL section 364-j to expand mandatory enrollment into Medicaid managed care by eliminating many of the exemptions and exclusions from enrollment previously contained in the statute.

**Needs and Benefits:**

The proposed regulations reflect current program practices and requirements, consolidate all managed care regulations in one place, and conform the regulations to the provisions of SSL section 364-j, including the recent amendments made by Chapter 59 of the Laws of 2011. The proposed regulations identify the individuals required to enroll in Medicaid managed care and identify the populations who are exempt or excluded from enrollment.

The proposed regulations also contain provisions, which apply to both the Medicaid managed care and the FHP programs: specifying good cause criteria for an enrollee to change MCOs or to change their primary care provider; explaining enrollees' rights to challenge actions of their MCO or social services district through the fair hearing process; establishing marketing/outreach guidelines for MCOs; and identifying unacceptable practices and sanctions for MCOs that engage in them.

**Costs:**

The proposed regulations do not impose any additional costs on local social services districts beyond those imposed by law. The current managed care program operates under a federal Medicaid waiver pursuant to section 1115 of the Social Security Act. Through the waiver, the State receives federal dollars for its Safety Net and FHP populations. Administrative costs associated with implementation of the managed care program incurred at start-up were covered by planning grants. Since 2005, administrative costs for the managed care program have been included with all other Medicaid administrative costs and there is no local share for administrative costs over and above the Medicaid administrative cap.

**Local Government Mandates:**

The proposed regulations do not create any additional burden to local social services districts beyond those imposed by law.

**Paperwork:**

Social Services Law requires that Medicaid recipients be advised in writing regarding enrollment, benefits and fair hearing rights. In compliance with the law, the proposed regulations describe the circumstances under which a Medicaid managed care participant should be provided with such notices, who is responsible for sending the notice and what should be included in the notice. There are reporting requirements associated with the program for social service districts and MCOs. The social services district is required to report on exemptions granted, complaints received and other enrollment issues. MCOs must submit network data, complaint reports, financial reports and quality data. These requirements have been in existence since 1997 when the mandatory Medicaid managed care program began. There are no new requirements for the social services districts or the MCOs in the proposed regulations.

**Duplication:**

The proposed regulations do not duplicate any State or federal requirements unless necessary for clarity.

**Alternative Approaches:**

The Department is required by SSL section 364-j to promulgate regulations to implement a statewide managed care program. The proposed regulations implement the provisions of SSL section 364-j in a way which balances the needs of MA recipients, managed care providers and local social services districts. No alternatives were considered.

**Federal Standards:**

Federal managed care regulations are in 42 CFR 438. The proposed regulations do not exceed any minimum standards of the federal government.

**Compliance Schedule:**

The mandatory Medicaid managed care program has been in operation since 1997. As a result, all counties in the State have some form of managed care. The requirements in the proposed rules have been implemented through the contract between the State or eligible social services and participating MCOs.

**Regulatory Flexibility Analysis****Effect on Small Businesses and Local Governments:**

Section 364-j of Social Services Law (SSL) authorizes a Statewide Medicaid managed care program that includes mandatory enrollment of most Medicaid beneficiaries. In 1997 the State applied for and received approval of a Federal waiver under Section 1115 of the Social Security Act to implement mandatory enrollment. Section 369-ee of SSL authorizes the Family Health Plus (FHP) program and requires eligible persons to receive services through managed care organizations (MCOs). Currently, all counties have implemented some form of managed care. As of April, 2011, forty-nine counties have a mandatory Medicaid managed care program; nine counties have a voluntary Medicaid managed program. All counties have a FHP program.

As a result of the implementation of the Medicaid managed care program and FHP programs, most Medicaid recipients and all FHP eligible persons are required to enroll and receive services from providers who contract with a managed care organization (MCO). MCOs must have a provider network that includes a sufficient array and number of providers to serve enrollees, but they are not required to contract with any willing provider. Consequently, local providers may lose some of their patients. However, this loss may be offset by an increase in business as a result of the implementation of FHP.

The proposed regulations do not impose any additional requirements beyond those in law and the benefits of the program outweigh any adverse impact.

**Compliance Requirements:**

No new requirements are imposed on local governments beyond those included in law and there are no requirements for small businesses.

**Professional Services:**

No professional services will be necessitated as a result of this rule. However, the services of a professional enrollment broker will be available to counties that choose to access them. The costs of these services are shared by the State and the local districts.

**Compliance Costs:**

No additional costs for compliance will be incurred as a result of this rule beyond those imposed by law. Administrative costs associated with implementation of the managed care program incurred at start-up were covered by planning grants. Since 2005, administrative costs for the managed care program have been included with all other Medicaid administrative costs and there is no local share for administrative costs over and above the Medicaid administrative cap. Additionally, the 1115 waiver reduced local government costs by authorizing Federal participation for the Safety Net and Family Health Plus (FHP) populations.

**Economic and Technological Feasibility:**

Administrative costs incurred at program start-up were covered by planning grants. Since 2005, administrative costs for the managed care program are included with all other Medicaid administrative costs and there is no local share for administrative costs over and above the Medicaid administrative cap.

The Medicaid managed care program utilizes existing state systems for operation (Welfare Management System, eMedNY, etc.).

The Department provides ongoing technical assistance to counties to assist in all aspects of planning, implementing and operating the local program.

**Minimizing Adverse Impact:**

The mandatory Medicaid managed care program is implemented only when there are adequate resources available in a local district to support the program. No new requirements are imposed beyond those included in law.

The benefits of the managed care program outweigh any adverse effects. Managed care programs are designed to improve the relationship between individuals and their health care providers and to ensure the proper delivery of preventive medical care. Such programs help avoid the problem of individuals not receiving needed medical care until the onset of advanced stages of illness, at which time the individual would require higher levels of medical care such as emergency room care or inpatient hospital care. The State has fourteen years of Quality Data that demonstrate that Medicaid beneficiaries enrolled in managed care receive better quality care than those in fee-for-service Medicaid.

**Small Business and Local Government Participation:**

The regulations do not introduce a new program. Rather, they codify current program policies and requirements and make the regulations consistent with section 364-j of SSL. During the development of the 1115 waiver application and the design of the managed care program, input was obtained from many interested parties.

**Rural Area Flexibility Analysis****Effect on Rural Areas:**

All rural counties with managed care programs will be affected by this rule. As of April 2011, all rural counties have a Medicaid managed care and Family Health Plus (FHP) program.

**Compliance Requirements:**

This rule imposes no additional compliance requirements other than those already contained in Section 364-j of the Social Services Law (SSL).

**Professional Services:**

No professional services will be necessitated as a result of this rule. However, the services of a professional enrollment broker will be available to counties that choose to access them. The costs of these services are shared by the State and the local districts.

**Compliance Costs:**

No additional costs for compliance will be incurred as a result of this rule beyond those imposed by law. The administrative costs incurred by local governments for implementing the Statewide managed care program are included with all other Medicaid administrative costs and beginning in 2005, there was no local share for administrative costs over and above the administrative cost base of the Medicaid administrative cap. Additionally, the Federal Section 1115 waiver which allowed the State to implement mandatory enrollment, reduced local government costs by authorizing Federal participation for the Safety Net and FHP populations.

**Minimizing Adverse Impact:**

The benefits of the managed care program outweigh any adverse effects. Managed care programs are designed to improve the relationship between individuals and their health care providers and to ensure the proper delivery of preventive medical care. Such programs help avoid the problem of individuals not receiving needed medical care until the onset of advanced stages of illness, at which time the individual would require higher levels of medical care such as emergency room care or inpatient hospital care. The State has many years of Quality Data that demonstrate that Medicaid beneficiaries enrolled in managed care receive better quality care than those in fee-for-service Medicaid.

**Feasibility Assessment:**

Administrative costs incurred at program start-up were covered by planning grants. Since 2005, administrative costs for the managed care program are included with all other Medicaid administrative costs and there is no local share for administrative costs over and above the Medicaid administrative cap.

The Medicaid managed care program utilizes existing state systems for operation (Welfare Management System, eMedNY, etc.).

The Department provides ongoing technical assistance to counties to assist in all aspects of planning, implementing and operating the local program.

**Rural Area Participation:**

The proposed regulations do not reflect new policy. Rather, they codify current program policies and requirements and make the regulations consistent with section 364-j of the SSL. During the development of the 1115 waiver application and the design of the managed care program, input was obtained from many interested parties.

**Job Impact Statement****Nature of Impact:**

The rule will have no negative impact on jobs and employment opportunities. The mandatory Medicaid managed care program authorized by Section 364-j of the Social Services Law (SSL) will expand job opportunities by encouraging managed care plans to locate and expand in New York State.

**Categories and Numbers Affected:**

Not applicable.

**Regions of Adverse Impact:**

None.

**Minimizing Adverse Impact:**

Not applicable.

**Self-Employment Opportunities:**

Not applicable.

**Assessment of Public Comment**

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

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

**Nursing Home Sprinklers**

**I.D. No.** HLT-36-12-00005-P

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

**Proposed Action:** Addition of section 86-2.41 to Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 2803(2)

**Subject:** Nursing Home Sprinklers.

**Purpose:** To assist eligible nursing homes with accessing credit markets to finance the costs of installing automatic sprinkler systems.

**Text of proposed rule:** Pursuant to the authority vested in the Public Health and Health Planning Council and the Commissioner of Health by section 2803(2) of the Public Health Law, Subpart 86-2 of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York, is amended by adding a new section 86-2.41 to be effective upon publication of a Notice of Adoption in the New York State Register, to read as follows:

**86-2.41 Sprinkler systems**

(a) Subject to the availability of federal financial participation, the capital cost components of the rates of eligible residential health care facilities for periods on and after the effective date of this regulation shall be adjusted in accordance with the following:

(1) For the purposes of this section, eligible facilities are those facilities which the commissioner determines are financially distressed in terms of their being unable to finance, at terms acceptable to the commissioner, the installation of automatic sprinkler systems, in conformity with the provisions of federal regulations set forth in 42 CFR 483.70(a)(8). In making such determinations of eligibility the commissioner shall consider information obtained from a facility's cost report, other more recent financial information to be provided by the facility, and such other information as may be required by the commissioner, including, but not limited to:

(i) operating profits and losses;

(ii) eligibility for funding pursuant to subdivision twenty-one of section 2808 of the Public Health Law;

(iii) unrestricted fund balances;

(iv) documentation demonstrating the inability of the facility to obtain credit, at terms acceptable to the commissioner, without the reimbursement treatment accorded pursuant to this section;

(v) working capital;

(vi) days of cash expense on hand;

(vii) days of revenue in accounts receivable;

(viii) transfers and withdrawals;

(ix) information related to the health and safety of a facility's residents;

(x) other financial information as may be required from the facility by the commissioner; and

(xi) the filing of a Notice pursuant to Subdivision 1-a of Section 2802 of the Public Health Law, or the receipt of required CON approvals, as appropriate.

(2) The capital cost component of the Medicaid rates of each eligible facility shall be adjusted in an amount, as determined by the commissioner, to reflect the costs of the annual debt service related to the financing of equipment and other capital improvements directly related to the financing of an automatic sprinkler system that will be in compliance with applicable federal regulations.

(3) As a condition for receipt of funding pursuant to this section, each eligible facility shall submit to the commissioner the costs of the project, the proposed terms of the financing, including interest rate and term of the financing, and a schedule setting forth by month the estimated debt service payable over the life of the financing. Such schedule, along with such other information as may be required by the commissioner, shall be provided to the commissioner for review and approval at least sixty days prior to the due date of such first debt service payment, or such shorter period as the commissioner may permit.

(4) As a condition for receipt of funding pursuant to this section, Medicaid revenues attributable to the rate adjustments authorized by this section and any other additional facility revenues needed to cover scheduled debt service payments relating to the financing of an automatic sprinkler system that is in compliance with federal regulation as described in this section, shall be deposited into a separate account maintained by the facility and the deposits in such account shall be used solely for the purpose of satisfying such debt service payments.

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

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

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

**Regulatory Impact Statement****Statutory Authority:**

The statutory authority for this regulation is contained in the authority vested in the Public Health and Health Planning Council and the Commis-

sioner of Health by section 2803(2) of the Public Health Law, which authorizes the Council to “adopt and amend rules and regulations, subject to the approval of the commissioner” and which further provides that such rules may address the “establishment...of rates, payments, reimbursements, grants and other charges...” for medical facilities, including nursing homes.

**Legislative Objectives:**

Federal regulations require that on or before August 13, 2013, all nursing homes be protected throughout by a supervised automatic sprinkler system. Subpart 86-2 of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York, is amended by adding a new section 2.41 to assist eligible nursing homes (i.e., those which are determined to be financially distressed) with accessing the credit markets to finance the costs of equipment and other capital costs directly related to the installation of an automatic sprinkler system that is compliant with the Federal regulations. To provide an immediate source of revenue to financially distressed nursing homes to pay the debt service on loans to finance sprinkler systems, the Medicaid capital rate will be adjusted to accelerate the reimbursement of such costs (e.g., reimbursement will begin in 2012 rather than 2014 - the normal 2 year lag under which capital reimbursement normally occurs). In addition, to provide assurance to prospective lenders that such funds will be available to pay debt service, the proposed regulation also requires eligible facilities to deposit in a separate account Medicaid revenues attributable to the capital rate adjustments for sprinklers, and other facility revenues as may be required to cover 100% of debt service payments due. The funds held in such separate account may only be used for the purpose of paying the debt service on the outstanding sprinkler loans. The Department of Health estimates there are approximately 98 nursing homes that are financially distressed and that do not meet the Federal mandate for sprinklers.

**Needs and Benefits:**

Federal regulations require that all nursing homes be protected by an automatic sprinkler system. There are roughly 98 nursing homes that are not compliant with the Federal mandate and that are estimated to be financially distressed (as described by the criteria established in the regulation). This regulation will ensure that the health and safety of nursing homes residents is protected and access to care is maintained by ensuring that financially distressed nursing homes avoid penalties for non-compliance (i.e., civil monetary penalties, the denial of Medicare and Medicaid payment for new admissions, the termination of Medicaid and Medicare provider certifications).

**Costs to Private Regulated Parties:**

There will be no additional costs to private regulated parties.

**Costs to State Government:**

There is no additional aggregate increase in Medicaid expenditures anticipated as a result of these regulations. The acceleration of the reimbursement of Medicaid capital costs anticipated by this provision will be accommodated in the nursing home appeals cap and in the processing of annual capital rates. Depending on the terms of the financing, it is likely the acceleration of capital costs will reduce over the life debt service costs and result in long term savings for the State.

**Costs to Local Government:**

Local districts’ share of Medicaid costs is statutorily capped; therefore, there will be no additional costs to local governments as a result of this proposed regulation.

**Costs to the Department of Health:**

There will be no additional costs to the Department of Health as a result of this proposed regulation.

**Local Government Mandates:**

The regulation does not impose any new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district or other special district.

**Paperwork:**

The regulation will require nursing homes to apply to the Department to determine if they meet the financially challenged criteria established by the regulation and to submit a schedule of debt service payments. This additional paperwork is expected to be minimal, as the Department will primarily use information already required to be submitted by nursing homes (i.e., annual cost report data) to determine eligibility and to reimburse capital costs.

**Duplication:**

These regulations do not duplicate existing state or federal regulations. These regulations will assist financially distressed nursing homes with meeting the requirements of an existing federal regulation for sprinkler systems.

**Alternatives:**

The regulation is prompted by the requirement that nursing homes comply with the Federal mandate for sprinklers and the lack of alternative financing vehicles for financially distressed homes that cannot, in the absence of this regulation, independently access the credit markets. Absent

this regulation, nursing homes that are unable to comply with the Federal mandate are at risk for losing their provider certifications.

**Federal Standards:**

The regulation will assist nursing homes with meeting an existing Federal mandate which requires nursing homes to be equipped with an automatic sprinkler system.

**Compliance Schedule:**

This proposed regulation will help nursing homes meet the August 13, 2013 deadline for becoming compliant with Federal regulations that require homes to be equipped with an automatic sprinkler system.

**Regulatory Flexibility Analysis**

**Effect of Rule:**

For the purpose of this regulatory flexibility analysis, small businesses were considered to be residential health care facilities with 100 or fewer employees. Based on recent financial and statistical data extracted from Residential Health Care Facility Cost Reports, approximately 60 residential health care facilities (i.e., nursing homes) were identified as employing fewer than 100 employees. It is estimated that 7 of these small business nursing homes are not currently compliant with Federal regulations requiring automatic sprinklers and will meet the financially distressed criteria established by this regulation.

This rule will have no direct effect on local governments.

**Compliance Requirements:**

There are no new compliance requirements. The regulation will assist financially distressed nursing homes, 7 of which are estimated to be small businesses, with meeting an existing Federal mandate which requires all nursing homes be protected throughout by an automatic sprinkler system.

**Professional Services:**

No new or additional professional services are required by small business nursing homes to apply to the Department to determine if they are eligible to receive accelerated Medicaid reimbursement of capital costs for sprinklers.

**Compliance Costs:**

There are no new compliance costs. The regulation will assist financially distressed nursing homes, 7 of which are estimated to be small businesses, with meeting an existing Federal mandate which requires all nursing homes be protected throughout by an automatic sprinkler system.

**Economic and Technological Feasibility:**

The proposed rule doesn’t require additional technological or economic requirements.

**Minimizing Adverse Impact:**

This regulation will assist homes, some of which will be small businesses as described above, with meeting the requirements of Federal regulations that mandate all nursing homes be protected by an automatic sprinkler system. Assisting nursing homes (including nursing homes which are small businesses), with meeting this mandate will minimize the adverse implications of failing to comply, which include potentially jeopardizing the health and safety of nursing home residents, civil monetary penalties, the denial of Medicare and Medicaid payment for new admissions, and the termination of Medicaid and Medicare provider certifications.

**Small Business and Local Government Participation:**

The Department, in collaboration with the Nursing Home Industry Associations (which include representation of small business nursing homes) worked collaboratively to develop the regulation. In addition, a Federal Public Notice, published in the New York State Register invited comments and questions from the general public.

**Rural Area Flexibility Analysis**

**Effect on Rural Areas:**

Rural areas are defined as counties with populations less than 200,000 and, for counties with populations greater than 200,000, include towns with population densities of 150 persons or less per square mile. The following 43 counties have populations of less than 200,000:

Allegany	Hamilton	Schenectady
Cattaraugus	Herkimer	Schoharie
Cayuga	Jefferson	Schuyler
Chautauqua	Lewis	Seneca
Chemung	Livingston	Steuben
Chenango	Madison	Sullivan
Clinton	Montgomery	Tioga
Columbia	Ontario	Tompkins
Cortland	Orleans	Ulster
Delaware	Oswego	Warren
Essex	Otsego	Washington

Franklin	Putnam	Wayne
Fulton	Rensselaer	Wyoming
Genesee	St. Lawrence	Yates
Greene		

The following nine counties have certain townships with population densities of 150 persons or less per square mile:

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

#### Compliance Requirements:

There are no new compliance requirements. The regulation will assist approximately 98 financially distressed nursing homes that are located across the State, including in many of the counties listed above, with meeting an existing Federal mandate which requires all nursing homes be protected throughout by an automatic sprinkler system.

#### Professional Services:

No new or additional professional services are required by nursing homes located in rural areas to apply to the Department to determine if they are eligible to receive accelerated Medicaid reimbursement of capital costs for sprinklers.

#### Compliance Costs:

No additional compliance costs are anticipated as a result of this regulation. The regulation will assist financially distressed nursing homes located across the State, including in many of the counties listed above, with meeting an existing Federal mandate which requires all nursing homes be protected throughout by an automatic sprinkler system.

#### Minimizing Adverse Impact:

This regulation will assist nursing homes located across the State, with meeting the requirements of Federal regulations that mandate all nursing homes be protected by an automatic sprinkler system. Assisting nursing homes (including nursing homes located in many of the counties listed above), with meeting this mandate will minimize the adverse implications of failing to comply, which include potentially jeopardizing the health and safety of nursing home residents, civil monetary penalties, the denial of Medicare and Medicaid payment for new admissions, and the termination of Medicaid and Medicare provider certifications.

#### Rural Area Participation:

The Department, in collaboration with the Nursing Home Industry Associations (which include representation of rural nursing homes) worked collaboratively to develop the regulation. In addition, a Federal Public Notice, published in the New York State Register invited comments and questions from the general public.

#### Job Impact Statement

A Job Impact Statement is not required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is not expected that the proposed rule to accelerate capital reimbursement for costs related to the installation of automatic sprinkler systems will have a material impact on jobs or employment opportunities across the Nursing Home industry.

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

#### Early Intervention Program

**I.D. No.** HLT-36-12-00010-P

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

**Proposed Action:** Amendment of Subpart 69-4 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 2559-b

**Subject:** Early Intervention Program.

**Purpose:** Eliminate conflicts of interest by evaluators, service coordinators, and service providers in the Early Intervention Program.

**Text of proposed rule:** A new paragraph (ii) is added to subdivision 7 of section 69-4.11 to read as follows:

(7) If the early intervention official and the parent agree on the initial or subsequent IFSPs, the IFSP shall be deemed final and the ongoing service coordinator shall be authorized to implement the plan.

(i) The early intervention official shall request, and the parent shall supply, the parent's social security number and the social secu-

urity number for their child at the time of the IFSP meeting; provided, however that if the parent refuses to furnish such information to the early intervention official, early intervention services contained within the IFSP must still be provided and such refusal by the parent shall be documented in the child's record.

(ii)(a) For children referred to the early intervention program on or after December 1, 2012, or for children referred to the early intervention program prior to December 1, 2012 for whom an additional evaluation or partial evaluation is requested on or after December 1, 2012 for the purpose of adding a new service, neither the evaluator which conducts an evaluation of a child, an approved agency which employs or contracts with the evaluator, nor a relative or business associate of the evaluator, shall provide early intervention services to such child unless authorized by the commissioner, after consultation with the early intervention official, due to special circumstances related to the evaluator's qualifications or availability or other extraordinary circumstances in which there is a clear showing that the child will not be able to access needed services absent such authorization.

(1) For purposes of this paragraph, the following terms shall have the following meanings:

(i) "business associate" shall mean a person joined or united with one or more individuals in a business or enterprise; and

(ii) "relative" shall mean any person living in the same household as an individual or the individual's spouse, child, stepchild, stepparent, or any person who is a direct descendant of that individual's grandparents or the spouse of such descendant.

(b) Any request for such authorization shall be made by the child's service coordinator, which shall fully document the basis for the request in a manner and format prescribed by the commissioner. Requests for authorization shall be made no later than twenty days after the child's IFSP meeting; provided, however, that any request for authorization shall not delay the timely delivery of early intervention services authorized in the child's IFSP. The commissioner shall issue a determination upon such a request within ten calendar days after the request is received.

(c) If the commissioner finds there is a shortage of evaluators or approved providers in certain disciplines in a particular region of the state, the commissioner may issue a standing authorization, on such terms or conditions as he or she deems appropriate, which shall remain in effect in such region until such time as the commissioner determines that such shortage no longer exists.

(d) A service coordinator shall not assign as a service provider, a business associate of the service coordinator, a relative of such service coordinator or an agency provider which employs or contracts with such relative, who is not otherwise prohibited from serving as the provider for a child pursuant to subparagraph (a) of this paragraph, unless such relationship is disclosed to the parent and the parent does not object to the assignment.

A new paragraph (6) is added to subdivision (a) of section 69-4.5 to read as follows:

(6) Commencing on and after December 1, 2012, individuals shall not be approved to deliver both service coordination and evaluations in the early intervention program. Individuals approved prior to December 1, 2012 to deliver both service coordination and evaluations shall notify the department regarding which of these services the individual wishes to continue providing after December 1, 2012, and approval to deliver the service not selected by the individual in accordance with this paragraph shall terminate on December 1, 2012.

New paragraphs (i), (ii) and (iii) are added to subdivision (e) of section 69-4.5 to read as follows:

(e) (i) Approved providers shall not disseminate, or cause to be disseminated on their behalf, marketing materials that are false, deceptive, or misleading. Upon the Department's request, providers shall periodically submit copies of marketing materials for review. Marketing materials that do not comply with the provisions of this subdivision may be a basis for action against the provider's approval in accordance with the provisions of section 69-4.24 of this subpart. The Department shall develop standards on appropriate marketing materi-

als and shall require that marketing materials that seek to promote or advertise early intervention program evaluations or services adequately inform parents or guardians of potentially eligible or at-risk children less than three years of age about the early intervention program. Marketing materials that seek to promote or advertise early intervention program evaluations or services shall include the following statements or their equivalent:

(1) Clear identification that the early intervention program and early intervention services available through the early intervention program are for children less than three years of age who have or are suspected of having a developmental delay and/or disability.

(2) A statement that the early intervention program is a public program funded by New York State and county governments.

(3) A statement that all children must be referred to the municipality to access early intervention program services, and including the municipal agency's telephone number.

(4) Clear identification of the provider referenced in the marketing and advertising materials, and an accurate statement that the provider is approved as a provider of early intervention program services and under contract with the municipality to deliver early intervention program services.

(5) A statement that all services provided under the early intervention program are provided at no out-of-pocket cost to parents, but that health insurance may be accessed for reimbursement for early intervention services provided to eligible children and their families.

(6) A statement that eligibility for the early intervention program can be determined only by State-approved evaluators under contract with the municipality.

(7) A statement that if a child is found eligible for the early intervention program, all needed early intervention services are identified in collaboration with the parent and must be authorized by the municipality.

(8) A statement that the municipality will arrange for service providers, considering the individual needs of the child and family, to deliver services authorized by the municipality.

(9) A statement that when early intervention services are delivered in child care settings or community locations that require a fee, the parent is responsible for paying any associated costs with such access to child care or community locations.

(ii) *Service coordinators, evaluators and approved providers, and any individual or entity which performs paid or unpaid marketing activities related to early intervention program services on their behalf, shall not engage in any marketing and advertising practices that offer incentives, or could be construed or appear to offer incentives of any kind to the parents or relatives of an eligible or potentially eligible child, or to the service coordinator, evaluator, or other approved providers authorized to deliver services to an eligible or potentially eligible child, that attempts to or would appear to influence selection of a service coordinator, evaluator or provider of services.*

(iii) *Approved agency providers shall not offer incentives or appear to offer incentives to its employees or subcontractors in the form of payment, performance evaluations, or other awards or benefits that are based on the number of referrals and/or services authorized under the early intervention program.*

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

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

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

#### **Regulatory Impact Statement**

Statutory Authority:

The Early Intervention Program is established in Title II-A of Article 25 of the Public Health Law (PHL) and implements Part C of the federal Individuals with Disabilities Education Act (IDEA). PHL § 2550(1) establishes the Department of Health (Department) as the lead agency responsible for the general administration and supervi-

sion of programs under the Early Intervention Program. PHL § 2550(2) authorizes the Department to establish standards for evaluators, service coordinators and providers of early intervention services and requires the Department to monitor agencies, institutions and organizations providing early intervention services. In addition, PHL § 2544(4) and (5) require that the evaluation of each child be made without regard to the availability of services in the municipality or who might provide those services, and prohibits an evaluation from including a reference to any specific provider of early intervention services. PHL § 2543 sets forth the responsibilities of service coordinators. PHL § 2545(10) requires the service coordinator to implement the child's and family's IFSP in a timely manner. PHL § 2559-b authorizes the Commissioner of Health (Commissioner) to adopt regulations necessary to carry out the Early Intervention Program.

#### **Legislative Objectives:**

The legislative objectives of the Early Intervention Program include establishing a coordinated, comprehensive array of services; enhancing the development of infants and toddlers with disabilities and minimizing the need for special education services after infants and toddlers with disabilities become eligible for services under Part B of IDEA.

PHL § 2544 entitles a child thought to be eligible for the Early Intervention Program to a multidisciplinary evaluation. The evaluation must be made without regard to who might provide those services. If the child is found eligible, an Individualized Family Service Plan (IFSP) must be jointly developed by the Early Intervention Official, service coordinator, parent, and evaluator. 10 NYCRR §§ 69-4.11(a)(6). Once an agreement is reached on an IFSP, the service coordinator must implement the plan in a timely manner. PHL § 2545(10).

To ensure that children receive an objective multidisciplinary evaluation and to prohibit conflicts of interest that may impact the results of the evaluation, for children referred to the Early Intervention Program on or after December 1, 2012 or for children referred to the Early Intervention Program prior to December 1, 2012 for whom an additional evaluation or partial evaluation is requested on or after December 1, 2012 for the purpose of adding a new service, the proposed rule prohibits the evaluator which conducts an evaluation of a child, an approved agency which employs or contracts with the evaluator, and relatives and business associates of the evaluator from providing services to such child unless authorized by the Commissioner due to special circumstances related to the evaluator's qualifications or availability or other extraordinary circumstances in which there is a clear showing that the child will not be able to access needed services absent such authorization. Requests for authorization must be made by the child's service coordinator within twenty days after the child's IFSP meeting. The commissioner must issue a determination within ten calendar days after the request is received.

The proposed rule allows the Commissioner to issue a standing authorization if there is a shortage of evaluators or approved providers in certain disciplines in a particular region of the state. The standing order remains in effect in such region until the Commissioner determines that such shortage no longer exists.

The proposed rule also prohibits a service coordinator from assigning as a service provider, a business associate or relative of such service coordinator, or an agency provider which employs or contracts with such relative, who is not otherwise prohibited from serving as the provider for a child, unless such relationship is disclosed to the parent and the parent does not object.

Commencing on and after December 1, 2012, individuals cannot be approved to deliver both service coordination and evaluations. Individuals approved prior to December 1, 2012 to deliver both service coordination and evaluations are required to notify the Department regarding which of these services the individual wishes to continue providing after December 1, 2012. Approval to deliver the service not selected by the individual terminates on December 1, 2012.

The proposed rule incorporates into regulation existing marketing standards issued by the Department in December, 2006. Service coordinators, evaluators and approved providers, and any individual

or entity which performs paid or unpaid marketing activities related to Early Intervention Program services on their behalf, are prohibited from engaging in any marketing/ advertising practices that offer or appear to offer incentives to the parents or relatives of an eligible or potentially eligible child, or to the service coordinator, evaluator, or other approved providers that attempts to or would appear to influence selection of a service coordinator, evaluator or provider of services. Approved agency providers are prohibited from offering or appearing to offer incentives to employees or subcontractors that are based on the number of referrals and/or services authorized under the Early Intervention Program.

#### Needs and Benefits:

As indicated, it is important that a child receive an objective multidisciplinary evaluation that provides comprehensive information about the child's developmental status, strengths and needs, and that recommendations for early intervention services are discussed at the IFSP meeting. An objective planning process that focuses on the child's strengths and needs, measurable results to be achieved through early intervention, and the frequency, intensity, duration, location, and method of early intervention services requires participation of evaluators who have no vested interest in these decisions, or in what provider is authorized to deliver those services.

In New York City, over 90 percent of evaluators provide services to children whom they evaluated, and average utilization levels and costs are higher than in the rest of the State. Outside New York City, more than 44 percent, on average, of evaluators also provide services to children whom they evaluated. One factor that potentially contributes to the difference in utilization levels is the conflict of interest created when agencies and their staff or contractors responsible for conducting evaluations to determine eligibility for services could potentially render services included in children's IFSPs.

The proposed rule will ensure that the relationship between evaluator and provider does not encourage the inappropriate provision of services, fostering the objectivity of evaluations and decreasing costs for taxpayers. The proposed rule also recognizes that in certain circumstances, it may be appropriate for an evaluator, a business associate or relative of the evaluator, or approved agency which employs or contracts with the evaluator, to also render services to the child, and allows the Commissioner, after consultation with the Early Intervention Official, to authorize service provision in certain circumstances, as outlined above.

The proposed rule prohibiting service provision by the evaluator, business associate or relative of the evaluator, or agency which employs or contracts with the evaluator will apply only to those children referred to the Early Intervention Program on or after December 1, 2012, or for children referred prior to December 1, 2012 for whom an additional evaluation or partial evaluation is requested on or after December 1, 2012 for the purpose of adding a new service, to ensure continuity of care for children and families receiving early intervention services prior to the effective date, by allowing them to continue to receive services from their current providers.

The proposed rule also ensures that familial or business relationships between the service coordinator and the provider does not improperly influence the assignment of service providers and that service coordinators identify those providers who are most appropriately qualified to meet the child's and family's needs.

The proposed rule ensures that approved individuals may not serve as both the service coordinator and evaluator for the child, fostering the objectivity of evaluations and decreasing costs for taxpayers.

Finally, the proposed rule codifies existing marketing standards for the Early Intervention Program.

#### Costs to Regulated Parties:

Evaluators which conduct evaluations of children, relatives or business associates of such evaluators, and approved agency providers which employ or contract with such evaluators will be impacted by the proposed rule to the extent that they will no longer be able to render services to children evaluated by the evaluator unless authorized to do so by the Department. However, their overall participation in the Early Intervention Program will not be impacted and they will continue to be able to serve other children.

Likewise, while the new rule prohibits a service coordinator from assigning as a service provider, a person or entity which has a business or familial relationship with the service coordinator, unless such relationship is disclosed to the parent and the parent does not object to the assignment, the overall participation of providers in the Early Intervention Program who have these types of relationships with the service coordinator will not be impacted in that they will continue to be able to serve other children.

Individual providers in the program who are currently approved to deliver both evaluation services and service coordination services will be provided with adequate notice to determine which of these services they wish to continue to deliver as of December 1, 2012.

Incorporating existing marketing standards for the Early Intervention Program into regulation will result in no costs to regulated parties which are currently required to adhere to the standards.

Costs to the Agency, the State and Local Governments for the Implementation of and Continuing Compliance with the Rule:

By prohibiting evaluators from acting as service providers under the Early Intervention Program, the proposed rule will reduce inappropriate service utilization and can be expected to result in an undefined level of savings to the program. Further, the proposed rule will require the Department to consult with the Early Intervention Official to review and act upon requests for authorization for a child to receive early intervention services from an evaluator, agency that employs or contracts with the evaluator, or a business associate or relative of the evaluator, in appropriate circumstances, which is not expected to have a measurable impact on administrative resources.

#### Local Government Mandates:

The proposed rule does not impose any new duty upon any county, city, town, village, school district, fire district, or other special district.

#### Paperwork:

The proposed rule will require a minimal amount of paperwork for service coordinators that request authorization from the Department for a child to receive early intervention services from an evaluator in appropriate circumstances.

#### Duplication:

The proposed rule does not duplicate, overlap, or conflict with relevant rules and other legal requirements of the State and federal government.

#### Alternatives:

The alternative course of action is to make no change to the regulatory requirements, which would not address either the potential conflict that arises (i) when an evaluator, an agency that employs or contracts with an evaluator, or a relative or business associate of the evaluator, also acts as a service provider; or (ii) when a service coordinator seeks to assign a business associate or relative of such service coordinator, or an agency provider which employs or contracts with such relative; or (iii) when an individual provider delivers both evaluation and service coordination services.

#### Federal Standards:

While neither federal statute nor regulation specifically prohibit evaluators from also serving as the providers of early intervention services, Part C of the IDEA and the associated federal regulations, 34 CFR Part 303, establish broad authority for states to oversee and administer Early Intervention Programs.

There are no applicable federal standards with respect to marketing of early intervention services.

#### Compliance Schedule:

The Department anticipates implementing the proposed rule effective December 1, 2012, allowing sufficient time to notify early intervention evaluators, service coordinators and providers of the rule's provisions and ensuring continuity of care for children and families participating in the program prior to the effective date.

#### Regulatory Flexibility Analysis

##### Effect of Rule:

Currently, there are approximately 600 agency and 1,100 individual qualified personnel who are approved and under contract with municipal governments to deliver early intervention services. Approved

agencies are incorporated entities, partnerships, and state operated facilities. Qualified personnel are individuals approved by the Department of Health (Department) in accordance with 10 NYCRR Subpart 69-4 to provide services in the Early Intervention Program and who have appropriate licensure, certification, or registration in the area in which they are providing services (including allied health professionals, physicians, special educators, psychologists, and vision specialists).

#### Compliance Requirements:

For children referred to the Early Intervention Program on or after December 1, 2012, or for children referred to the Early Intervention Program prior to December 1, 2012 for whom an additional evaluation or partial evaluation is requested on or after December 1, 2012 for the purpose of adding a new service, the proposed rule prohibits the evaluator which conducts an evaluation of a child, an approved agency which employs or contracts with the evaluator, and relatives and business associates of the evaluator, from providing early intervention services to such child unless authorized by the Commissioner of Health (Commissioner), after consultation with the early intervention official, due to special circumstances related to the evaluator or provider's qualifications or availability or other extraordinary circumstances in which there is a clear showing that the child will not be able to access needed services absent such authorization. The child's service coordinator is required to submit requests for such authorizations no later than twenty days after the child's initial IFSP meeting, and must fully document the basis for the request in a manner and format prescribed by the Commissioner. Any request for authorization cannot delay the timely delivery of early intervention services authorized in the child's IFSP. The Commissioner must issue a determination upon such a request within ten calendar days after the request is received.

The Commissioner, if he or she finds there is a shortage of evaluators or approved providers in certain disciplines in a particular region of the state, may issue a standing authorization, on such terms or conditions as he or she deems appropriate. Such authorization remains in effect in such region until such time as the Commissioner determines that such shortage no longer exists.

Effective December 1, 2012, service coordinators are prohibited from assigning as a service provider, a business associate or relative of such service coordinator or an agency provider which employs or contracts with such relative, who are not otherwise prohibited from serving as the provider for a child, unless such relationship is disclosed to the parent and the parent does not object to the assignment.

For purposes of the proposed rule, "business associate" shall mean a person joined or united with one or more individuals in a business or enterprise, and "relative" shall mean any person living in the same household as an individual or the individual's spouse, child, stepchild, stepparent, or any person who is a direct descendant of that individual's grandparents or the spouse of such descendant.

Commencing on and after December 1, 2012, individuals shall no longer be approved to deliver both service coordination and evaluations in the Early Intervention Program. Individuals approved prior to December 1, 2012 to deliver both service coordination and evaluations will be required to notify the department regarding which of these services the individual wishes to continue providing after December 1, 2012. Approval to deliver the service not selected by the individual shall terminate on December 1, 2012.

Service coordinators, evaluators and approved providers, and any individual or entity which performs paid or unpaid marketing activities related to Early Intervention Program services on their behalf, are prohibited from engaging in any marketing and advertising practices that offer incentives, or could be construed or appear to offer incentives of any kind to the parents or relatives of an eligible or potentially eligible child, or to the service coordinator, evaluator, or other approved providers authorized to deliver services to an eligible or potentially eligible child, that attempts to or would appear to influence selection of a service coordinator, evaluator or provider of services.

Approved agency providers are prohibited from offering incentives or appearing to offer incentives to employees or subcontractors in the form of payment, performance evaluations, or other awards or benefits that are based on the number of referrals and/or services authorized under the Early Intervention Program.

#### Professional Services:

It is not anticipated that evaluators, service coordinators or providers will require additional professional services to comply with proposed rule.

#### Compliance Costs:

There are no anticipated initial capital costs that will be incurred by a regulated business or industry or local government for compliance with the proposed rule.

#### Economic and Technological Feasibility:

There are no economically or technologically challenging aspects to the requirements of the proposed rule that do not already exist in current requirements for the Early Intervention Program.

#### Minimizing Adverse Impact:

The proposed rule prohibiting the evaluator which conducts an evaluation of a child, an approved agency which employs or contracts with the evaluator, and relatives and businesses associates of the evaluators from also rendering early intervention services to the child, unless authorized by the Commissioner, applies only to those children referred to the Early Intervention Program on or after December 1, 2012, and to children referred prior to December 1, 2012 for whom an additional evaluation or partial evaluation is requested after that date for the purpose of adding a new service. This phase-in of the new requirements will ensure continuity of care for children and families receiving early intervention services prior to the effective date.

There will be no adverse impact as a result of the proposed rule on local governments. The proposed rule allows the Commissioner, after consultation with the Early Intervention Official, to authorize service provision by the evaluator, approved agency, or relative or business associate of the evaluator in certain circumstances, as outlined above. Maintaining sufficient capacity to deliver appropriate and timely evaluations and early intervention services in rural areas is a high priority for the Department.

Individual providers in the program who are currently approved to deliver both evaluation services and service coordination services will be provided with adequate notice to determine which of these services they wish to continue to deliver as of December 1, 2012.

Under the proposed rule, service coordinators, evaluators and approved providers, and any individual or entity which performs paid or unpaid marketing activities related to Early Intervention Program services on their behalf, are prohibited from engaging in any marketing and advertising practices that offer incentives, or could be construed or appear to offer incentives of any kind to the parents or relatives of an eligible or potentially eligible child, or to the service coordinator, evaluator, or other approved providers authorized to deliver services to an eligible or potentially eligible child, that attempts to or would appear to influence selection of a service coordinator, evaluator or provider of services. Approved agency providers are prohibited from offering incentives or appearing to offer incentives to employees or subcontractors in the form of payment, performance evaluations, or other awards or benefits that are based on the number of referrals and/or services authorized under the Early Intervention Program. The proposed rule incorporates into regulation existing marketing standards issued by the Department, and which have had no adverse impact on jobs since their issuance in December, 2006.

#### Small Business and Local Government Participation:

A copy of this notice of proposed rulemaking will be posted on the Department's website and submitted to the electronic mail listserv for the Early Intervention Program. The notice will invite public comments on the proposal and include instructions for anyone interested in submitting comments, including small businesses and local governments. The proposed rule will also be submitted to the Early Intervention Coordination Council (EICC), which is charged in statute with reviewing all proposed rules and regulations related to the Early Intervention Program and offering any comment thereon prior to the Commissioner's approval of the final rule.

#### Rural Area Flexibility Analysis

##### Types and Estimated Numbers of Rural Areas:

The proposed rule applies to all municipalities, evaluators, service coordinators, and providers in the Early Intervention Program, includ-

ing those in rural areas of the State. The proposed rule prohibiting the evaluator which conducts an evaluation of a child, an approved agency which employs or contracts with the evaluator, and relatives and businesses associates of the evaluator from providing early intervention services to the child, unless authorized by the Commissioner of Health (Commissioner), applies only to those children referred to the Early Intervention Program on or after December 1, 2012, and to children referred prior to December 1, 2012 for whom an additional evaluation or partial evaluation is requested after that date for the purpose of adding a new service. The proposed rule prohibiting individuals from being approved to deliver both service coordination and evaluations is effective on and after December 1, 2012. Individual providers who are currently approved to deliver both evaluation services and service coordination services will be provided with adequate notice to determine which of these services they wish to continue to deliver after December 1, 2012. Approval to deliver the service not selected by the individual provider will terminate on December 1, 2012.

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

Municipalities and providers in the Early Intervention Program in rural areas of the State will have no additional reporting or record-keeping requirements associated with the proposed rule, except that a minimal amount of paperwork will be required of service coordinators that request authorization from the Commissioner for a child to receive early intervention services from an evaluator, and others associated with the evaluator, in appropriate circumstances.

It is not anticipated that municipalities and providers will require additional professional services to comply with the proposed rule.

**Costs:**

Evaluators which conduct evaluations of children, approved agency providers which employ or contract with such evaluators, and relatives and business associates of evaluators, will be impacted by the proposed rule to the extent that they will no longer be able to render services to children evaluated by the evaluator unless authorized to do so by the Commissioner. However, their overall participation in the Early Intervention Program will not be impacted and they will continue to be able to serve other children.

Likewise, while the new rule prohibits a service coordinator from assigning as a service provider, a business associate or relative of such service coordinator, or an agency provider which employs or contracts with such relative, who are not otherwise prohibited from serving as the provider for a child, unless such relationship is disclosed to the parent and the parent does not object to the assignment, the overall participation of providers in the Early Intervention Program who have these types of relationships with the service coordinator will not be impacted in that they will continue to be able to serve other children.

Individual providers who are currently approved to deliver both evaluation services and service coordination services will be provided with adequate notice to determine which of these services they wish to continue to deliver after December 1, 2012. Approval to deliver the service not selected shall terminate on December 1, 2012.

Incorporating existing marketing standards for the Early Intervention Program into regulation will result in no costs to regulated parties which adhere to the standards.

There are no costs for municipalities and providers in rural areas associated with the proposed rule. By prohibiting evaluators from acting as service providers under the Early Intervention Program, the proposed rule will reduce inappropriate service utilization and can be expected to result in an undefined level of savings to the program which is funded with both state and local funds.

**Minimizing Adverse Impact:**

It is not anticipated that the proposed rule will result in any adverse impact in rural areas. The proposed rule prohibiting the evaluator which conducts an evaluation of a child, an approved agency which employs or contracts with the evaluator, and relatives and businesses associates of the evaluators from provide early intervention services to the child, unless authorized by the Commissioner, applies only to those children referred to the Early Intervention Program on or after December 1, 2012, and to children referred prior to December 1, 2012

for whom an additional evaluation or partial evaluation is requested after that date for the purpose of adding a new service. This will ensure continuity of care for children and families receiving early intervention services prior to the effective date, by allowing them to continue to receive services from their current providers.

The proposed rule ensures sufficient capacity will be maintained to provide appropriate evaluation services and early intervention services to children in rural areas, by allowing the Commissioner, after consultation with the Early Intervention Official, to authorize the evaluator, approved agency which employs or contracts with the evaluator, or a business associate or relative of the evaluator, to also serve as the provider due to special circumstances related to the evaluators qualifications or availability or other extraordinary circumstances in which there is a clear showing that the child will not be able to access needed services absent such authorization. The proposed rule also allows the Commissioner to issue a standing authorization, on terms or conditions he or she deems appropriate, upon finding there is a shortage of evaluators or approved providers in certain disciplines in a particular region of the State.

The proposed rule prohibiting individuals from being approved to deliver both service coordination and evaluations is effective on and after December 1, 2012. Individual providers in the program who are currently approved to deliver both evaluation services and service coordination services will be provided with adequate notice to determine which of these services they wish to continue to deliver as of December 1, 2012.

**Rural Area Participation:**

A copy of this notice of proposed rulemaking will be posted on the Department of Health's website and submitted to the electronic mail listserv for the Early Intervention Program. The notice will invite public comment on the proposal and include instructions for anyone interested in submitting comments, including small businesses and local governments. The proposed rule will also be reviewed by the Early Intervention Coordination Council (EICC), which is charged in statute with reviewing all proposed rules and regulations related to the Early Intervention Program and offering any comment thereon prior to the Commissioner's approval of the final rule. The EICC includes in its membership municipal and provider representatives located in rural areas.

**Job Impact Statement**

**Nature of Impact:**

The proposed rule will have minimal or no impact on jobs. While an evaluator which conducts an evaluation of a child, approved agency providers which employ or contract with such evaluator, and relatives and business associates of the evaluators may be impacted by the proposed rule to the extent that they will no longer be able to render services to the child unless authorized to do so by the Department of Health (Department), their overall participation in the Early Intervention Program will not be impacted and they will continue to be able to serve other children. Likewise, the proposed rule prohibits a service coordinator from assigning as a service provider, a business associate of the service coordinator, a relative of such service coordinator, or an agency provider which employs or contracts with such relative, who are not otherwise prohibited from serving as the provider for a child, unless such relationship is disclosed to the parent and the parent does not object to the assignment, the overall participation of providers in the Early Intervention Program who have these types of relationships with the service coordinator will not be impacted in that they will continue to be able to serve other children.

The proposed rule prohibiting individuals from being approved by the Department to deliver both service coordination and evaluations in the Early Intervention Program after December 1, 2012 will not impact the overall participation of individual providers in the Early Intervention Program.

The proposed rule maintains adequate capacity to provide evaluations and services, by allowing the Department, after consultation with the Early Intervention Official, to authorize the provision of services to a child by the evaluator which conducted the child's evaluation, the approved agency which employs or contracts with the evaluator, or a relative or business associate of the evaluator, due to special

circumstances related to the evaluator's qualifications or availability or other extraordinary circumstances in which there is a clear showing that the child will not be able to access needed services absent such authorization. The proposed rule also allows the Commissioner of Health (Commissioner) to issue a standing authorization, on such terms and conditions as he or she deems appropriate, if he or she finds there is a shortage of evaluators or approved providers in certain disciplines in a particular region of the state. The standing order will remain in effect in such region until such time as the Commissioner determines that such shortage no longer exists.

Under the proposed rule, service coordinators, evaluators and approved providers, and any individual or entity which performs paid or unpaid marketing activities related to Early Intervention Program services on their behalf, are prohibited from engaging in any marketing and advertising practices that offer incentives, or could be construed or appear to offer incentives of any kind to the parents or relatives of an eligible or potentially eligible child, or to the service coordinator, evaluator, or other approved providers authorized to deliver services to an eligible or potentially eligible child, that attempts to or would appear to influence selection of a service coordinator, evaluator or provider of services. Approved agency providers are prohibited from offering incentives or appearing to offer incentives to employees or subcontractors in the form of payment, performance evaluations, or other awards or benefits that are based on the number of referrals and/or services provided under the early intervention program. The proposed rule incorporates into regulation existing marketing standards issued by the Department, and which have had no adverse impact on jobs since their issuance in December, 2006.

#### Categories and Numbers Affected:

Currently, there are approximately 600 agency and 1,100 individual qualified personnel who are approved and under contract with municipal governments to deliver early intervention services. Approved agencies are incorporated entities, partnerships, and state operated facilities. Qualified personnel are individuals approved by the Department in accordance with 10 NYCRR 69-4 to provide services in the Early Intervention Program and who have appropriate licensure, certification, or registration in the area in which they are providing services (including allied health professionals, physicians, special educators, psychologists, and vision specialists).

The type of business entities includes a mix of business corporations, professional corporations, professional limited liability corporations, not-for-profit organizations and local governmental agencies.

#### Regions of Adverse Impact:

It is anticipated that New York City will be the most heavily impacted by the proposed rule. In New York City, over 90 percent of children receive early intervention services from providers who conducted their evaluations, and average utilization levels and costs are higher than in the rest of the State. Outside New York City, more than 44 percent, on average, of children receive services from providers who also act as evaluators. One factor that potentially contributes to the difference in utilization levels is the conflict of interest created when agencies and their staff or contractors responsible for conducting evaluations to determine eligibility for services and level of need could potentially render services included in children's IFSPs.

In addition, New York City contracts with agency providers to deliver service coordination services and the majority of these agencies also provide early intervention evaluations and services. Most county governments outside New York City are approved to deliver service coordination services and deliver initial service coordination services and/or ongoing service coordination services using county employees.

Rural areas with fewer providers may also be more heavily impacted.

#### Minimizing Adverse Impact:

The proposed rule prohibiting service provision by the evaluator, business associate or relative of the evaluator, or agency which employs or contracts with the evaluator will apply only to those children referred to the Early Intervention Program on or after December 1, 2012, and to children referred prior to December 1, 2012 for whom an additional evaluation or partial evaluation is requested after that

date for the purpose of adding a new service. This phase-in of the new requirements will ensure continuity of care for children and families receiving early intervention services prior to the effective date.

Likewise, individual providers in the program who are currently approved to deliver both evaluation services and service coordination services will be provided with adequate notice to determine which of these services they wish to continue to deliver after December 1, 2012.

The proposed rule provides the Department with sufficient authority to minimize adverse impact on children and families and on employment opportunities within the program by allowing the Department, after consultation with the Early Intervention Official, to authorize service provision by the evaluator, approved agency, or relative or business associate of the evaluator in certain circumstances, as outlined above. Maintaining sufficient capacity to deliver appropriate and timely evaluations and early intervention services in rural areas is a high priority for the Department.

Under the proposed rule, service coordinators, evaluators and approved providers, and any individual or entity which performs paid or unpaid marketing activities related to Early Intervention Program services on their behalf, are prohibited from engaging in any marketing and advertising practices that offer incentives, or could be construed or appear to offer incentives of any kind to the parents or relatives of an eligible or potentially eligible child, or to the service coordinator, evaluator, or other approved providers authorized to deliver services to an eligible or potentially eligible child, that attempts to or would appear to influence selection of a service coordinator, evaluator or provider of services. Approved agency providers are prohibited from offering incentives or appearing to offer incentives to employees or subcontractors in the form of payment, performance evaluations, or other awards or benefits that are based on the number of referrals and/or services authorized under the Early Intervention Program. The proposed rule incorporates into regulation existing marketing standards issued by the Department, and which have had no adverse impact on jobs since their issuance in December, 2006.

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## Hudson River Park Trust

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

#### Proposed Action Is the Amendment of Rules and Regulations for Hudson River Park, Including a Ban on Smoking

I.D. No. HPT-36-12-00004-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 751.3, 751.4, 751.5, 751.6, 751.7 and 751.8 of Title 21 NYCRR.

**Statutory authority:** Hudson River Park Act, L. 1998, ch. 592

**Subject:** Proposed action is the amendment of rules and regulations for Hudson River Park, including a ban on smoking.

**Purpose:** To remain consistent with other parks in the area and to incorporate activities previously not addressed.

**Substance of proposed rule (Full text is posted at the following State website: [www.hudsonriverpark.org](http://www.hudsonriverpark.org)):** The amendments to sections 751.3(m), (q) and (s) are being made to improve clarity.

Existing clauses 751.3(x) through 751.3(ad) are renumbered 751.3(y) through 751.3(ae) and new subdivisions (x) and (af) are added to define "playground" and "website."

The amendment to section 751.4(a)(1) specifies that the bikeway/walkway is owned by the New York State Department of Transportation.

The amendments to sections 751.4(a)(3), (d)-(f) are to improve clarity and grammar, and make usage consistent, and to add volleyball, mini golf, carousel, and skatepark to the enumerated list of specialized park facilities.

The amendment to sections 751.5(a) is to clarify that a fee may be required for the issuance of a permit. The amendments to sections 751.5(h) and (m) are to improve clarity and make usage consistent.

The amendments to section 751.6(a)-(c), (e) are to improve clarity and to make usage consistent.

The amendment to section 751.6(f) is to make explicit what weapons are prohibited in the park, and to make it clear that other governmental authorities can authorize the carrying of weapons.

The amendments to section 751.6(g)-(h) are to improve clarity and make usage consistent.

The amendment to section 751.6(i) is to clarify the legality of service animals in the park.

The amendments to section 751.6(k)-(l) are to improve clarity and make usage consistent.

The amendment to section 751.6(m) is to improve clarity and make usage consistent, to make it clear that it is prohibited to climb on railings and artwork, and to specify that disorderly conduct includes blocking an entrance or exit to the park.

The amendments to sections 751.6(n)-(u) are to improve clarity and make usage consistent.

The addition of section 751.6(v) is to prohibit smoking in the park except as may be designated by the trust.

The amendments to section 751.7(a)-(e) are to improve clarity and make usage consistent.

The amendments to section 751.7(f) are to improve clarity and make usage consistent, and to establish that possession of an open container containing an alcoholic beverage shall establish a rebuttable presumption that the holder of such container intended to consume its contents.

The amendments to section 751.7(g) are to improve clarity and make usage consistent.

The amendment to section 751.7(h) is to establish that when fishing, casting is not permitted except in designated areas.

The amendments to section 751.7(i)-(o) are to improve clarity and make usage consistent.

The amendments to section 751.7(p) are to establish that persons under the age of twelve are allowed in exclusive children's playgrounds only when supervising a child under the age of twelve, to establish that dogs in dog runs must wear license tags and be vaccinated against rabies, and to make it explicit that rules regarding docking and mooring are posted in the docking and mooring areas in the park and/or on the website.

The amendments to section 751.7(q)-(r) are to improve clarity and make usage consistent.

The addition of section 751.7(s) is to prohibit geocaching and treasure hunting games except as expressly permitted by the trust.

The amendments to sections 751.8(a)-(c),(e)-(f),(i)-(j),(l)-(n),(p)-(q) are to improve clarity and make usage consistent.

**Text of proposed rule and any required statements and analyses may be obtained from:** Laura LaVelle, Hudson River Park Trust, 353 West Street, 2nd Floor, Pier 40, (212) 627-2020, email: llavelle@hrpt.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**

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

Hudson River Park Act, Chapter 592 of the New York State Laws of 1998 grants the Hudson River Park Trust, a public benefit corporation, the authority and power to adopt rules and regulations to provide for the health, safety and welfare of the public using Hudson River Park.

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

Hudson River Park has been created for the public benefit and to make the waterfront an asset for the city and the region. Park Rules and Regulations were proposed in 2001 and adopted in 2002. Since that time Hudson River Park has grown, incorporating various activities not originally anticipated. Moreover, the New York City Department of Parks and Recreation and the New York State Office of Parks, Recreation and Historic Preservation have updated some of their rules and regulations. In an effort to remain consistent with other parks in the area and to incorporate activities previously not addressed, Hudson River Park Trust seeks at this time to amend and update our park rules and regulations to include a smoking ban and to further govern the conduct of the public, enhance and provide for the safety, well-being and enjoyment of each individual who may use Hudson River Park, and to assure to each individual equality of opportunity in the use and enjoyment of both the upland and water areas of the park.

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

The proposed action is the amendment of rules and regulations for Hudson River Park. The most significant change proposed is the addition of language that would prohibit smoking in Hudson River Park consistent with the recent smoking ban approved by the New York City Council and Mayor Michael Bloomberg that went into effect in May 2011. The City thoroughly researched the issue and learned that problems associated with smoking outdoors have been studied and documented measuring outdoor tobacco smoke, exposure to second-hand smoke, and litter. At this time, Hudson River Park (the "Park") is one of a handful of parks located in

the city that continues to allow smoking. As such, the Park may provide an incentive to smokers from around the city to come to smoke here and, in the process, increase litter, diminish the enjoyment of others and increase the health risks of park patrons. To remain consistent with 470 municipalities in the United State, including parks in San Francisco, California; Des Moines, Iowa; Cambridge, Massachusetts; Portland, Maine; Albuquerque, New Mexico; Salt Lake City, Utah, and the rest of New York City, Hudson River Park seeks to amend its regulations to prohibit smoking within the jurisdiction of the Park.

In addition, promulgation of these revised regulations is wholly consistent with all the permits, environmental reviews, and the General Project Plan adopted by the Hudson River Park Conservancy and the Empire State Development Corporation, predecessors to the Trust.

##### **COSTS:**

No additional costs are anticipated in connection with the adoption of the proposed rules and regulations.

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

Not applicable.

##### **PAPERWORK:**

Because the park is presently operational no new forms or paperwork will be required in connection with these rules and regulations. The type of paperwork presently utilized consists primarily of permit/special event applications.

##### **DUPLICATION:**

Proposed rules will not overlap with other state requirements. The proposed rules and regulations do not conflict with any applicable federal standards including those of the U.S. Army Corps of Engineers and the U.S. Coast Guard regarding navigable waters.

##### **ALTERNATIVES:**

There were no significant alternatives to the proposed rules.

##### **FEDERAL STANDARDS:**

The proposed rules and regulations do not conflict with any applicable federal standards.

##### **COMPLIANCE SCHEDULE:**

Immediate.

#### **Regulatory Flexibility Analysis**

A Regulatory Flexibility Analysis is not submitted with this proposed regulation because, as is evident from the nature of the proposed amendments, they will have no adverse economic impact or reporting, record-keeping, or other compliance requirements on small businesses or local governments. The amendments, which are modeled after the existing park rules for state parks and New York City parks, outline permitted and prohibited uses and activities within the upland and water areas of Hudson River Park.

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

A Rural Area Flexibility Analysis is not submitted with this proposed regulation because, as is evident from the nature of the proposed amendments, and the fact that the affected area is located in an urban setting, i.e., the 5 miles extending from Battery Park to 59th Street along the west side of Manhattan, they will have no adverse economic impact on rural areas or reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas. The amendments, which are modeled after the existing park rules for state parks and New York City parks, outline permitted and prohibited uses and activities within the upland and water areas of Hudson River Park.

#### **Job Impact Statement**

A Job Impact Statement is not submitted with this proposed regulation because, as is evident from the nature of the proposed rules, they will have no adverse impact on job opportunities or job development. The amendments, which are modeled after the existing park rules for state parks and New York City parks, outline permitted and prohibited uses and activities within the upland and water areas of Hudson River Park.

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## **Department of Labor**

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### **PROPOSED RULE MAKING HEARING(S) SCHEDULED**

#### **Child Performers**

**I.D. No.** LAB-36-12-00007-P

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

**Proposed Action:** Addition of Part 186 to Title 12 NYCRR.

**Statutory authority:** Labor Law, section 154-a

**Subject:** Child Performers.

**Purpose:** To establish rules regarding the employment of child performers.

**Public hearing(s) will be held at:** 10:00 a.m., Sept. 20, 2012 at Department of Labor, 75 Varick St., 7th Fl., New York, NY.

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

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

**Substance of proposed rule (Full text is posted at the following State website: [www.labor.ny.gov](http://www.labor.ny.gov)):** The proposed rule creates a new section of regulations designated as 12 NYCRR Part 186 entitled "Child Performers" promulgated pursuant to Labor Law § 154-a.

The Child Performer Education and Trust Act of 2003 (the Act) requires trust accounts to be established for child performers and requires employers to transfer 15% of earnings to such accounts to be held in trust until the child reaches eighteen years of age. It requires all child performers to have permits issued by the New York State Department of Labor. By amendment, effective July 21, 2011, such permits were changed from semi-annual to annual. It requires all employers of child performers to have employer certificates issued by the New York State Department of Labor, valid for three years, at specified costs. It requires employers of child performers to provide teachers to such child performers if they are otherwise unable to fulfill educational requirements due to their employment schedules.

Labor Law § 154-a requires the Commissioner of Labor to promulgate rules and regulations as shall be necessary and proper to effectuate the purposes and provisions of the Act, including but not limited to rules and regulations determining the hours of work and conditions of work necessary to safeguard the health, education, morals and general welfare of child performers.

An earlier version of the proposed rule was announced in the State Register on November 10, 2010. Two public hearings subsequently were held in New York City, on January 10, 2011 and January 31, 2011. Seventy six (76) persons submitted written comments and twenty six (26) persons spoke at the hearings, fourteen (14) of whom also submitted written comments, for a total of eighty eight (88) persons formally submitting comments. In response to the comments, many substantive changes were made in the proposed regulations.

A second version of the proposed rule was announced in the State Register on January 11, 2012. Twenty eight (28) written comments were received, 11 of which were from organizations in the industry and 17 of which were from parents. In response to these comments, further substantive changes were made in the proposed regulations. Further comment and discussion ensued, an further amendments were made to the regulations prompting this submission.

Proposed new Part 186 contains all regulations pertaining to child performers. They define the type of work that will categorize a child as a "child performer," including but not limited to work as part of a "reality show," a term defined in the regulations.

They also exempt various types of performances from regulatory oversight in accordance with Section 35.01(2) of the Arts and Cultural Affairs Law and provisions of the Labor Law.

They set forth the time and manner in which a child must obtain and renew a Child Performer Permit and the time and manner in which the employer of a child performer must obtain and renew an Employer Certificate of Eligibility. The proposed regulations also provide for a Temporary Child Performer Permit valid for fifteen days so as to permit a child performer who has never previously obtained a Child Performer Permit to be employed without or prior to submitting all documents necessary for a full Child Performer Permit. They also provide for an Employer Certificate of Group Eligibility permitting a group of children to be employed as a group on certain projects for not more than two days of work.

Like all other New York State working papers, a physician's certification of fitness to work is necessary to obtain the Child Performer Permit.

The proposed regulations require child performers below 16 years of age to be accompanied throughout the work day by a responsible person. In film, television and other types of work that is not live performance work, the responsible person is the parent or someone named by the parent. In live theater and other live performance, the responsible person may be named by the employer if allowing parental accompaniment is infeasible.

The proposed regulations require employers to provide a nurse, with pediatric practice experience, and a responsible person for each three or fewer child performers between the ages of fifteen days and six weeks, and for each ten or fewer child performers from ages of six weeks to six months.

The proposed regulations require employers to provide time and facilities for the education of child performers, whether schooled on location, home-schooled, or distance educated, when their work schedules prevent them from fulfilling their educational requirements outside of work. When needed, employers must provide certified or credentialed on-location teachers.

The proposed regulations also set forth the hours of work according to the age of the child and the production sector; one set of hours for live theater and other live performance work and another set of hours for all other productions.

The proposed regulations provide for the issuance of variances in the event of significant hardship and for the suspension or revocation of a permit or certificate after hearing. In addition, the proposed regulations permit the Commissioner of Labor to impose fines for violation of the regulations. However, no penalty or sanction shall be imposed for any violation of this Part that occurs, and is cured, prior to January 1, 2013 and where the employer self-identifies and ceases the conduct upon which the violation is based and abates the violation within 24 hours.

The proposed sections of Part 186 are summarized as follows:

Subpart 186-1 Purposes and scope

Subpart 186-2 Definitions

Subpart 186-3 Responsibilities of parents and guardians

Subpart 186-4 Responsibilities of employers

Subpart 186-5 Educational requirements

Subpart 186-6 Hours and Conditions of work

Subpart 186-7 Records; contracts

Subpart 186-8 Variances

Subpart 186-9 Suspension or revocation of permits and certificates

Subpart 186-10 Penalties and appeals.

**Text of proposed rule and any required statements and analyses may be obtained from:** Amy C. Karp, Legislative Counsel, New York State Department of Labor, State Office Campus, Building 12, Room 534, Albany, NY 12240, (518) 457-7350, email: [regulations@labor.ny.gov](mailto:regulations@labor.ny.gov)

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

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

#### **Summary of Regulatory Impact Statement**

Statutory Authority: Section 35.01 of the Arts and Cultural Affairs Law makes it unlawful, with certain exceptions, to employ, exhibit or cause to be exhibited any child under the age of sixteen years except as provided by Section 151 of the Labor Law. Labor Law Article 4-A, including Section 151, describes the circumstances under which child performers may be employed, including depositing at least fifteen percent of a child performer's earnings in a trust account in accordance with Estates Powers and Trust Law Article 7, Part 7, and fulfilling the compulsory education requirements in Education Law Article 65, Part 1 by providing a teacher to the child. Section 154-a of Article 4-A of the Labor Law (as added L. 2008 Ch. 89) charges the Commissioner with promulgating regulations determining the hours and conditions of work necessary to safeguard the health, education, morals and general welfare of child performers.

Legislative Objectives: The purpose of the authorizing legislation is to ensure that child performers who work or reside in the State of New York are provided with adequate education and ensure that a portion of the child performer's earnings are kept in trust until the age of majority.

**Needs and Benefits:** New Part 186 addresses the need to protect child performers by including all existing requirements related to the welfare of child performers in one regulation. The rule protects a portion of the child performer's pay by requiring the establishment of a trust fund. The rule mandates that alternative education be available if a child cannot attend school while performing and that a responsible person supervises and safeguards the child performer at work. The rule makes the Department responsible for certification and monitoring.

**Costs:** There is no cost to apply for a Child Performer Permit, nor any cost to renew the permit annually. The costs incurred in obtaining a physician's statement that the child performer is physically fit will be minimal.

For employers, the cost to apply for 3-year Certificates of Eligibility is \$350 for an initial certificate, \$200 for theaters with less than 500 seats, and \$200 for renewals and Employer Certificates of Group Eligibility.

Per Article 4-A of the Labor Law, the employer must incur the cost of providing a certified teacher to a child performer whose employment schedule prevents the child from fulfilling New York's compulsory education requirements. The proposed rule does not add further costs to this statutory requirement and accommodates several circumstances in which alternative education plans may be pursued by the parents without any cost to the employer.

The proposed rule requires that every child performer under 16 years of age be accompanied throughout the workday by a responsible person. This will be an added cost for some productions. The proposed rule supports the industry norm by assigning the responsibility to the family to provide a responsible person for the child and by exempting children once they reach the age of 16. Thus, in film and television there are no added costs to employers from the "responsible person" regulation. In the tight spaces and time-lines of live theater and other live performance work, many employers already employ "responsible persons" to supervise child performers, in lieu of permitting parental accompaniment backstage. The proposed rule supports existing industry practice in such productions and will not add to existing costs for them. Productions, which would neither permit parental accompaniment nor employ responsible persons, will be compelled to do one or the other. Each responsible person can supervise several children. A responsible person may not be listed on the New York State or national sex offender registries.

The proposed rule also requires employers to provide a nurse, who has pediatric practice experience, and a responsible person for each three or fewer child performers between the ages of fifteen days and six weeks, and a nurse and responsible person for each ten or fewer child performers from ages of six weeks to six months. This will be an added cost for some but not all productions.

Employers may incur additional accounting costs in the process of transferring statutory withholdings into a trust account and providing the parent or guardian with written notification of the transfers.

**Local Government Mandate:** Under the proposed rule the home school district will need to work with the parents and any employer-provided teacher to agree on an education plan that complies with home district requirements. The teacher will submit written reports on the child's educational progress, including attendance, lesson plans performed, and grades, to the child's parents and home school. If the child's work, grades, and credit are accepted by the school district, the child need not be declared absent and the school district's attendance-related state aid need not be affected. The proposed rule allows school officials, cooperating with parents, to develop alternative methods which satisfy educational requirements. Many child performers will be able to attend their local or private schools or be home- or distance educated.

**Paperwork:** The statute requires that child performers obtain one-year permits and employers obtain three-year certificates from the Department of Labor. The only document required of an employer, besides the application for the Employer Certificate of Eligibility, is proof of insurance coverage for workers' compensation and disability benefits.

Certificated employers must provide the Department with "Notices

of Use of Child Performers" at least 2 days in advance, containing very general information that includes anticipated dates of use, location of use, approximate number of children to be used, and type of production.

To employ a group of children as a group, for up to two nonconsecutive days, without the children having to apply individually for child performer permits, certificated employers must provide general information in order to obtain a group certificate.

Before the start of employment, employers are to obtain from the parent a copy of the child's permit, trust account information (if employment is paid), current emergency contact information, and authorization to provide emergency medical treatment.

The employer must give the parent or guardian written notification of the transfer of funds to a child's trust account within five days of such transfer.

If the employer lacks information on a trust account for a child, the employer is required to submit the monies to the NYS Comptroller instead.

The employer must require any on-set teacher to complete written reports covering attendance, lessons completed and grades. The reports will be given by the teacher to the child performer's school and parents or guardians at intervals required by the school and at the end of each employment. The employer will receive a copy of the attendance record only, as the employer will need this to show compliance with the education provisions.

The proposed rule requires the employer to retain records for six years. They must be open to inspection by the Department of Labor, school attendance and probation officers, the regular school or local school district, the State Education Department and the State Comptroller.

For a parent to apply for a Child Performer Permit, the statute requires the parent to provide the Department with information concerning the child, a school statement of satisfactory academic performance, and trust account information. The proposed rule, and the application process in use by the Department for several years, also requires proof of the child's age, a picture ID of the parent or guardian, a notarized guardian statement if the applicant is a guardian; and evidence that the child is no longer required to attend school, if that is the case.

A new requirement of the proposed rule is the requirement for a certification by a physician, nurse practitioner or physician's assistant that the child has been examined within 12 months prior to application or renewal and is physically fit to work.

Temporary 15-Day On-Line Child Performer Permits may be obtained on-line without providing any documentation to the Department and may be printed out by the applicants for the first time employment of a child who has never before applied for a child performer permit.

**Duplication:** This rule does not duplicate, overlap or conflict with any other State or federal requirements.

**Alternatives:** The Department conducted significant outreach to various groups that represent child performers and various employers who employ child performers, and asked them to make recommendations regarding the hours and conditions of work, as well as the educational needs, of child performers. The Department published an earlier version of the proposed regulations in the State Register and received written comments and oral testimony from some 88 different organizations and individuals. The Department used input from these various groups and individuals to draft and to revise Part 186.

Several groups requested an exemption from the rule's requirements when they were only using a larger group of children for a short scene. In response the Department created the Employer Certificate of Group Eligibility. The group certificate reduces the burden on the employer by eliminating the need to comply with the requirements necessary for individual child performers.

The scope of the rule is expressly excludes situations that are exempt from the child permit requirements of the Arts and Cultural Affairs Law, and provides exemptions from the employer requirements of the rule that are neither compensated nor of a professional

character, and that do not occur during school hours or in connection with a trade business or service. In addition, the rule provides opportunities to cure violations without penalties for violations that are self-identified by the employer, and for violations that are cured prior to January 1, 2013.

Parents were concerned about the ability to apply for and receive the Child Performer Permit in a timely manner when an unexpected and imminent performance opportunity occurs for the child. To accommodate these situations, the rule provides for a Temporary Permit. A parent or guardian of a child performer may apply for a Temporary Child Performer Permit prior to the first employment of a child performer. This allows the child performer to work for fifteen days while the parent or guardian fulfills the requirements for the Child Performer Permit.

Various production groups requested some flexibility if an employer would incur substantial hardship in complying with this rule. In response, the rule allows an employer to apply for a variance.

Federal Standards: Child performers are exempted from the child labor provisions of the federal Fair Labor Standards Act. There are no other federal standards regulating the employment of child performers.

Compliance Schedule: An employer's application for an Employer Certificate of Eligibility is due prior to employing a child performer. An Employer Certificate of Eligibility is valid for three years, and a renewal application for such certificate is due thirty days prior to the certificate's expiration date. An employer must provide a Notice of Use of Child Performers to the Department at least three business days prior to such use.

A parent or guardian of a child performer must obtain a Child Performer Permit prior to commencement of employment. A Child Performer Permit is valid for twelve months, and a renewal application for such permit is due thirty days prior to the permit's expiration date. The parent or guardian must provide the employer with documentation of the child performer's child performer trust account within fifteen days of the commencement of employment if providing a Temporary Child Performer Permit or at the start of the employment if working under a full Child Performer Permit.

The regulation will become effective upon publication of its adoption in the State Register. However, no penalties or sanctions shall be imposed for any violation that occurs, and is cured, prior to January 1, 2013 and where the employer self-identifies and ceases the conduct upon which the violation is based and abates the violation within 24 hours.

#### **Regulatory Flexibility Analysis**

Effect of Rule: Labor Law 154-a charges the Commissioner of Labor with promulgating regulations determining the hours and conditions of work necessary to safeguard the health, education, morals and general welfare of child performers. These regulations apply to all child performers who either reside or work in New York State and to all the entities that employ them. It is possible that small employers may employ child performers and therefore be subject to these regulations. It is not anticipated that local governments would employ a child performer, and therefore would not be subject to this Part. Additionally, when a child performer's performance is part of the activities of a school or is under the direction, control, or supervision of a department of education or is broadcast from a school, or is in productions made by students to meet academic requirements in a recognized course of study, it is exempted from these regulations, unless the child performer is participating in a reality show. A school district in which the child resides will be expected to work with the child performer's employer and parent or guardian in developing and agreeing to a suitable education plan for the child while he/she is employed, and monitor, through notice from the parents/employer, the student's status in fulfilling that plan. These activities will not have an adverse impact on the respective school districts.

Approximately 516 employers have current Child Performer Certificates of Eligibility. While the number of Child Performer Permits varies depending upon the amount of available work, 15,610 Child Performer Permits were issued in 2010, and 17,290 Child Performer Permits were issued as of 12/13/11. Each of these employers and child performers would be subject to this Part. Employers subject to these regulations represent a small fraction of all New York State employers.

Compliance Requirements: Employers, including small businesses, are required to apply for an Employer Certificate of Eligibility prior to employing any child performer. Such Certificate is valid for three years. Employers are required to apply for a renewal no later than 30 days prior to the expiration of an Employer Certificate of Eligibility. Applicants must provide their identifying business information and contact information, the type and location of employment of child performers for which the certificate is requested, proof of Workers Compensation and Disability Benefits Insurance coverage and compliance with other legal mandates, and a signed acknowledgement that the applicant has read, understands, and agrees to abide by the laws, rules and regulations applicable to the employment of child performers. Employers may also apply for an Employer Certificate of Group Eligibility permitting employment of children as a group to establish a background scene or to perform as a group. Such Employer Certificate of Group Eligibility is valid only for the duration of the performance but not for more than two non consecutive days.

An employer must notify the Commissioner in writing of its intent to employ a child performer at least two business days in advance. The employer must provide the dates and expected duration of use, the location of use, the approximate number of child performers to be used, and contact information for the employer's on-site representative and any other information required by the Commissioner.

Prior to employing a child performer, employers must collect a copy of the child performer's valid Temporary Child Performer Permit or Child Performer Permit, emergency contact information, and parent/guardian authorization to provide emergency medical treatment to the child. In order for the full Child Performer Permit to be valid, documentation of the child's trust account must be attached to it. The employer must keep these documents of file for six years.

Employers must transfer fifteen percent of the child performer's gross wages, or a higher amount if directed to do so by the custodian of the account, into a trust account. If the employment is under a Temporary Child Performer Permit, the parent or guardian must provide the necessary trust account information to the employer within fifteen days of the start of the child performer's employment. If the employment is under a full Child Performer Permit, the parent or guardian must attach the trust account documentation and transfer instructions to the copy of the permit given to the employer in order for the permit to be valid. The employer must provide the parent or guardian with written notice of the transfer of funds to the trust account within five business days of such transfer. The employer may provide the notice either separately or as a notation on the child's pay stub. If the parent or guardian has not provided the trust account information, the employer must transfer the funds to the Comptroller to be placed in the child performer's holding fund. No trust fund need be established for a child employed pursuant to an Employer Certificate of Group Eligibility.

Employers must ensure that one or more persons are designated to serve as a responsible person to supervise every child performer under the age of 16 throughout the work day and care for the child's best interests. Outside of live theater and other live performance, a child performer's parent or guardian must designate the responsible person and may choose to serve as the responsible person. In live theater and other live performance, when it is physically impracticable for the employer to permit a responsible person designated by the parent or guardian to accompany each child, the employer must either employ a responsible person (with the parent or guardian's consent to the person), or provide electronic or other means for a responsible person designated by the parent or guardian to see and hear the child; or both. A check of the state and federal sex offender registries must be performed, and the results considered in accordance with Article 23-A of the Correction Law.

On school days, if a child performer is not otherwise receiving educational instruction due to his or her employment schedule, the employer must provide the child with time for education during the workday and must set aside a suitable location or locations where teaching, tutoring and study can take place. Such space shall be for the use of children being taught by a location teacher, studying or being tutored in home-schooling, studying independently, or doing homework.

An employer must provide a teacher to a child, other than a home-schooled or distance educated child who is receiving appropriate instruction, from the third day of missed educational instruction, or from the first day of missed educational instruction if the child was guaranteed three or more consecutive days of employment, through the end of the child's participation in the production.

The employer must provide at least one teacher for every ten child performers in need of on-location education or fraction thereof and such teacher must be certified or competent to teach student in the applicable grade ranges and subject areas.

Employers must comply with stated restrictions on the hours of work and of presence at the worksite for child performers.

Employers must also provide meal periods, suitable places for the child to eat, play and rest, and where age appropriate, a crib or playpen at the worksite. Parents or guardians are responsible for providing sufficient nutritious food and diapers. An employer may not employ a child performer in any activity that could result in harm to the child performer's health, education, morals or general welfare and may not employ any child younger than 15 days of age.

Employers must allow a child performer at least twelve hours of rest between days of employment. An employer may not "hold" child performers when work is finished in order to ensure that the full rest and recreation time is provided.

The employer must provide orientation training to the child performer and the responsible person regarding safety and health precautions for the venue or location, traffic patterns backstage or on location, safe waiting areas for child performers, restricted areas, location of rest areas/rooms, toilet, makeup areas, and other relevant rooms, emergency procedures, and whom to talk to about hazardous conditions and what actions to take.

**Professional Services:** Employers will, under certain circumstances spelled out in detail in the proposed rule, be required to procure the services of certified or credentialed teachers recognized by the School District or non-public school in which the child is enrolled.

**Compliance Costs:** The application fees for employers, set by statute, are \$350.00 for an original Employer Certificate of Eligibility, \$200.00 for renewal, \$200 for original and renewal certificates for applicants operating theaters of fewer than 500 seats, and \$200 for a Certificate of Group Eligibility. Application fees for parents or guardians for Child Performer Permits are zero.

Employers will be required to employ appropriately credentialed teachers for child performers, other than home- or distance educated ones, if one or more children are unable to attend school due to their employment schedules. One teacher will be allowed to teach up to ten child performers, provided that the teacher is certified or competent to teach the applicable grade ranges and subject areas. The proposed rule spells out the circumstances in which a provided teacher is or is not required and supports several alternative methods of educating child performers. A teacher may not be listed on the state sex offender registry.

Employers must also provide a nurse with experience in pediatric practice and responsible person for each three or fewer child performers between the ages of fifteen days and six weeks, and for each ten or fewer child performers from ages of six weeks to six months.

Under certain circumstances spelled out in the proposed rule, employers will have to employ "responsible persons" to accompany children under 16 and care for their well-being. Under other circumstances, parents or guardians will accompany a child throughout the work day at no cost to the employer. The proposed rule supports those existing industry practices that work well.

**Economic and Technological Feasibility:** The regulation does not require any use of technology to comply. The Department will offer, but not mandate, on-line application and notification for certificates and permits. The Department will post information on its website when these applications are available on-line.

**Minimizing Adverse Impact:** Fees and paperwork are minimal. Therefore, the Department does not anticipate that the regulations will adversely impact small employers who comply with this Part.

The Department conducted significant outreach to various groups,

published earlier drafts of these regulations in the State Register, held two public hearings, and received written comments and oral testimony from numerous organizations and individuals. The organizations participating are listed in the Regulatory Impact Statement. The Department then published its revised proposed rule, and received additional written comments.

The Department used input from various groups and individuals to draft the first version of Part 186 and relied heavily on the written comments and oral testimony subsequently received from stakeholders to revise it, and relied heavily on the comments to the revised proposed rule to make additional revisions.

**Small Business and Local Government Participation:** The Department conducted outreach with small businesses and local governments during the rule making process. Notice of the proposed rulemaking was distributed to business organizations and government entities and was posted on the Department's website for comment. The Department spoke directly with industry stakeholders including performing arts organizations, production companies, advertisers, talent agents, parents, educators of child performers, and unions. As discussed in the Regulatory Impact Statement, the second revised proposal incorporates many of their recommendations.

#### *Rural Area Flexibility Analysis*

1. Types and estimated numbers of rural areas: Any rural area where children are employed as performers will be affected. However, because performances are exempt when they take place in a house of worship, or academy or school, as part of the regular services, curriculum, or activities thereof; or in a private home; or when the performance is under the direction, control, or supervision of a department or board of education and other circumstances set forth in the regulations, the impact is greatly reduced for rural areas.

Most of the affected areas will most likely be urban. The vast majority of child performers and their employers are found in and around New York City in theater, television, and film. When theater is taken on the road, it is traditionally found in cities.

2. Reporting, recordkeeping and other compliance requirements; and professional services: Employers who employ child performers will have reporting, recordkeeping and other compliance requirements as a result of statute and regulation. The burden will rest mostly on the employer, who must collect a copy of the Child Performer Permit, current emergency contact information, authorization to provide emergency medical treatment, and information about the child performer's trust account. The employer must also provide the child performer's parent or guardian with written notice of transfer of funds to the child's trust account; this may either be noted on the pay stub or issued separately. All documents related to this rule must be available for inspection by the Department, school attendance officers, the state education department or local school district, and the Comptroller.

The employer must notify the Department of its intent to use child performers at least two business days in advance. The employer must provide the date and expected duration of use, the location of use, the approximate number of child performers to be used, and the name and contact information of the employer's on-site representative.

The rule also requires employers to provide a teacher for any child performer, other than a home-schooled or distance educated child, who is unable to fulfill his or her regular educational requirements due to work. Many child performers can attend regular school and work outside of school hours. The teacher must either be certified or have credentials recognized by the school district or non-public school in which the child is enrolled. Therefore, employers may be required to engage the services of professional educators to comply with this rule.

3. Costs: Other than staffing needs, costs associated with the rule will be administrative and are required by the statute. Employers must prepare applications and notices, as well as regular transfers of a percentage of the child performer's gross income to a trust account. The fees to apply are \$350.00 for the initial Employer Certificate of Eligibility, \$200.00 for each renewal, \$200 for both the initial and renewal Certificates to employers operating theaters containing fewer than 500 seats, and \$200 for a Certificate of Group Eligibility. The employer certificates are good for three years, except the Certificate of Group Eligibility, which is valid only for the duration of the

performance. It is not anticipated that any employer would have to retain additional outside professional services to prepare these documents and financial transfers, although most, if not all, likely retain accountants and other staff to manage payroll and financial transfers for other performers.

Under certain circumstances spelled out in the proposed rule, employers must incur the costs of employing certified teachers for those child performers who must miss school in order to work and who are not home-schooled or distance educated.

The proposed rule requires every child performer under 16 years of age to be accompanied by a responsible person throughout the work day. Large segments of the industry rely on parents or guardians to do this, at no cost to the employer. The proposed rule fully supports this practice. In live theater and live performance, in contrast, there is a tendency for employers to prefer to hire professionals who will guide the children through their workdays and to limit the presence of parents and guardians backstage. The proposed rule fully supports this practice as well. One responsible person can supervise several children in live theater and performance. The cost to the employer of the responsible person rule will vary according to the extent to which parents serve as responsible persons versus hiring someone to fulfill this role.

The proposed rule also requires employers to provide a nurse who has experience in pediatric practice and a responsible person for each three or fewer child performers between the ages of fifteen days and six weeks, and a nurse and responsible person for each ten or fewer child performers from ages of six weeks to six months. This will be an added cost for some but not all productions.

Legal services may be required to negotiate, draft or review contracts with individuals providing teaching services or acting as the responsible person. It is anticipated that a vast majority of child performer employers in the State already have procurement or legal staff who regularly work on such contracts.

The cost to comply with this rule is minimal for child performers and their parent or guardian. There is no cost to apply for or renew a Child Performer Permit. There may be minimal costs incurred in obtaining a physician's statement that the child performer is physically fit.

4. **Minimizing adverse impact:** This rule is necessary to implement Labor Law § 154-a. This enabling legislation requires the promulgation of regulations to determine the hours and conditions of work necessary to safeguard the health, education, morals and general welfare of child performers. As discussed in the other SAPA documents related to this rule making, the Department included recommendations within the proposal to minimize adverse impact without jeopardizing the physical or mental health, education or general welfare of the children involved.

5. **Rural area participation:** The Department sought input on these regulations from various employee representative groups which represent rural area employees. Additionally, the Department received input from various employer representative groups which also represent rural area employers.

#### **Job Impact Statement**

The rule will facilitate the orderly employment of child performers in New York by codifying procedures and policies that have been applied to child performers for a number of years and further provides for the protection of child performers and assures that the child performers will receive the education which is mandated under state law. This should increase the availability of child performers for the arts, entertainment, and advertising industries and bring more of this work to New York. It is apparent from the nature and purpose of the rule that it will not have a substantial adverse impact on jobs or employment opportunities, therefore no Job Impact Analysis is required.

## Department of Law

### NOTICE OF ADOPTION

#### **Names and Addresses of Agencies, Disclosures Concerning Federal Deposit Insurance, Consistency of Terms, Number of Certain Items**

**I.D. No.** LAW-25-12-00004-A

**Filing No.** 870

**Filing Date:** 2012-08-21

**Effective Date:** 2012-09-05

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

**Action taken:** Amendment of Parts 16-18 and 20-25 of Title 13 NYCRR.

**Statutory authority:** General Business Law, section 352-e(2-b)

**Subject:** Names and addresses of agencies, disclosures concerning federal deposit insurance, consistency of terms, number of certain items.

**Purpose:** Ensure all of the above are current and consistent.

**Substance of final rule:** The proposed rule making makes several non-substantive changes to the Department of Law's regulations governing the public offering of cooperative interests in realty and real estate syndications. The original proposed changes:

a. update references to federal deposit insurance to reflect that the limits for such insurance have been increased and may not always be \$250,000;

b. correct inconsistencies in the name and address of the New York State Department of Law, Real Estate Finance Bureau;

c. update references to the former New York State Insurance and Banking Departments to refer to the New York State Department of Financial Services;

d. update references to an escrow "account" to reflect the current practice of depositing funds into multiple accounts;

e. reflect the current practice that only three copies of offering plans, and not six, are submitted to the Department of Law; and

f. update the name of the City agency responsible for Loft Law review and enforcement.

The regulations as adopted include all of the foregoing, plus the following additional non-substantive changes:

g. update references to the Internal Revenue Code to refer to the current 1986 Code;

h. eliminate references to former requirements of Internal Revenue Code section 216 that have been repealed; and

i. update references to generic dates (e.g., replacing "198\_\_" with "20\_\_").

**Final rule as compared with last published rule:** Nonsubstantive changes were made in sections 18.3 and 23.3.

**Text of rule and any required statements and analyses may be obtained from:** Lewis A. Polishook, Chief Counsel for Real Estate Finance, New York State Department of Law, 120 Broadway, 23rd Floor, New York, New York 10271, (212) 416-8372, email: lewis.polishook@ag.ny.gov

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

The agency received no public comment.

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

#### **Determining When Funds Escrowed in Connection with the Offer or Sale of Cooperative Interests in Realty May be Released**

**I.D. No.** LAW-50-11-00002-RP

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

**Proposed Action:** Amendment of sections 18.3, 20.3, 21.3, 22.3, 23.3, 24.3 and 25.3 of Title 13 NYCRR.

**Statutory authority:** General Business Law, section 352-e(2)(b) and (6)

**Subject:** Determining when funds escrowed in connection with the offer or sale of cooperative interests in realty may be released.

**Purpose:** Elimination of the Attorney General's role in adjudicating such disputes.

**Substance of revised rule:** The proposed amendments eliminate the Attorney General's role in adjudicating contractual disputes between sponsors of cooperatives, condominiums, homeowners' associations, timeshares, and senior residential communities and contract vendees, thereby leaving such matters to be adjudicated in court, as is done in the case of analogous disputes concerning contracts to purchase private homes and transactions between non-sponsor sellers and purchasers. The revised regulation clarifies the conditions under which the escrow agent holding the down payments may release the funds to the sponsor, and also provides that the previous version of the regulation will remain in effect for purchase agreements between sponsors and purchasers signed on or before September 4, 2012.

**Revised rule making(s) were previously published in the State Register on May 16, 2012.**

**Revised rule compared with proposed rule:** Substantial revisions were made in sections 18.3, 20.3, 21.3, 22.3, 23.3, 24.3 and 25.3.

**Text of revised proposed rule and any required statements and analyses may be obtained from** Lewis A. Polishook, New York State Department of Law, 120 Broadway, 23rd Floor, New York, New York 10271, (212) 416-8372, email: lewis.polishook@ag.ny.gov

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

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

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

1. Statutory Authority. New York General Business Law ("GBL") Section 352-e(6) authorizes the Attorney General to adopt, promulgate, amend, and rescind suitable rules and regulations to carry out the legislative mandates of Section 352-e of the General Business Law. GBL § 352-e(2-b) further authorizes the Attorney General to "adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions of this subdivision, including, but not limited to, determining when escrow funds may be released."

2. Legislative Objectives. GBL 352-e requires that, "[i]n the case of offerings of cooperatives, condominiums, interest in homeowners association and other cooperative interests in realty, . . . the attorney general may refuse to issue a letter of acceptance unless the offering statement, prospectus or plan shall provide that all deposits, down payments or advances made by purchasers of residential units shall be held in a special escrow account" or other appropriate form of security "pending delivery of the completed apartment or unit and a deed or lease whichever is applicable." The Attorney General has promulgated detailed regulations, codified at 13 NYCRR §§ 18.3(p), 20.3(o)(3), 21.3(l), 22.3(k), 23.3(q), and 24.3(m) concerning escrow accounts or other suitable substitutes. Although the statute authorizes the Attorney General to issue regulations concerning "when escrow funds may be released," it does not direct the Attorney General to be the arbiter of such disputes.

3. Needs and Benefits. In 1992, the Attorney General amended Title 13, Parts 18, 20, 21, 22, 23, and 24 to require sponsors, and permit purchasers and escrow agents, to apply to the Attorney General for a determination on the disposition of a down payment and any interest earned thereon in connection with the purchase of residential units. At the time, the vast majority of offering plans involved the conversion of tenanted buildings from rental to cooperative or condominium ownership. The escrow deposits in such offerings were generally for small sums, and disputes over the release of these funds generally involved the question of whether the sponsor had complied with the requirements set forth in the procedure to purchase section of the offering plan. Primarily, those disputes involved procedural requirements such as whether the sponsor gave proper notification that the funds had been deposited into escrow, adequately noticed the closing date, or properly demanded payment.

In recent years, however, the down payment disputes submitted to the Attorney General have both broadened in their scope and multiplied in number. In particular, the individualized and fact-specific nature of these disputes has required the expenditure of significant resources in areas not exclusively within the province of the Attorney

General's jurisdiction. For example, purchasers submitting disputes often contend that the units as constructed materially deviate from representations in the offering plan or are defective in ways not apparent without review by an engineer. Other disputes raise contested factual issues as to representations sponsors or selling agents allegedly made to purchasers and whether the unit was in fact ready for occupancy. Some disputes concern compliance with statutes over which the Attorney General has no jurisdiction, such as the federal Interstate Land Sales Full Disclosure Act and the Building Code of the City of New York. Furthermore, the submitted disputes more often than not involve deposits of hundreds of thousands, and sometimes millions of dollars, with the purchasers being persons of substantial means. The severe downturn in the real estate market in 2008 accelerated the volume of disputes submitted to the Attorney General from 15 disputes in 2005 to a high of 473 in 2009.

Unlike the limited scope of disputes envisioned by the 1992 regulation, most of the down payment disputes involving cooperatives, condominiums, interests in homeowners' associations, timeshares, and senior residential communities that have been submitted to the Attorney General in recent years involve fact-specific issues similar to those regularly addressed as part of an adversarial process in courts of law. The Attorney General believes that such disputes more appropriately should be addressed by the court system, which has the capacity and procedures necessary for conducting evidentiary hearings that traditionally form the core of the judicial system.

Over the years, escalating real estate prices have obviated another intended purpose of the 1992 regulation: Providing a means of legal redress for purchasers and sellers who, because of personal economic circumstances or the amount in controversy, would not have ready access to legal representation or judicial relief. The Attorney General notes in this regard that the cost of purchasing cooperatives, condominiums and interests in homeowners' associations is comparable to and often higher than the cost of purchasing private homes. Contracts for the purchase and sale of private homes typically require that the parties or escrow agent seek a judicial or arbitral determination as to the entitlement to escrowed funds. The Attorney General's proposed regulations would leave purchasers and sellers of cooperatives, condominiums, interests in homeowners' associations, timeshares, and interests in senior residential communities similarly situated to purchasers and sellers of private homes - a result congruous with their similar costs.

Based on public comments, the Attorney General has modified the proposed rule making to clarify the conditions under which the escrow agent holding the down payments may release the funds to the sponsor.

The proposed regulations will not apply to existing purchase agreements, all of which currently provide that in case of a dispute the escrow agent will hold the escrowed funds pending a joint written direction by the parties, a judicial order, or a determination by the Attorney General, and the Attorney General will continue to adjudicate escrow disputes concerning the disposition of down payments for purchase agreements entered into on or before September 4, 2012. For such disputes, the previous version of these regulations will remain in effect. The Attorney General anticipates requiring that all offering plans, form purchase agreements, and escrow agreements be amended on or shortly after September 4, 2012, to eliminate references to the Attorney General's role in making such determinations. The Attorney General further anticipates providing a model amendment to address the necessary changes to offering plans, escrow agreements, and form purchase agreements, and to provide further guidance by policy memorandum as to the procedure for the submission of such amendments.

4. Costs. The proposed regulations impose no additional costs to either the regulated parties or local and state governments. Purchasers and sellers might incur increased filing and attorneys' fees in connection with participating in court proceedings. However, the Attorney General notes that retaining counsel in connection with the submission of applications for the disposition of down payments is costly, and, under the current system, the losing party may still pursue judicial review of such determinations pursuant to Article 78 of the New York Civil Practice Law and Rules ("Article 78"), which adds to the cost of the dispute determination process. As a result of this change, the courts may experience a slight increase in case load as a result of

disputes being filed in court rather than before the Attorney General. Again, however, some of these matters are already brought in court as petitions for review pursuant to Article 78.

The adoption of the rule will impose no additional costs on the Department of Law.

5. Local Government Mandates. The proposed regulations do not impose any programs, services, duties or responsibilities on any county, city, town, village, school district, fire district or other special district. However, local courts may experience a minimal increase in the number of cases filed as a result of the proposed regulations.

6. Paperwork. There are no additional reporting or paperwork requirements as a result of the proposed regulations.

7. Duplication. The proposed regulations will not duplicate any existing state or federal rule.

8. Alternatives. The Attorney General has considered alternatives, including preserving the existing regulation or limiting the dispute resolution function to cases that fall below a jurisdictional maximum dollar amount. As the accompanying reasons underlying the Attorney General's finding of necessity make clear, the Attorney General believes that maintenance of the status quo is unnecessary for disputes involving more expensive properties. Moreover, the vast majority of disputes concerning cooperative interests in realty submitted to the Attorney General in recent years are more amenable to resolution in a judicial forum, because of the nature of the issues, the amounts in controversy, and the fact that the parties in most of the disputes currently before the Department of Law are ordinarily represented by counsel highly capable of litigating the matter in court as part of the adversarial process.

The Attorney General also considered and rejected preserving the dispute resolution function for disputes involving sums that fall under a jurisdictional maximum dollar amount. The Attorney General rejected that possibility for two reasons. First, any jurisdictional limit would be arbitrary, especially given the different percentages of the total purchase price required as a deposit in different contracts. For example, a \$100,000 deposit could represent either 10 percent of the purchase price of a million-dollar unit or 25 percent of the purchase price of a \$400,000 unit. Although the sum in dispute is the same, the purchasers of those two units are not similarly situated. Second, the Attorney General believes that dispute resolution for transactions concerning the sale and purchase of private homes or transactions between non-sponsor sellers of cooperatives, condominiums, homeowners' associations, timeshares, and interests in senior residential communities are currently resolved in the courts regardless of amount in dispute, and that those fora provide a reasonably efficient system for dispute resolution. Third, courts have the capacity and procedures necessary for conducting evidentiary hearings that traditionally form the core of the judicial system. Finally, for very small sums, the courts of limited jurisdiction are available for ease of access and lower cost.

Finally, the Attorney General considered applying the proposed regulations retroactively to all pending applications. However, the Attorney General has determined that because the parties to such disputes have already expended significant time and effort in presenting their positions to the Attorney General, it would not be appropriate to require those parties to start anew in litigation. Accordingly, the proposed amendments to the regulations will apply only to disputes submitted after the regulations become effective, but will not apply to disputes submitted pursuant to purchase agreements signed before September 4, 2012, the effective date of these regulations.

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

10. Compliance Schedule. The proposed regulations will go into effect upon the publication of a Notice of Adoption in the New York State Register.

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

The revisions to the regulation first proposed in the December 14, 2012 Notice of Proposed Rule Making do not alter the amended regulations' impact on compliance obligations, economic or technical feasibility, jobs, or small business or local government participation. The revisions will reduce slightly the amended regulations' already-minimal impact on

professional services and costs by preserving the right of purchasers and sponsors who signed purchase agreements before the effective date of the amended regulations to seek to resolve their disputes via a determination of the Attorney General.

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

The revisions to the regulation first proposed in the December 14, 2012 Notice of Proposed Rule Making do not alter the amended regulations' impact on reporting, record keeping, and other compliance requirements in rural areas or rural area participation. The revisions will reduce slightly the amended regulations' already-minimal impact on costs by preserving the right of purchasers and sponsors who signed purchase agreements before the effective date of the amended regulations to seek to resolve their disputes via a determination of the Attorney General.

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

The Department of Law received comments from two individuals. The comments fall into four categories. The first category concerns the need to update offering plans to reflect the revised language. The second category concerns the possibility of explicitly referring to arbitration as a means of dispute resolution. The third category identifies difficulties in the proposed language concerning release of escrowed funds on notice to purchasers. The final comment is that the Attorney General should retain its escrow dispute determination function for matters below a jurisdictional cap. These comments are addressed in turn below.

##### **Amendment to Existing Plans**

One commenting party asked whether immediate amendment of all offering plans would be required under the revised regulations. The previous regulatory impact statement did not address this issue, but the new regulatory impact statement clarifies that all offering plans, including the forms of purchase agreement used in connection therewith, will have to be amended to reflect the elimination of the escrow dispute resolution function. However, to give offerors and the Department of Law adequate time to prepare the new purchase agreements and offering materials and process the new amendments, amendments updating the escrow language of offering plans should not be submitted before September 4, 2012.

Additionally, the original proposed amendments contemplated the elimination of the dispute resolution function even as to existing purchase agreements that call for dispute resolution by the Attorney General. The revised proposed amendments clarify the implementation date for the revised regulations-September 4, 2012-and also make clear that the Attorney General will entertain applications concerning disputes where the purchase agreement was signed before September 4, 2012.

The Attorney General further anticipates providing a model amendment to address the necessary changes to offering plans, escrow agreements, and form purchase agreements, and to provide further guidance by policy memorandum as to how to the submission of such amendments.

##### **Arbitration**

One commenter suggested that the revised regulations explicitly authorize arbitration of disputes under purchase agreements. The Department of Law will not address the issue of the interplay between the Department's dispute resolution regulations and arbitration clauses in purchase agreements in connection with this rule making. The issue appears to be one of first impression in New York and should be addressed, if at all, by the Courts of this State in the first instance.

##### **Escrow Release Language**

Both commenting parties commented on the language in the proposed amendments concerning the conditions under which the escrow agent would release the escrowed funds. One commenter found the phrasing of the timing of the release of such funds to be awkward, and also believed that the modified regulations might deter purchasers from pursuing meritorious claims to deposits because they would have to seek preliminary injunctive relief in Court. The other commenter stated that the proposed language did not give escrow agents sufficient guidance or authority to release funds.

In revising the proposed amendments to the regulations, the Department of Law has modified the language of the subsections governing the release of funds. The revised proposed amendments track the stan-

dard form contracts (the “Form Contracts”) for cooperative, condominium, and home sales prepared by the New York City and New York State Bar Associations by providing that the escrow agent may release funds to the sponsor upon prior written notice to the purchaser unless the purchaser provides timely notice of objection to the release of funds, in which case the escrow agent must retain the funds in escrow until receipt of a further written directive signed by the parties to the purchase agreement or final non-judicial adjudication of the merits of the dispute. This revised language is consistent with the existing practices in the resale market and provides greater protection to purchasers (and sponsors) by allowing them to preserve the status quo by simply putting the escrow agent on notice of the dispute.

Both the original regulations and the Form Contracts give the objecting parties only 10 business days to object to the release of funds. The Department of Law has seen several situations in which purchasers were unaware of the impending release of funds or may even have been misled by ongoing settlement negotiations. For this reason, both the original proposed amendments and the revised proposed amendments require written notice 30 days before the release of escrowed funds.

#### Jurisdictional Threshold

One commenter noted that the Attorney General should consider retaining the determination function for disputes falling below an unspecified jurisdictional threshold. The Attorney General considered and rejected this alternative, for the reasons explained in the Regulatory Impact Statement, and sees no reason to revisit those conclusions. Simply put, in this regard purchasers of units from sponsors are similarly-situated to purchasers of units at resale and purchasers of private homes, who must resort to other fora to resolve such disputes.

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## Office of Mental Health

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### NOTICE OF ADOPTION

#### Rates of Reimbursement - Hospitals Licensed by the Office of Mental Health

**I.D. No.** OMH-25-12-00007-A

**Filing No.** 849

**Filing Date:** 2012-08-20

**Effective Date:** 2012-09-05

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

**Action taken:** Amendment of Part 577 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.09 and 43.02

**Subject:** Rates of Reimbursement - Hospitals Licensed by the Office of Mental Health.

**Purpose:** To continue the 2011 rates paid to freestanding psychiatric hospitals for the 2013 rate year, effective January 1, 2013.

**Text or summary was published** in the June 20, 2012 issue of the Register, I.D. No. OMH-25-12-00007-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Sue Watson, NYS Office of Mental Health, 44 Holland Avenue, Albany, NY 12229, (518) 474-1331, email: Sue.Watson@omh.ny.gov

#### Assessment of Public Comment

The agency received no public comment.

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

#### Prior Approval Review for Quality and Appropriateness

**I.D. No.** OMH-36-12-00006-P

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

**Proposed Action:** This is a consensus rule making to amend Part 551 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 31.04 and 31.23

**Subject:** Prior Approval Review for Quality and Appropriateness.

**Purpose:** To repeal an outdated reference and establish consistency with Federal requirements regarding accessibility standards.

**Text of proposed rule:** 1. Subdivision (b) of Section 551.11 of Title 14 NYCRR is amended to read as follows:

(b) Projects which include new construction or substantial renovation as defined in section 551.4 of this Part shall meet the following requirements:

(1) the facility shall be designed and constructed to be readily accessible to, and usable by, persons with physical disabilities;

(2) the design of the facility shall meet the most current requirements of the [Uniform Federal Accessibility Standards (41 CFR, part 101-19.6, appendix A)] *applicable sections of the Americans with Disabilities Act and the ADA Standards for Accessible Design (28 CFR parts 35 and 36)*;

(3) all common use space shall be accessible; and

(4) no less than five percent of the facility’s occupancy, or at least one bedroom, whichever is greater, shall be accessible.

**Text of proposed rule and any required statements and analyses may be obtained from:** Sue Watson, NYS Office of Mental Health, 44 Holland Avenue, Albany, NY 12229, (518) 474-1331, email: Sue.Watson@omh.ny.gov

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

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

#### Consensus Rule Making Determination

This rule making is filed as a Consensus rule on the grounds that its purpose is to make a technical change and comply with non-discretionary statutory requirements.

Part 551 of Title 14 NYCRR establishes the minimum standards necessary for entities seeking an operating certificate from the Office of Mental Health with respect to quality and safety of persons receiving mental health services. On September 15, 2010, the United States Department of Justice published revised regulations for Titles II and III of the Americans with Disabilities Act of 1990 (ADA) in the Federal Register. These regulations adopted revised, enforceable accessibility standards called the 2010 ADA Standards for Accessible Design (“2010 Standards”). Effective March 15, 2012, compliance with the 2010 Standards is required for new construction and alterations to existing structures. Use of the “Uniform Federal Accessibility Standards” is no longer allowable. This consensus rule making is needed to repeal the outdated reference in Part 551 and establish consistency with Federal requirements.

**Statutory Authority:** Section 31.04 of the Mental Hygiene Law grants the Commissioner of Mental Health the power and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction and to establish procedures for the issuance and amendment of operating certificates. Section 31.23 of the Mental Hygiene Law establishes the criteria for the approval of facility programs, services and sites.

#### Job Impact Statement

A Job Impact Statement is not submitted with this notice because it is evident from the subject matter of the rule making that there will be no impact upon jobs and employment opportunities. The rule making merely corrects an inaccurate reference in existing regulations and provides consistency with Federal requirements regarding accessibility standards for new construction and alterations of existing structures.

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## Department of Motor Vehicles

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### NOTICE OF ADOPTION

#### Genesee County Motor Vehicle Use Tax

**I.D. No.** MTV-27-12-00007-A

**Filing No.** 872

**Filing Date:** 2012-08-21

**Effective Date:** 2012-09-05

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

**Action taken:** Amendment of section 29.12(aj) of Title 15 NYCRR.

**Statutory authority:** Vehicle and Traffic Law, sections 215(a) and 401(6)(d)(ii); and Tax Law, section 1202(c)

**Subject:** Genesee County motor vehicle use tax.

**Purpose:** To impose a Genesee county motor vehicle use tax.

**Text or summary was published** in the July 3, 2012 issue of the Register, I.D. No. MTV-27-12-00007-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Heidi Bazicki, Department of Motor Vehicles, 6 Empire State Plaza, Rm. 522A, Albany, NY 12228, (518) 474-0871, email: heidi.bazicki@dmv.ny.gov

#### Assessment of Public Comment

The agency received no public comment.

### NOTICE OF ADOPTION

#### Medical Variance Restriction “V” Code for CDL Holders

**I.D. No.** MTV-27-12-00017-A

**Filing No.** 873

**Filing Date:** 2012-08-21

**Effective Date:** 2012-09-05

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

**Action taken:** Amendment of Part 3 of Title 15 NYCRR.

**Statutory authority:** Vehicle and Traffic Law, sections 215(a), 501(2)(c) and 508(4)

**Subject:** Medical Variance Restriction “V” Code for CDL Holders.

**Purpose:** To comply with regulations issued by the FMCSA regarding medical standards and qualifications for CDL holders.

**Text or summary was published** in the July 3, 2012 issue of the Register, I.D. No. MTV-27-12-00017-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Monica J Staats, Department of Motor Vehicles, 6 Empire State Plaza, Room 522A, Albany, NY 12228, (518) 474-0871, email: monica.staats@dmv.ny.gov

#### Revised Job Impact Statement

A Job Impact Statement is not submitted with this rule because it will not have an adverse impact on job creation or development.

#### Assessment of Public Comment

The agency received no public comment.

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## Public Service Commission

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### NOTICE OF WITHDRAWAL

#### Overbilling Credits for Telephone Service

**I.D. No.** PSC-08-11-00001-W

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

**Action taken:** Notice of proposed rule making, I.D. No. PSC-08-11-00001-P, has been withdrawn from consideration. The notice of proposed rule making was published in the *State Register* on February 23, 2011

**Subject:** Overbilling credits for telephone service.

**Reason(s) for withdrawal of the proposed rule:** The Company filed a cancellation of Tariff Amendments.

### NOTICE OF WITHDRAWAL

#### Revenue Decoupling Mechanism

**I.D. No.** PSC-24-12-00005-W

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

**Action taken:** Notice of proposed rule making, I.D. No. PSC-24-12-00005-P, has been withdrawn from consideration. The notice of proposed rule making was published in the *State Register* on June 13, 2012

**Subject:** Revenue Decoupling Mechanism.

**Reason(s) for withdrawal of the proposed rule:** The Company filed a cancellation of Tariff Amendments.

### NOTICE OF WITHDRAWAL

#### Revenue Decoupling Mechanism

**I.D. No.** PSC-24-12-00007-W

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

**Action taken:** Notice of proposed rule making, I.D. No. PSC-24-12-00007-P, has been withdrawn from consideration. The notice of proposed rule making was published in the *State Register* on June 13, 2012

**Subject:** Revenue Decoupling Mechanism.

**Reason(s) for withdrawal of the proposed rule:** The Company filed a cancellation of Tariff Amendments.

### NOTICE OF ADOPTION

#### Establish a Four-Year State Universal Service Fund Commencing on January 1, 2013

**I.D. No.** PSC-04-12-00004-A

**Filing Date:** 2012-08-17

**Effective Date:** 2012-08-17

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

**Action taken:** On 8/16/12, the PSC adopted an order approving the operative terms of a Joint Proposal, submitted in Phase II of this proceeding, that would establish a four-year State Universal Service Fund (SUSF), commencing on January 1, 2013.

**Statutory authority:** Public Service Law, sections 4, 5, 90, 91, 92, 94, 96 and 97

**Subject:** Establish a four-year State Universal Service Fund commencing on January 1, 2013.

**Purpose:** To approve a four-year State Universal Service Fund commencing on January 1, 2013.

**Substance of final rule:** The Commission, on August 16, 2012 adopted an order approving the operative terms of a Joint Proposal, submitted in Phase II of this proceeding, that would establish a four-year State Universal Service Fund (SUSF), commencing on January 1, 2013, subject to the terms and conditions set forth in the order.

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

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

#### Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (09-M-0527SA5)

## NOTICE OF ADOPTION

**Waiver of Retirement Requirements for a Generation Facility Located in Dunkirk, New York****I.D. No.** PSC-15-12-00008-A**Filing Date:** 2012-08-16**Effective Date:** 2012-08-16

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

**Action taken:** On 8/16/12, the PSC adopted an order denying the petition of Dunkirk Power LLC and NRG Energy, Inc. for a waiver of the 180-day notice period so that it could mothball the generating units prior to the expiration of the notice period.

**Statutory authority:** Public Service Law, sections 5(1)(b), 65(1), (2), (3), 66(1), (3), (5), (10) and (12)

**Subject:** Waiver of retirement requirements for a generation facility located in Dunkirk, New York.

**Purpose:** To deny a waiver of retirement requirements for a generation facility located in Dunkirk, New York.

**Substance of final rule:** The Commission, on August 16, 2012 adopted an order denying the petition of Dunkirk Power LLC and NRG Energy, Inc. for a waiver of the 180-day notice period so that it could mothball the generating units prior to the expiration of the notice period, subject to the terms and conditions set forth in the order.

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

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

**Assessment of Public Comment**

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

(12-E-0136SA1)

## NOTICE OF ADOPTION

**To Submeter Electricity at 225 and 235 Adams Street and 270 Jay Street, Brooklyn, New York****I.D. No.** PSC-16-12-00012-A**Filing Date:** 2012-08-21**Effective Date:** 2012-08-21

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

**Action taken:** On 8/16/12, the PSC adopted an order approving the petition of Concord Village Owners, Inc. to submeter electricity at 225 and 235 Adams Street and 270 Jay Street, Brooklyn, New York located in the territory of Consolidated Edison Company of New York, Inc.

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

**Subject:** To submeter electricity at 225 and 235 Adams Street and 270 Jay Street, Brooklyn, New York.

**Purpose:** To approve the petition of Concord Village Owners, Inc. to submeter electricity at 225 and 235 Adams St. and 270 Jay St., Brooklyn.

**Substance of final rule:** The Commission, on August 16, 2012 adopted an order approving the petition of Concord Village Owners, Inc. to submeter electricity at 225 and 235 Adams Street and 270 Jay Street, Brooklyn, New York located in the territory of Consolidated Edison Company of New York, Inc.

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

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

**Assessment of Public Comment**

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

(12-E-0150SA1)

## NOTICE OF ADOPTION

**Denying the Petition to Burn Glued Wood As an Up to 10% Portion of Biomass Fuel Eligible for Incentive Payments****I.D. No.** PSC-18-12-00012-A**Filing Date:** 2012-08-16**Effective Date:** 2012-08-16

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

**Action taken:** On 8/16/12, the PSC adopted an order denying the petition of Niagara Generation, LLC for authorization to burn glued wood as an up to 10% portion of biomass fuel eligible for production incentive payments in the Renewable Portfolio Standard (RPS) program.

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

**Subject:** Denying the petition to burn glued wood as an up to 10% portion of biomass fuel eligible for incentive payments.

**Purpose:** To deny the petition to burn glued wood as an up to 10% portion of biomass fuel eligible for incentive payments.

**Substance of final rule:** The Commission, on August 16, 2012 adopted an order denying the petition of Niagara Generation, LLC for authorization to burn Glued Wood (plywood and particleboard) as an up to 10% portion of biomass fuel eligible for production incentive payments in the Renewable Portfolio Standard (RPS) program, subject to the terms and conditions set forth in the order.

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

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

**Assessment of Public Comment**

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

(03-E-0188SA32)

## NOTICE OF ADOPTION

**Modify the Terms of the Gas Rate Plan for Purposes of RDM Reconciliations****I.D. No.** PSC-18-12-00013-A**Filing Date:** 2012-08-20**Effective Date:** 2012-08-20

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

**Action taken:** On 8/16/12, the PSC adopted an order approving, in part, the petition of Rochester Gas and Electric Corporation to modify the terms of the Gas Rate Plan, by further consolidating non-residential customer classes for purposes of RDM reconciliations.

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

**Subject:** Modify the terms of the Gas Rate Plan for purposes of RDM reconciliations.

**Purpose:** To approve, in part, a modification to the terms of the Gas Rate Plan for purposes of RDM reconciliations.

**Substance of final rule:** The Commission, on August 16, 2012 adopted an order approving, in part, the petition of Rochester Gas and Electric Corporation to modify the terms of the currently-effective Gas Rate Plan, by further consolidating certain non-residential customer classes for purposes of Revenue Decoupling Mechanism (RDM) reconciliations to consolidate non-residential rate group SC-1/SC-5 with non-residential rate group SC-3/SC-3HP, subject to the terms and conditions set forth in the order.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (09-G-0718SA2)

**NOTICE OF ADOPTION****Modify the Terms of the Gas Rate Plan for Purposes of RDM Reconciliations**

**I.D. No.** PSC-18-12-00015-A

**Filing Date:** 2012-08-20

**Effective Date:** 2012-08-20

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

**Action taken:** On 8/16/12, the PSC adopted an order approving, in part, the petition of New York State Electric & Gas Corporation to modify the terms of the Gas Rate Plan, by further consolidating non-residential customer classes for purposes of RDM reconciliations.

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

**Subject:** Modify the terms of the Gas Rate Plan for purposes of RDM reconciliations.

**Purpose:** To approve, in part, a modification to the terms of the Gas Rate Plan for purposes of RDM reconciliations.

**Substance of final rule:** The Commission, on August 16, 2012 adopted an order approving, in part, the petition of New York State Electric & Gas Corporation to modify the terms of the currently-effective Gas Rate Plan, by further consolidating certain non-residential customer classes for purposes of Revenue Decoupling Mechanism (RDM) reconciliations to consolidate non-residential service classes SC-1T and SC-5T into non-residential rate group SC-2S/SC-14T, subject to the terms and conditions set forth in the order.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (09-G-0716SA2)

**NOTICE OF ADOPTION****Denying the Petition to Restructure the Price Terms of Its 4/17/07 RPS Main Tier Incentive Contract**

**I.D. No.** PSC-19-12-00009-A

**Filing Date:** 2012-08-16

**Effective Date:** 2012-08-16

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

**Action taken:** On 8/16/12, the PSC adopted an order denying the petition of Niagara Generation, LLC to restructure the price terms of its April 17, 2007 Renewable Portfolio Standard (RPS) Main Tier incentive contract.

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

**Subject:** Denying the petition to restructure the price terms of its 4/17/07 RPS Main Tier incentive contract.

**Purpose:** To deny the petition to restructure the price terms of its 4/17/07 RPS Main Tier incentive contract.

**Substance of final rule:** The Commission, on August 16, 2012 adopted an order denying the petition of Niagara Generation, LLC to restructure the price terms of its April 17, 2007 Renewable Portfolio Standard Main Tier incentive contract, subject to the terms and conditions set forth in the order.

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

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann.ayer@dps.ny.gov An IRS employer ID no. or social se-

curity no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (03-E-0188SA33)

**NOTICE OF ADOPTION****Waiver of 16 NYCRR Sections 894.1 to 894.4**

**I.D. No.** PSC-21-12-00013-A

**Filing Date:** 2012-08-21

**Effective Date:** 2012-08-21

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

**Action taken:** On 8/16/12, the PSC adopted an order approving the Town of Hardenburgh's petition for a waiver of the rules contained in 16 NYCRR sections 894.1, 894.2, 894.3 and 894.4 to expedite the cable television franchising with Time Warner Cable.

**Statutory authority:** Public Service Law, section 216(1)

**Subject:** Waiver of 16 NYCRR sections 894.1 to 894.4.

**Purpose:** To approve waiver of the rules contained in 16 NYCRR sections 894.1 to 894.4 to expedite the cable television franchising process.

**Substance of final rule:** The Commission, on August 16, 2012 adopted an order approving the Town of Hardenburgh's (Ulster County) request for waiver of the rules contained in 16 NYCRR sections 894.1, 894.2, 894.3 and 894.4 to expedite the cable television franchising process with Time Warner Cable, subject to the terms and conditions set forth in the order.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (12-V-0024SA2)

**NOTICE OF ADOPTION****Amendments to PSC No. 16 — Gas, Effective 9/1/12**

**I.D. No.** PSC-22-12-00006-A

**Filing Date:** 2012-08-16

**Effective Date:** 2012-08-16

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

**Action taken:** On 8/16/12, the PSC adopted an order approving Rochester Gas and Electric Corporation's amendments to PSC No. 16 — Gas, effective 9/1/12 to make revisions to its methodology for determining the applicable index prices for its cashout calculation.

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

**Subject:** Amendments to PSC No. 16 — Gas, effective 9/1/12.

**Purpose:** To approve amendments to PSC No. 16 — Gas, effective 9/1/12.

**Substance of final rule:** The Commission, on August 16, 2012 adopted an order approving Rochester Gas and Electric Corporation's amendments to PSC No. 16 — Gas, effective September 1, 2012 to make revisions to its methodology for determining the applicable index prices for its cashout calculations to be established in the Gas Transportation and Operations Procedures (GTOP) Manual.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.  
(12-G-0216SA1)

**NOTICE OF ADOPTION****Joint Petition for a Merger**

**I.D. No.** PSC-23-12-00006-A  
**Filing Date:** 2012-08-17  
**Effective Date:** 2012-08-17

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

**Action taken:** On 8/16/12, the PSC adopted an order approving the Joint Petition of Aqua New York of Sea Cliff, Inc., Aqua New York, Inc., New York Water Service Corporation and Long Island Water Corporation for a merger.

**Statutory authority:** Public Service Law, sections 89-h and 108  
**Subject:** Joint Petition for a merger.

**Purpose:** To approve a Joint Petition for a merger.

**Substance of final rule:** The Commission, on August 16, 2012 adopted an order approving the Joint Petition of Aqua New York of Sea Cliff, Inc., Aqua New York, Inc., New York Water Service Corporation and Long Island Water Corporation to merge New York Water Service Corporation and Aquarion Water Company of Sea Cliff, Inc. with its parent, Aqua New York, Inc., into a corporate entity named Aqua New York, Inc. and to merge Aqua New York, Inc. with Long Island Water Corporation in a corporate entity named New York American Water Company, subject to the terms and conditions set forth in the order.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.  
(12-W-0217SA1)

**NOTICE OF ADOPTION****Waiver of Certain Portions of the Gas Cost Refund Tariff**

**I.D. No.** PSC-24-12-00006-A  
**Filing Date:** 2012-08-16  
**Effective Date:** 2012-08-16

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

**Action taken:** On 8/16/12, the PSC adopted an order approving the petition of New York State Electric & Gas Corporation for a temporary waiver of certain portions of its Gas Cost Refund tariff.

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

**Subject:** Waiver of certain portions of the Gas Cost Refund tariff.

**Purpose:** To approve a waiver of certain portions of the Gas Cost Refund tariff.

**Substance of final rule:** The Commission, on August 16, 2012 adopted an order approving the petition of New York State Electric & Gas Corporation (Company) for a temporary waiver of certain portions of its Gas Cost Refund tariff provision to allow a refund received from Tennessee Gas Pipeline Company to be returned to non-daily metered gas customers that obtain gas commodity through the competitive market as well as retail sales customers that take gas commodity from the Company, subject to the terms and conditions set forth in the order.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.  
(12-G-0245SA1)

**NOTICE OF ADOPTION****Waiver of 16 NYCRR Sections 894.1 to 894.4**

**I.D. No.** PSC-25-12-00010-A  
**Filing Date:** 2012-08-21  
**Effective Date:** 2012-08-21

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

**Action taken:** On 8/16/12, the PSC adopted an order approving the Town of Amboy's petition for a waiver of the rules contained in 16 NYCRR sections 894.1, 894.2, 894.3 and 894.4 to expedite the cable television franchising with Time Warner Entertainment-Advance/Newhouse.

**Statutory authority:** Public Service Law, section 216(1)  
**Subject:** Waiver of 16 NYCRR sections 894.1 to 894.4.

**Purpose:** To approve waiver of the rules contained in 16 NYCRR sections 894.1 to 894.4 to expedite the cable television franchising process.

**Substance of final rule:** The Commission, on August 16, 2012 adopted an order approving the Town of Amboy's (Oswego County) request for waiver of the rules contained in 16 NYCRR sections 894.1, 894.2, 894.3 and 894.4 to expedite the cable television franchising process with Time Warner Entertainment-Advance/Newhouse Partnership, subject to the terms and conditions set forth in the order.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.  
(12-V-0219SA1)

**NOTICE OF ADOPTION****Transfer of Real Property**

**I.D. No.** PSC-26-12-00015-A  
**Filing Date:** 2012-08-20  
**Effective Date:** 2012-08-20

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

**Action taken:** On 8/16/12, the PSC adopted an order approving the petition of Caithness Long Island LLC for the transfer of real property located by the approximately 326 MW Caithness Long Island Energy Center it owns in the Town of Brookhaven, New York.

**Statutory authority:** Public Service Law, section 70

**Subject:** Transfer of real property.

**Purpose:** To approve the transfer of real property.

**Substance of final rule:** The Commission, on August 16, 2012 adopted an order approving the petition of Caithness Long Island LLC for the transfer of real property located by the approximately 326 MW Caithness Long Island Energy Center it owns in the Town of Brookhaven, New York. The property, consisting of various parcels totaling about 30 acres, will be transferred to CELI Land LLC, subject to the terms and conditions set forth in the order.

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

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

**Assessment of Public Comment**

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

(12-E-0220SA1)

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

**Customer Eligibility Limits in Commercial Electric Energy Efficiency Programs**

I.D. No. PSC-36-12-00008-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 May 15, 2012 petition by Central Hudson Gas & Electric Corporation to remove the 350kW cap in its Mid-Size Commercial Electric program to provide energy efficiency measures to these larger customers.

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

**Subject:** Customer eligibility limits in commercial electric energy efficiency programs.

**Purpose:** To encourage energy conservation by larger commercial customers.

**Substance of proposed rule:** The Commission is considering whether to adopt, modify, or reject, in whole or in part, or to take other action regarding a May 15, 2012 petition submitted by Central Hudson Gas & Electric Corporation (the company) in response to the Commission's October 25, 2011 Energy Efficiency Portfolio Standard Order in Case 07-M-0548, Ordering Clause 23, which required each electric utility to prepare a filing to explore creation of a block bidding program. Block bidding programs allow energy service companies, performance contractors, management companies, and C&I customers to submit proposals for projects and the Commission required each electric utility to either propose a block bidding program with a recommended source of funding or explain why such an approach would not be effective.

In its petition the company argues that there are fewer than 200 commercial customers in its service territory with annual demand greater than 350 kW, and that it is more appropriate to serve these customers by expanding its existing commercial electric program rather than establishing a block bidding program. Therefore the company is proposing to remove the existing cap of 350 kW in its Mid-Size Commercial Electric Program and to provide energy efficiency measures to these larger customers funded from its existing commercial electric program budget.

**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:** Jaclyn 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.

(07-M-0548SP72)

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

**EEPS Residential Programs Administered by Consolidated Edison Company of New York, Inc**

I.D. No. PSC-36-12-00009-P

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

**Proposed Action:** The Commission is considering a August 15, 2012 petition from Consolidated Edison Company of New York, Inc. for modifications to the company's EEPS energy efficiency residential electric and gas programs.

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

**Subject:** EEPS residential programs administered by Consolidated Edison Company of New York, Inc.

**Purpose:** To redesign the residential electric and gas programs and modify the budgets and targets.

**Substance of proposed rule:** The Commission is considering whether to adopt, modify, or reject, in whole or in part, or to take other action regarding a filing submitted on August 15, 2012 by Consolidated Edison Company of New York, Inc. (Con Edison) to redesign its Energy Efficiency Portfolio Standard electric and gas residential programs.

Con Edison seeks to eliminate its electric Residential Direct Install Program and certain other measures that do not pass cost-effectiveness tests. Con Edison also seeks to reduce the residential electric program portfolio savings target by 25%, with a corresponding budget reduction of 38%, and reduce the residential gas programs savings target by 3%, with a corresponding budget reduction of 10%. Finally, Con Edison plans to modify and/or expand the measures and incentives offered to customers in the redesigned residential programs, and rename the "Residential Room AC Program" to the "Residential Appliance Rebate Program."

The Commission may apply its decision here to other utilities and/or the New York State Energy Research and Development Authority. In addition, Commission action on this matter may result in modifications to the Energy Efficiency Portfolio Program Classification Groups.

**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:** Jaclyn 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.

(07-M-0548SP73)

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

**Revised Residential Electric Submetering Regulations**

I.D. No. PSC-06-12-00007-RP

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

**Proposed Action:** Amendment of Part 96 of Title 16 NYCRR.

**Statutory authority:** Public Service Law, sections 4(1), 30-53, 65 and 66

**Subject:** Revised Residential Electric Submetering Regulations.

**Purpose:** Electric submetering regulations for multi-unit residential premises.

**Substance of revised rule:** The purpose of the rulemaking is to revise 16 NYCRR Part 96, residential submetering regulations, adopted in 1988 with minor amendments in 1996. In 2003, the Home Energy Fair Practices Act (HEFPA) (Public Service Law §§ 30-52) was extended to submetered customers through Public Service Law § 53. In addition, the Commission has issued numerous orders clarifying and modifying the obligations of submeterers in an effort to balance the need for energy efficiency and consumer protections. It is necessary to update the electric submetering regulations to reflect the changes made by Commission orders and the extension of HEFPA to submetered tenants, as well as bifurcating the Department of Public Service's review of routine submetering petitions from those requiring additional Department scrutiny.

This summary provides an overview of the more significant changes in the draft revisions to the submetering regulations.

Residential submetering will now be permitted in both existing premises that seek to convert to submetering and in new and substantially renovated buildings.

Notices of Intent to Submeter will be reviewed and approved by Department Staff and confirmed by an abbreviated Commission order. Current requirements that assisted living and senior living facilities obtain a waiver of individual metering requirements is eliminated. Requests to submeter in buildings in which electric heat is submetered and in which more than 20% of tenants receive income based housing assistance and when the

owner of a direct-metered premises seeks to convert to submetering will continue to be addressed on a case-by-case basis in comprehensive Commission orders. Filing requirements for both situations have been detailed separately in the regulations.

The regulations clarify in detail submeterers' HEFPA obligations, including filing requirements that demonstrate the applicant is in compliance with all HEFPA provisions.

Submeterers will be required to install meters that comply with 16 NYCRR Parts 92 and 93 in both new construction and when current submeters require replacement. In addition, submetering systems must allow for the termination of submetered electric service to individual units.

**Revised rule compared with proposed rule:** Substantial revisions were made in sections 96.2, 96.3, 96.5, 96.6 and 96.8.

**Text of revised proposed rule and any required statements and analyses may be obtained from** Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann.ayer@dps.ny.gov

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

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

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

Upon publication of initial draft electric submetering regulations in January 2012, the Public Service Commission received comments from American Metering & Planning Services, Inc. & Elemco Building Controls (AMPS/Elemco), Bay City Metering Company, Inc. (Bay City), Hon. Kevin A. Cahill, Chair, NYS Assembly Standing Committee on Energy and Hon. Charles D. Lavine, Chair, NYS Assembly, Administrative Regulations Review Commission (Cahill & Lavine) Car Charging Group, Inc., City of New York (NYC), Coulomb Technologies, Consolidated Edison Company of New York, Inc. (Con Edison), Consumer Power Advocates (CPA), Council of New York Cooperatives & Condominiums (CNYC), Energy Investment Systems, Inc. (EIS), Environmental Defense Fund (EDF), Herbert E. Hirschfeld, P.E. (Hirschfeld), Hon. Micah Z. Kellner, NYS Assembly (Kellner), Minol, Inc., New York State Energy Research and Development Authority (NYSERDA), Real Estate Board of New York (REBNY) and Quadlogic Controls Corporation (QL). As a result of those comments and further Commission review, changes to the January 2012 draft regulations are now proposed. The most notable of these changes include:

(1) Eliminating the requirement that all new and substantially renovated buildings be direct metered and allowing direct metered premises to convert to submetering after certain conditions are met;

(2) Adding notice and hearing procedures for the administrative reduced rate cap remedy when a submeterer violates the regulations, Commission orders, or other law; and

(3) Adding the requirement of an energy efficiency audit when landlords seek to submeter premises heated primarily with electric heat or in which more than 20% of residents receive governmental housing assistance.

Between 2005 and 2009 the Department convened at least five meetings with stakeholders to discuss necessary modifications to the submetering regulations, including one formal technical conference in January 2009. DPS invited written comments as well. The rule adoption process was suspended temporarily in 2008 when it came to the DPS' attention that submetering in electrically heated buildings housing low income tenants required that further tenant safeguards be added to the pending regulations. In January 2012, the Commission issued a Notice of Proposed Rulemaking, again met with numerous stakeholders, and received written comments until April 26, 2012 from the parties listed above.

#### **Statutory Authority:**

The Public Service Commission's (PSC, Commission) authority to regulate submetering and to develop the proposed revisions to 16 NYCRR Part 96 is contained primarily in Public Service Law (PSL) § 66(12) and 66(14), which gives the PSC broad authority over electric utility tariffs and rates and service classifications within those tariffs; PSL § 65, which requires the Commission to ensure that electric service is safe and adequate, just and reasonable, and that electric service rates are reasonable; and PSL § 4(1), which assigns the PSC "all powers necessary or proper" to carry out these mandates. Utility tariffs govern the manner in which electricity is provided to each service classification. Master-metered buildings that submeter, are governed by their own service classification standards and requirements and the Commission's authority to govern and interpret tariffs is well-settled. Moreover, in 1951, when the Commission prohibited submetering, a decision that was upheld upon judicial review (Matter of Campo Corp. v. Feinberg, 279 A.D. 302 (1952) aff'd 303 N.Y. 995), the court relied on the Commission's authority to regulate "reasonable classifications, regulations and practices under which a utility. . .

renders service." In 1976, in Case 26998, the Commission banned master-metering in new construction because it discouraged energy conservation, which sparked a submetering revival, and in 1988, the Commission adopted submetering regulations, which have been in effect until now. Pursuant to those regulations, the Commission has approved petitions to submeter on a case-by-case basis. Through these unchallenged orders approving submetering, the Commission has, among other things, adopted generic submetering standards that apply to premises in which submetered charges pay for electric heat, with particular attention to premises in which tenants who receive housing assistance reside.

In 2003, the Public Service Law was amended to extend the statutory requirements of the Home Energy Fair Practices Act (HEFPA, Public Service Law Article 2) to "any entity that, in any manner, sells or facilitates the sale. . . of. . . electricity to residential customers." In a 2006 New York Supreme Court decision, PSL § 53 was held to apply to submeterers. Submeterers, therefore, are now required by statute to provide tenants all HEFPA protections, including notice of service termination, budget billing, deferred payment agreements, and the remedy of service termination when electric charges have gone unpaid (Matter of Waterside Plaza, LLC, v. Pub. Serv. Commn. of State of N.Y., Slip Opinion (July 3, 2006, Ferradino, J.).

Some commenters have asserted that the Commission has no jurisdiction to implement the regulations. This is simply incorrect. It has also long been resolved that the Commission maintains the authority to regulate the terms and conditions of service classifications, including the submeterer redistribution service classification, through utility tariffs and even to prohibit submetering altogether. Moreover, since PSL § 53 was enacted, the Commission has direct authority to ensure submeterer compliance with HEFPA. That being said, if Commission authority to regulate the service requirements of submeterers or if service classification oversight is ever nullified or found wanting after judicial review, new rules may have to be issued prohibiting or greatly limiting submetered service. While the Commission does not contemplate such action, the protections and safeguards required of submetering customers are indispensable to maintaining the balance between market drivers of the submetering industry and the need to protect submetered end-users.

#### **Legislative Objectives:**

A primary legislative objective of the draft regulations is codifying HEFPA's statutory application to submeterers as well as the terms and conditions by which distribution utilities may supply electricity to submeterers pursuant to Public Service Law §§ 66(5) and 66(14).

#### **Current Requirements:**

The regulations apply to multi-unit dwellings through utilities' service classification tariffs. The current residential submetering regulations, 16 NYCRR Part 96, were adopted in 1988 with minor amendments in 1996. Various Commission determinations approving individual submetering petitions, some with generic application to all submeterers, as well as judicial decisions, have further defined the obligations of submeterers. One purpose of the proposed regulations is to codify Commission orders that have been issued in individual cases the requirements of which should apply generically to all submeterers.

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

In 2003, the Home Energy Fair Practices Act (HEFPA) (Public Service Law §§ 30-51) was extended to submetered customers through the enactment of Public Service Law § 53. In addition, the Commission has issued numerous orders clarifying and modifying the obligations of submeterers in an effort to balance the need for energy efficiency, which submetering advances, and consumer protections when end-users become responsible for paying submeterers monthly electric charges based upon actual usage. It is necessary to update the electric submetering regulations to reflect the changes made by Commission orders, the extension of HEFPA obligations to submeterers and HEFPA benefits to submetered tenants, and to streamline the Department of Public Service's review of routine applications to submeter. The proposed regulations are consistent with these prior determinations and, for the most part, simply implement those requirements in regulatory form.

The draft regulations issued for comment in January 2012 limited the extent to which new construction and substantially renovated premises could submeter. Because utilities have more than 30 years experience with HEFPA and similar tariffed service requirements, the January 2012 draft regulations were based on the strong belief that direct metering best protected end-users. As described below, however, primarily due to the extensive and costly technical limitations associated with the use of direct meters in high-rise residential premises, the revised regulations eliminate this limitation and no longer require all new or renovated construction to install direct meters.

This RIS describes the changes made to the January 2012 draft regulations in response to comments and some of the changes that are not being made despite protests to the contrary. At the outset, the Commission clarifies that the new rules, like all laws, will be prospective. This means that,

for instance, (1) currently installed submeters need not be replaced by new submetering technology that allows for service termination but reasonable attempts must be made, if possible, to reprogram submeters to make installed submeters compliant with the regulations. When in-use submeters that cannot be reprogrammed must be replaced, the new submeters must be capable of service termination; and (2) service problems that have already been resolved by binding arbitration will not be disturbed; however, current lease agreements that include binding arbitration as a remedy were deemed against public policy when PSL § 53 was enacted; binding arbitration was made void by that 2003 statutory requirement.

#### Prohibition of Submetering in New Construction

By far, the most comments received during the SAPA comment period concerned the reasons the PSC should not require direct metering in all new construction and premises that are substantially renovated. While the majority of commenters opposed the requirement because they believe it foretells the demise of the submetering industry, technical and cost considerations have led the Commission to now propose that direct metering not be required, nor submetering be prohibited, in all new construction and substantial renovations.

The January 2012 draft regulations proposed exceptions to the prohibition on submetering in new construction that were believed to be the only necessary accommodation to the continued use of submetering by allowing for submetering after proof of energy efficient and demand response programs that depended upon submetering. Con Edison, however, explained that costly technical improvements would be required if high-rise, multi-use premises used direct metering for each residential unit. As Con Edison explained, it is not uncommon for large residential buildings constructed or renovated in Con Edison's service territory to contain retail and non-residential space in the first few floors and residential apartments in the upper floors. Developers of these large buildings often request higher voltage supply from the Company due to their expected high demands (460 volt (v) service as opposed to 120/208v service). According to Con Edison, service at the higher voltage saves developers significant costs during construction, makes it easier for the building to meet code requirements for acceptable voltage drops and is more environmentally friendly. Con Edison may also require service to be taken at 460v when warranted by the magnitude or location of the load or when it would result in the least cost to the Company, thereby reducing costs for all Con Edison ratepayers.<sup>2</sup> In each of these scenarios, Con Edison states that it is unable to provide direct metering of the residential areas of the building or premises in lieu of submetering. Requiring Con Edison to install additional, low tension services to residential areas within these mixed-use premises would: (1) eliminate part of the Company's savings from providing a single service to the building; (2) undermine Con Edison's current ability to require high tension service in accordance with Con Edison's tariff; and (3) cause the customer higher costs to redistribute electric service to residential units on the upper floors of the building.

Further, submetering is a less expensive alternative to direct metering. For instance, the size of direct meter rooms are vastly larger than the space required for submeters, resulting in the loss of usable (i.e. leasable) space. Commenters estimate that direct meter rooms must be at least 360 cubic feet while submeter rooms require only 64 cubic feet of space for the same number of residential units. Similarly, comments show that the cost to install direct meters is estimated to be at least \$200 more per apartment because direct meters are individually wired.

Staff's further review of the technical limitations of installing direct meters in multi-use high-rise buildings has ultimately led to the conclusion that submetering in these buildings provides the least cost technology to provide individual metering. Moreover, as Con Edison points out, "the provisions [contained in the draft regulations] provide sufficient consumer protections; [therefore] it is not necessary to establish an outright prohibition on submetering in new or substantially renovated buildings."

To the extent the Department has considered submeterers' concerns that, in general, other aspects of the proposed regulations increase submeterers' costs, such as providing HEFPA protections and meter tests, it is important to keep in mind a number of things. First, creating a structure that balances the needs of end-users and the industry advances submetering by securing dependable service and even in encouraging technical advances in the industry. Second, with the exception of buildings that are regulated by HCR and HPD, most building owners retain as profit the margin between what the tenant is billed and what the utility charges the landlord. The differential between these two rates provides an adequate financial cushion for submeterers to comply with the new regulatory requirements. In advocating to eliminate the direct metering requirement, commenters referred often to this rate differential, stating it is passed back to customers. Consistent with this claim, therefore, it is reasonable to presume that any added administrative costs due to the application of PSL § 53 to submetered services may reduce the savings to customers that are typically passed back. But, given the large differential submeterers cite, it is not likely to cost landlords more. Third, submeterers (including building

owners who serve HCR and HPD housing populations), may take advantage of financial incentives, such as participation in demand-response programs, by which submeterers may (1) curtail usage in common areas during peak usage periods and obtain what can be a substantial monetary benefit for such curtailment; (2) avoid costly investment in capacity expanding equipment to accommodate increased electrical usage; (3) avoid the burden of absorbing increased electric utility costs in rent, such as air conditioning and other high-use tenant activity; and/or (4) enlist in New York State Energy Research and Development Authority (NYSERDA) programs that provide rebates and other financial support to offset the cost of submeter installation and energy efficiency measures.

At the same time, the new draft regulations allow that currently direct metered premises may be converted to submetering when a premises owner submits a Petition to Submeter with proof of enrollment in a demand response program or the installation of co-generation equipment on site or advanced energy efficiency equipment. Inasmuch as what constitutes "advanced energy efficiency equipment" will change as technology improves, we cannot determine now, nor will we limit, exactly what will be acceptable technology when seeking approval to switch from direct meters to submeters.

In sum, the filings for whom the Commission will treat as prima facie filings in the public interest are now called "Notices of Intent to Submeter." Notices of Intent to Submeter may be filed for all submetering conversions, as long as electric heat is not going to be submetered, and all new construction, including new construction in which electric heat will be billed. Petitions to Submeter will require additional documentation to prove such submetering is in the public interest. Petitions to Submeter will be required for premises converting to submetering at which electric heat will be submetered and for conversions of direct metered premises to submetering, which must include a showing of advanced energy efficiency equipment or on-site cogeneration to justify the conversion.

#### The Return of Commission Orders Approving Condominium and Cooperative Submetering

The January 2012 proposed regulations removed from current regulations the heretofore distinction between condominiums/ cooperatives (condo/coop) and rental properties when the building manager proposes to install submetering. Rather than requiring submetering approval for condo/coops, since 1988, DPS has relied upon the internal legal agreements and procedures between condo/coop owners and management in any transition to submetering. Some stakeholders commented that this ability of a condo/coop to self-govern was removed from the regulations for no reason; one party indicated that removing the distinction would prolong the process for converting a coop/condo from master metering to submetering.

We have not modified the January 2012 proposed regulations that require submetering approval for coops/condos. Our intent in requiring condo/coops to follow the newly developed, abbreviated, Notice of Intent to Submeter procedure in the proposed regulations was to ensure that HEFPA is enforced whether a premises is a coop/condo or a "pure" rental premises. Requiring the simpler Notice of Intent to Submeter was intended to be the least burdensome way to accomplish this goal. Because submetered condo/coop residents now enjoy the same HEFPA protections as submetered rental tenants, DPS can only enforce the rights of condo/coop residents, and ensure notification of those rights, if the Commission is on notice of a condo/coop decision to submeter.

Commenters state that internal by-laws and regulations adequately govern coop/condo submeterer accountability. First, the DPS has found this not to be wholly accurate. DPS Staff handle numerous condo/coop complaints between owners, tenants, and Boards of Managers. Therefore, the benefit of a Notice of Intent to Submeter to tenants/owners is clear: if the Commission knows when a coop or condo becomes submetered, the Commission can better protect end-users in billing and service complaints by enforcing the commitments made in the Notice of Intent to Submeter and by applying the conditions required of submeterers in the regulations. That being said, it is not our intention to interfere with internal coop/condo procedures for resolving complaints. Indeed, HEFPA requires all submeterers to resolve customer disputes internally before an end-user may bring a complaint to the Department. Therefore, Commission oversight of coop/condo complaints will be limited to only those instances when internal by-laws and regulations insufficiently respond to end-user problems. Finally, commenters complain that a 60% rate cap reduction will hurt end-users because Boards use the rate cap differential to pay for other building expenses. If a Board of Managers that repeatedly violates our regulations or HEFPA becomes subject to the 60% rate cap, the Board may be forced to shift to all owners added costs that had previously been subsumed into the higher rate cap. Owners, in response, may note the added expense and take action internally to address this problem if it arises.

Other commenters believe that coops/condos should be exempt from providing the Commission details of their submetering plan. While the Commission does not intend to interfere with the internal obligations of coop/condos, without certain information, the Department cannot deter-

mine the consistency or accuracy of bills to resolve those consumer complaints that come before the Department because they have not been resolved internally at the coop/condo.

Finally, treating all condos/coops the same as rental properties obviates ambiguity in the existing regulations by which, for example, existing condo/coops may submeter without Commission approval under certain circumstances while new condo/coops are required to seek Commission approval prior to submetering. The rules for all condos/coops are now consistent.

#### Termination of Electric Service

The earlier, August 2011, draft proposed regulations required that, as a condition to submeter in all future submetering petitions, the submeters to be installed be capable of terminating electric service to individual units. Some parties continue to object to this requirement. First, while such submeters may now be "rarely used," the Department has been told on many occasions, and indeed, petitions to submeter are pending that seek to install submeters capable of service termination. Therefore, comments claiming that submeters that include the ability to terminate service do not exist are simply incorrect.

Second, the City of New York claims that the proposed requirement that submeters be capable of service termination "could" conflict with established landlord/tenant law. Offering no citation to support this claim, the City suggests that HEFPA "may violate the spirit" of Real Property Law § 235-b, which creates a statutory right of habitability for all tenants. In response, first, the statutory requirements of HEFPA guarantee the remedy of service termination to end-users when bill payments are delinquent.<sup>3</sup> These regulations implement that statute. Second, direct metered tenants are entitled to the remedy of service termination after all HEFPA complaint procedures are completed; therefore, submetered tenants should be entitled to it as well. Third, HEFPA provides landlords a complete defense if a tenant, after failing to pay the electric bill, claims a Real Property Law § 235-b breach of habitability. Looking at "[e]ach case. . . on its own," courts are unlikely to credit a tenant claim that RPL § 235-b has been violated if the submetering landlord has followed HEFPA, which provides extensive consumer complaint procedures, including not shutting off service while a tenant complaint is pending. See *Suarez v. Rivercross Tenants' Corp.*, 107 Misc. 2d 135 (1st Dept. 1981); see also L. 1975, ch. 597, NY Legis. Ann., 1975, p. 437, Governor's statement [RPL § 235-b intended to remedy inequities].

Some Commenters stated that submeters that are technically capable of service termination submeters would be "cost prohibitive" but provided no further explanation. While perhaps more expensive than submeters not capable of service termination, such advanced submeters are on the market, submeters are installing them, and reprogramming or rewiring can make many submeters capable of service termination. In that replacement is not the only alternative to compliance with the service termination requirement, it is an exaggeration to say such a requirement is cost prohibitive. Finally, to allow for service termination, it may be that leases will have to be modified to allow, when necessary, submetering landlords to enter apartments to access the submeter after HEFPA procedures have been followed.

It bears repeating that not requiring service shut-off capability could be misinterpreted as a DPS endorsement of eviction as an acceptable remedy for non-payment of electric charges. For these reasons, DPS has not modified the January 2012 proposed regulations requiring submeters to install equipment that is capable of service termination to individual units.

Finally, commenters apparently misread the regulations in expressing concern that submeters will have to actually be placed inside apartments. The regulations state that submeters must be "accessible," which means submeters must, at least, be located where tenants may view them upon request.

#### Billing Periods

The August 2011 proposed regulations required that submetered electric service billing periods largely coincide with utility billing of the master-metered service billing periods by specifying that bills to submetered customers be sent within five days of the submeterer's receipt of the utility bill. No commenter disagreed with the newest revision to billing period requirements.

#### Commission Remedies For Submetering Violations

Commenters complained that the Department's use of a 60% rate cap reduction as a remedy for submeterer violations (1) lacks justification; (2) is "arbitrary and unnecessary"; (3) should be eliminated or reduced; and (4) requires enunciated procedural steps prior to the reduction being enforced.

We are changing the draft regulations to clarify that, prior to a Departmental requirement that the rate cap be reduced by up to 40% for submetering violations (1) a Department investigation will have been conducted, after which the Department will notify the submeterer with a Notice of Alleged Violations describing the Department's proposed changed rate cap; (2) the submeterer will then have 15 days to dispute,

or otherwise respond to the Department based upon the DPS investigatory findings; (3) if, within 20 days, the Department finds that such violation has not been cured or has continued for such a duration that a remedy is warranted, DPS shall send to the submeterer a Notice of Rate Cap Reduction; (4) within 15 days of receiving a Notice of Rate Cap Reduction, the submeterer may appeal the Department's Notice of Rate Cap Reduction to the Commission. The reduced rate cap will not be enforced until all appeals to the Commission have been exhausted.

The section that allowed the Commission to adjust the rate cap "for good cause" has been removed from the draft regulations as unnecessary since the Commission's authority to adjust a tariff provision and enforce tariffs must always pass the test of reasonableness. By the same token, the Commission's authority to interpret tariff requirements, of which the reduced rate cap will become one, has been upheld repeatedly, as has the Commission's authority to authorize tariff refunds going back two years when warranted. Moreover, the rate cap adjustment is similar to other remedies that exist in tariffs when a customer fails to abide by their service classification requirements. For instance, when interruptible customers fail to curtail load in accordance with the requirements of their service classification, the customer is subject to a tariff penalty. Inasmuch as the Commission created and has always authorized submeterers to retain 100% of the rate margin, authorizing a reduced rate cap differential when a submeterer has violated a utility's redistribution tariff (into which these regulations will be incorporated), after notice and an opportunity to be heard, is reasonable.

Finally, pursuant to recent legislation, if a submeterer fully cures the alleged violation within 30 days, the submeterer may avoid the imposition of the reduced rate cap altogether. Indeed, it is the Commission's primary objective to ensure that what appears to be a submetering violation is cured; as a practical matter, therefore, it will be only those submeterers who are flagrant in their abuse of the submetering service classification requirements for whom a 60% rate cap will be assessed.

#### COSTS

##### Costs to Private Regulated Parties:

As noted in the previous SAPA notice, the statutory requirement that submeterers abide by HEFPA will add somewhat higher operating costs, which recent comments support are recoverable from the bulk and residential rate differential as well as other programs. In any event, to comply with the Public Service Law, such added costs are unavoidable. In particular, commenter claims that meter testing will be unduly costly are addressed below.

The proposed regulations now require that landlords who want to submeter premises primarily heated with electric heat and those at which more than 20% of residents receive income-based housing assistance must complete an energy audit by a certified auditor. With this added requirement, the Department believes that the safeguards in the draft regulations further balance the need to protect these resident subgroups while not losing altogether the energy efficiency opportunity that price signals provide to encourage conservation for people who pay for electric heat.

Other parties continue to maintain that submetering of electric heat should be banned altogether. An outright ban on submetering in buildings whose heating systems are electric, however, could remove significant opportunity for energy efficiency, since heating with electricity uses so much energy.

##### Submeters To Comply with 16 NYCRR Parts 92 and 93

The proposed regulations continue to require that the quality of future installed submeters be the same as that required of regulated utilities by requiring that submeters meet the regulatory standards defined in 16 NYCRR Parts 92 and 93 and that submeterers conduct routine meter testing, which is required currently of regulated electric utilities. In response to the January 2012 draft regulations, commenters continue to claim that the requirement of annual testing of submeters will unduly add to submeterers' costs. First, the concern over the extent to which costs will increase for meter testing is exaggerated. Parts 92 and 93 of 16 NYCRR require annual, random testing of submeters consistent with the American National Standards for Inspection and Attributes (ANSI) Z1.4, which recommends accuracy and stability measures for testing. Those standards require that only 8% of submeters at each premises be tested annually (80 submeters out of 1000). Even then, it is only when a subset of those 80 submeters fails that replacement of the failing submeters is necessary. Moreover, virtually all in-service meters take less than 15 minutes to test, which, with 1000 submeters, translates to a requirement of three days of testing per year to ensure meter accuracy. Second, the need for submeter accuracy cannot be overstated. As recently as 2008, three complaints brought to our attention that one landlord had installed in 2005 submeters that were found to over read usage up to 100%. Use of such meters resulted in end-user bills that were twice what they should have been. Moreover, the draft regulations require that in-service submeters read electric consumption within 2% of actual use. Even at 2% accuracy, a \$150 electricity charge from a submeterer allows the submeterer to collect an

additional \$2.50 per month, per end-user. In a 1,000 unit premises, a landlord will overcollect (and some perhaps have been overcollecting) \$2500 per month, or \$30,000 per year. Third, claims that all submeters will have to be replaced to meet accuracy requirements is incorrect. Only if an in-service submeter cannot be reprogrammed, rewired, or recalibrated to meet the accuracy requirements will replacement be necessary. Moreover, as a practical matter, replacement will occur gradually, as failed submeters are detected during annual random testing or due to consumer complaints.

Some stakeholders indicated that these requirements would be expensive to implement and that routine testing in particular would be difficult to accomplish where meters are located within individual dwelling units. HEFPA provides a remedy when an end-user continually fails to provide access for meter testing. In the future, landlords should take the testing requirement into account when deciding where to install submeters.

#### Costs to Local Government:

There are no costs to local government.

Costs to the Public Service Commission or the Department of Public Service:

The proposed revisions would impose no new costs to the Commission or Department.

#### Costs to Other State Agencies:

There are no costs to other State agencies or offices of State government.

#### Local Government Mandates:

The proposed revisions do not impose any new programs, services, duties or responsibilities upon any county, city, town village, school district, fire district or other special district.

#### Paperwork:

The proposed revisions streamline submeterers' filing and processing requirements except in rare circumstances (when electric heat is provided at the premises to be submetered and when 20% of the tenants living at a premises receive income based housing assistance). The proposed revisions also eliminate the need for assisted and senior living facilities to petition for a waiver of individual metering requirements.

#### Duplication:

There are no relevant State regulations which duplicate, overlap or conflict with the proposed revisions. To the extent rules applicable to the Division of Housing are impacted, a conflict of law provision was added that defers to such other housing assistance program requirements.

#### Alternatives:

No other suitable alternative has been identified. In the January 2012 draft regulations, the PSC forbade submetering in new or substantially renovated construction unless certain conditions were met. In response to comments opposing that prohibition, we have revised the rules to allow submetering in new and substantially renovated construction. Similarly, Commenters sought specific administrative procedures when a reduced rate cap may be imposed; the revised regulations respond to that request by adding further notice and opportunity to be heard. The service termination requirement, meter testing and the need for Commission orders authorizing coop/condo submetering, however, are all unavoidable to ensure compliance with Public Service Law § 53.

#### Federal Standards:

The proposed revisions are not impacted by any standards of the Federal government except that federal energy efficiency standards set the bar for the need for refrigerator replacement in the transition to submetering.

#### Compliance Schedule:

The proposed revisions will be effective upon publication of a Notice of Adoption in the New York State Register.

<sup>1</sup> CNYC comments include the position of the Federation of New York Housing Cooperatives, Coordinating Council of Cooperatives, Association of Riverdale Cooperatives, and Urban Homesteading Assistance Board.

<sup>2</sup> See Con Edison P.S.C. No. 10, Schedule for Electric Service ("Con Edison Tariff"), General Rule 4.3

<sup>3</sup> Real Property Law § 235-b, which establishes a statutory Warranty of Habitability, states, *inter alia*, "When any such condition [alleged to violate the warranty of habitability] has been caused by the misconduct of the tenant or lessee or persons under his direction or control, it shall not constitute a breach of such covenants and warranties." On its face, therefore, the statute protects a landlord when it is the tenant's failure to pay electric charges that leads to service termination.

### Revised Regulatory Flexibility Analysis

#### Effect of Rule:

During the initial SAPA period, commenters claimed that the new rules add burdens to submeterers, such as added paperwork, that the original SAPA notice did not address. First, virtually all of the information required in the proposed regulations is being collected now from submetering

petitioners pursuant to Commission orders or Departmental practice. Second, the Notice of Intent to Submeter procedure creates a rebuttable presumption that the planned submetering is in the public interest after a one-time filing of information that is necessary primarily to abide by Public Service Law §§ 30-53. For those who seek to submeter electric heated buildings, Commission experience has shown that energy audits and shadow billing studies or history is necessary to protect residents.

Other comments claim that the limited prohibition on future submetering would have a deleterious effect on the City of New York and its energy efficiency initiatives. Having become aware of the City's initiatives, the Department revised the rules allowing submetering to continue. That being said, SAPA's Regulatory Flexibility Analysis For Small Businesses and Local Governments "only requires that a Regulatory Flexibility Analysis consider those persons and entities that are directly affected by the Rule, not on all small businesses that might experience some indirect economic effect of the Rule because of the application of the Rule to others." See, *Pacific Salmon Unlimited v. New York State Department of Environmental Conservation*, 208 AD 2d 241, 622 N.Y.S.2d 820 (3d Dept. 1995).

The new regulatory requirements for meter standards will actually benefit small business landlords in that the rules establish standards for accuracy of submetering equipment, which avoids the situation in which a landlord becomes financially responsible for the added costs of having installed faulty equipment. Moreover, better accuracy requirements will increase business opportunities for companies that supply and install the most reliable submetering equipment while only reducing the business opportunities of sellers of faulty equipment. Finally, any added paperwork in the new regulations stems from the fact that HEFPA applies to submeterers and the Public Service Commission is only implementing that statute.

#### Compliance Requirements:

The proposed revisions to the existing electric submetering regulations will continue to apply to all property owners who provide submetered electric service at multi-unit residential buildings. Assisted living and senior living facilities will no longer be required to obtain a waiver to be able to provide master-metered electric service. The proposed revisions bifurcate the Department of Public Service's review of routine requests to submeter; clarify the obligations of submeterers to act consistently with their submetering plans and Commission orders approving those plans; specify consumer protections and notification requirements required of all submeterers by virtue of the Public Service Law; include energy efficiency goals; and require the use of submeters that meet the same reliability standards as direct metered customers. Finally, the revised regulations specify that electric vehicle charging stations are not subject to submetering service classification requirements.

#### Professional Services:

Only petitioners who seek to submeter electrically heated premises or who intend to submeter premises in which more than 20% of residents receive income-based housing assistance will be required to engage a professional energy consultant to audit the premises for energy efficiency improvements. Such a requirement is deemed necessary because electric heat is so expensive and when end-users become responsible for paying for electric heat through submetering, every measure to minimize those costs should be required. Similarly, residents who receive income based housing assistance are more vulnerable than the population at large; an energy audit prior to submetering provides added assurance that they will be protected from paying higher than necessary electric bills.

#### Compliance Costs:

Some submeterers have claimed that the requirement to install utility-grade meters and annual testing of submetering equipment will add costs to their operations. However, many current submeterers already use submeters that comply with 16 NYCRR Parts 92 and 93. Moreover, the use of accurate submeters and the cost to test 8% of submeters annually balances the needs of submetering landlords who are able to shed the ever-increasing cost of electricity and end-users, for whom accurate billing is safeguarded by HEFPA. Finally, because the regulations allow submeterers to charge end-users up to the higher residential rate when submeterers pay a lower master-metered rate, some of the costs to upgrade or improve submeters may be recoverable. While some commenters claim that the rate differential between master-metered service and residential service will not cover the added costs of HEFPA compliance, the ability to cover administrative costs in a decision to switch to submetering is but one of the many factors to be considered in such a transition.

#### Economic and Technological Feasibility:

The economic feasibility is achieved through the allowed rate cap differential, described above, as well as possible participation in demand-response programs that offer financial incentives, sometimes in the tens of thousands of dollars. The required use of accurate submeter technology is necessary to provide end-users with the same accuracy of their electric usage as direct metered customers, both of whom are protected by the statutory requirements of HEFPA.

#### Minimizing Adverse Impact:

Further review was conducted to consider other approaches to mitigate adverse economic impact as suggested in the State Administrative Procedure Act Section 202-b(1). Most notably, the newly proposed regulations no longer include the prohibition of submetering in new or substantially renovated buildings. The Notice of Intent to Submeter is expected to expedite review and approval of the majority of requests to submeter. In response to earlier comments, the Department also required that customers only receive more than one free annual meter test if it is made as part of an actual consumer complaint to avoid repeated requests by a customer to test the submeter.

#### Small Business and Local Government Participation:

Proposed revisions have been discussed with submeterers and their representatives on numerous occasions. The Department of Public Service sponsored a technical conference on January 20, 2009, accepted informal written comments and spoke on many occasions with the City of New York, submeterers, and submetering equipment providers.

(IF APPLICABLE) For Rules That Either Establish or Modify a Violation or Penalties:

The proposed revisions would not impose an automatic penalty. However, in addition to the Commission's current statutory authority to address submetering violations, the regulations specify that rescission or suspension of a submeterer's authorization to submeter may be imposed upon submeterers who are not in compliance with either their submetering plan, the regulations, the Commission order approving the submetering plan or other Commission orders. Moreover, if Department Staff identifies a submeterer's failure to abide by HEFPA, the regulations or order approving submetering (for which an opportunity to cure has been provided), Staff may adjust the submeterer's rate cap downward by up to 40%, an administrative action that is appealable to the Commission.

#### Revised Rural Area Flexibility Analysis

A rural flexibility analysis is not required because this rulemaking will not impose any adverse economic impacts on rural areas or on any reporting, recording keeping or other compliance requirements on public or private entities in rural areas. This proposal amends the Commission's residential electric submetering regulations in multi-unit dwellings, which are located primarily in urban, not rural, areas.

#### Revised Job Impact Statement

A job impact statement is not submitted because this proposed rule will have no adverse impact on jobs or employment opportunities. Comments on the January 2012 draft regulations claimed an adverse impact on jobs solely due to the proposed prohibition of submetering in new or renovated construction. Inasmuch as that prohibition has been removed from the proposed regulations, a job impact statement remains unnecessary. In any event, the January 2012 comments support the possibility of added jobs due to the continuing expansion and increased technological sophistication of submetering systems.

#### Assessment of Public Comment

As listed in the Revised Regulatory Impact Statement, public comments were received from more than 20 parties, including legislators, submeterers, the City of New York, and Consolidated Edison Company of New York (Con Edison), under whose tariff submetering is primarily provided. In response to the comments received, the Department is recommending that submetering be authorized even in new and substantially renovated construction, which was prohibited in the first published draft regulations. Moreover, procedures have been added to Sections 96.2 and 96.8 of the draft regulations to provide notice and an opportunity to be heard before the Department requires any reduction in the authorized rate cap in response to submeterer violations of HEFPA, the Commission order authorizing submetering, the submeterer's plan upon which Commission authorization is based, or the terms and conditions of submetered service as embodied in the regulations. The rate cap remedy, while now described as a reduction of "up to 40%" of the current rate cap, has been retained and may be assessed when a submeterer fails to cure any violations of the statute, orders, or regulations. The reduction amount is now a variable percentage that Staff will determine based upon the egregiousness or longevity of a submeterer's violation.

The revised regulations attempt to more clearly delineate when it is appropriate to file with the Commission a Notice of Intent to Submeter or a Petition to Submeter; what service requirements will be expected of all submeterers, such as meter testing and HEFPA notices; and what new submetering notices and petitions must include.

Con Edison recommended that owners of residential rental facilities where 20% or more of the tenants are low income participants and/or have electric heat be required to provide an energy audit, completed by either NYSERDA or a certified energy audit provider (e.g., a utility or third party certified by NYSERDA or utility). This requirement has been added.

For the reasons stated in the Revised Regulatory Impact Statement, many sections of the revised residential submetering regulations have not

been changed. These include, but are not limited to: (1) the requirement that condominiums and cooperatives file a Notice of Intent to Submeter because, by virtue of Public Service Law § 53, HEFPA applies to all submetered end-users and such filings are necessary to the Commission's enforcement of HEFPA; (2) the requirement that new submeterers be capable of service termination because the remedy for unpaid electric charges envisioned by HEFPA is service termination. This requirement specifically applies to submeterers that are installed to replace current equipment; (3) the requirement of a regular submeter accuracy testing program within the meaning of 16 NYCRR Parts 92 and 93. These sections enunciate parameters within which submeterers must operate to avoid end-users paying for inaccurately "measured" electricity that they simply have not used; (4) a change to the refrigerator replacement requirements. Pursuant to the EPA's own rules, before the EPA may enact new energy efficiency standards, the proposed standards must show that the cost of purchasing the refrigerator will be recouped in electric savings over the life of the refrigerator. Since the federal regulations already test the cost/benefit of refrigerator replacement, the current language has been retained as reasonable.

(11-M-0710SP2)

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## Racing and Wagering Board

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### EMERGENCY RULE MAKING

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

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

Filing No. 844

Filing Date: 2012-08-16

Effective Date: 2012-08-16

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

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

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

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

**Specific reasons underlying the finding of necessity:** The Board has determined that immediate adoption of this rule is necessary for the preservation of general welfare and that compliance with the requirements of subdivision 1 of Section 202 of the State Administrative Procedure Act would be contrary to the public interest.

This rule is proposed to conform with Part Y of Chapter 58 of the Laws of 2012, which was part of the 2012 budget for the State of New York. The budget was painstakingly crafted and negotiated to ensure that the economy of New York once again becomes robust and grows to its fullest potential. Over 40,000 jobs exist in the horse racing industry annually in the State of New York. In the face of budget cuts and the potential loss of racing officials that are essential to ensuring the integrity of harness racing, the 2012 state budget calls for the preservation of those critical regulatory jobs by requiring the reimbursement of compensation costs by the operators of harness race tracks.

This rule is necessary to ensure that harness racing officials are hired and compensated, thereby further ensuring the integrity of harness racing, the continuity of harness racing and jobs that are created therewith, and the millions of dollars in revenue that are generated in support of government derived from pari-mutuel wagering on harness racing.

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

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

**Text of emergency rule:** Section 4101.41 of 9 NYCRR is hereby added to read:

*4101.41. Reimbursement for racing officials.*

*(a) All licensed racing corporations shall reimburse the racing and wagering board for the per diem cost to the board to employ one associate judge and the starter at and in relation to racing meetings conducted by the licensed racing corporation. Reimbursement shall include the per diem rate accorded to the title as well as fringe benefits and any indirect costs attributable to the position.*

(b) The board shall notify each licensed racing corporation of the costs to be reimbursed prior to the beginning of each month.

(c) Payment of the reimbursement shall be made to the board no later than the last business day of each month and shall be accompanied by a report, under oath, on a form prescribed by the board. The report shall contain such information as the board may require.

(d) A penalty of five percent of the payment due with interest at the rate of one percent per month calculated from the last business date of the month when payment is due to the date of payment shall be payable in the event that any reimbursement or part thereof is not paid when due.

(e) The board or its duly authorized representatives shall have the power to examine or cause to be examined the books and records of the corporations required to provide the reimbursement for the purpose of examining and checking the same and ascertaining whether the proper amounts are being paid.

(f) If the board determines that any reimbursement received by it was paid in error or exceeded the actual amount required, the board may cause the same to be refunded without interest out of the monies collected or credited to the racing corporation, provided an application therefore is filed with the board within one year from the date the incorrect payment was made.

(g) If the board determines that any reimbursement received by it was insufficient due to an increase in racing days or other circumstance, the board shall direct the racing corporation to provide for such reimbursement by notifying the racing corporation of the obligation and requiring payment by issuance of an assessment fixing the correct amount. Such assessment may be issued within three years from the filing of any report. Any such assessment shall be final and conclusive unless an application for a hearing is filed by the racing corporation within thirty days of the date of the assessment. The action of the board in making such final assessment shall be reviewable in the supreme court in the manner provided by and subject to the provisions of Article 78 of the Civil Practice Law and Rules.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. RWB-25-12-00001-P, Issue of June 20, 2012. The emergency rule will expire October 15, 2012.

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

#### **Regulatory Impact Statement**

1. Statutory authority: Racing, Pari-Mutuel Wagering and Breeding Law Sections 101(1), 301(1) and 308(2). Section 101 subdivision (1) vests the Board with general jurisdiction over all horse racing and all pari-mutuel wagering activities in New York State. Section 301 subdivision (1) grants the Board the power to supervise generally all harness race meetings in this state at which pari-mutuel betting is conducted, and adopt rules and regulations consistent with provisions of the Racing Law. Section 308 subdivision 2 requires the Board to promulgate rules and regulations to ensure the proper reimbursement of costs related to the employment of one associate judge and one starter at each harness horse race meeting.

2. Legislative objectives: To enable the New York State Racing and Wagering Board to preserve the integrity of pari-mutuel racing, while generating reasonable revenue for the support of government.

3. Needs and benefits: This harness racing rule is necessary to comply with the provisions of Chapter 58 of the Laws of 2012 (Part Y), which amended section 308 of the Racing, Pari-Mutuel Wagering and Breeding Law. Under Chapter 58, licensed racing corporations shall reimburse the racing and Wagering Board for the per diem cost to the Board to employ one associate judge and a starter at each harness race meeting.

The rule is also needed to specify costs that comprise the employment compensation for associate judges and starters at harness race meets. Currently, these costs are borne through the budget of the New York State Racing and Wagering Board. Under Chapter 58 of the Laws of 2012, the costs for associate judges and starters will be reimbursed by each licensed racing corporation where the associate judge or starter is employed.

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

(a) Costs to regulated parties for the implementation of and continuing compliance with the rule. There are seven harness tracks located in New York State that are subject to the proposed rule and the requirement of Section 308(2) of the Racing Law: Buffalo Raceway, Batavia Downs, Monticello Raceway, Saratoga Harness Raceway, Vernon Downs, Tioga Downs, Yonkers Raceway. Costs will vary among the various tracks due to inconvenience pay, location pay, fringe benefits and indirect costs. The approximate monthly total rate for all tracks combined will be \$100,139, although it should be noted that not all harness tracks are open at the same

time and most meets overlap. The monthly cost and daily average rates for each respective track starter and associate judge will be as follows: Buffalo Raceway with 18 days of racing per month for 6.5 months (99 total racing days): starter \$7,982 per month/\$443 per day, associate judge \$7,785 per month/\$432 per day. Monticello with 16 days of racing per month for 12 months (207 total racing days): starter \$7,056 per month/\$441 per day, associate \$6,880 per month/\$430 per day. Saratoga, with 22 days of racing per month for 8.5 months (169 total racing days): starter \$9,759 per month/\$443 per day, associate \$9,518 per month/\$432 per day. Vernon Downs, with 13 days of racing per month for 7.5 months (90 total racing days): starter \$5,774.20 per month/\$444 per day, associate \$5,632 per month/\$433 per day. Yonkers with 20 days of racing per month for 12 months (238 total racing days): starter \$8,864 per month/\$443 per day, associate \$9,069 per month/\$453 per day. Tioga Downs with 14 days of racing for 4.5 months (61 total racing days): starter \$6,206 per month/\$443 per day, associate \$6,052 per month/\$432 per day. Batavia Downs with 17 days of racing per month for 4.5 months (72 total racing days): starter \$7,550 per month/\$444 per day, associate \$7,364 per month/\$433 per day.

It should be noted that these figures are estimates. The figures are subject to adjustments due to factors that arise from collective bargaining agreements, fringe benefits, holiday pay, and increased number of draws and qualifying races.

(b) Costs to the agency, the state and local governments for the implementation and continuation of the rule: None. Local governments would bear no costs because the regulation of thoroughbred racing is exclusively regulated by the New York State Racing and Wagering Board. As is apparent from the intent of the statutory amendment, this rule would impose no costs upon the Racing and Wagering Board.

(c) The information related to costs was obtained by the Personnel Office New York State Racing and Wagering Board based upon historical payroll information, projected race dates, current compensation scales for the respective tracks. The total costs include per diem rates, inconvenience pay, location pay, fringe benefits and indirect costs for the various tracks.

5. Paperwork: This rule will require harness track operators to maintain books and records for the purpose of allowing Racing and Wagering Board auditors to examine and check whether proper reimbursement amounts have been made. In order give force and effect to the rule, the Board will use Form RRO-1, which is a "Report of Reimbursement for Racing Officials. Form RRO-1 will be submitted to the harness racetrack operator by the Racing and Wagering Board. The Board will also require the use of Form AC-909 to withdraw funds from the reimbursement fund in instances where the Board determines that a reimbursement was made in error and a refund to the track is due.

6. Local government mandates: Since the New York State Racing & Wagering Board is solely responsible for the regulations of pari-mutuel wagering activities in the State of New York, there is no program, service, duty or responsibility imposed by the rule upon any county, city, town, village, school district, fire district or other special district.

7. Duplication: There are no relevant rules or legal requirements of the state and federal governments that duplicate, overlap or conflict with the rule.

8. Alternative approaches: This Board did not consider an alternative because this rule is based upon the directives of Chapter 58 of the Laws of 2012.

9. Federal standards: There are no federal standards for harness racing.

10. Compliance schedule: This rule will go into effect on the day that it is submitted to the Department of State, which was May 24, 2012.

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

As is evident by the nature of this rulemaking, this proposal affects operations at thoroughbred and harness racetracks and will not adversely impact rural areas, jobs, small businesses or local governments and does not require a Regulatory Flexibility Statement, Rural Area Flexibility Statement or Job Impact Statement because it will not impose an adverse impact on rural areas, nor will it affect jobs. This rule is intended to conform with a statutory amendment to Section 308 of the Racing, Pari-Mutuel Wagering and Breeding Law that requires harness track operators to reimburse the New York State Racing and Wagering Board for the salaries and costs of associate judges and starters. A Regulatory Flexibility Statement and a Rural Area Flexibility Statement are not required because the rule does not adversely affect small business, local governments, public entities, private entities, or jobs in rural areas. The rule will have a positive impact on the harness industry by ensuring that proper officiating of pari-mutuel wagering events occurs, thereby ensuring the uninterrupted conduct of harness racing and thousands of jobs that are affiliated with the harness racing industry. A Job Impact Statement is not required because this rule amendment will not adversely impact jobs. This rulemaking does not impact upon a small business pursuant to such definition in the State

Administrative Procedure Act § 102(8) nor does it negatively affect employment. The proposal will not impose adverse economic impact on reporting, recordkeeping or other compliance requirements on small businesses in rural or urban areas nor on employment opportunities. The rule does not impose any technological changes on the industry either.

## Office of Temporary and Disability Assistance

### NOTICE OF ADOPTION

#### Food Stamp Program Renamed to be the Supplemental Nutrition Assistance Program (SNAP)

**I.D. No.** TDA-26-12-00017-A

**Filing No.** 869

**Filing Date:** 2012-08-21

**Effective Date:** 2012-09-05

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

**Action taken:** Amendment of sections 387.0 and 387.1 of Title 18 NYCRR.

**Statutory authority:** 7 USC, ch. 51, sections 2011 and 2013; Social Services Law, section 95; L. 2012, ch. 41

**Subject:** Food Stamp Program renamed to be the Supplemental Nutrition Assistance Program (SNAP).

**Purpose:** To change the name of the Food Stamp Program to SNAP pursuant to chapter 41 of the Laws of 2012.

**Text or summary was published** in the June 27, 2012 issue of the Register, I.D. No. TDA-26-12-00017-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Kathryn Mazzeo, Office of Temporary and Disability Assistance, 40 North Pearl Street, 16C, Albany, NY 12243, (518) 473-3271, email: Kathryn.Mazzeo@otda.ny.gov

#### Revised Regulatory Impact Statement

##### 1. Statutory authority:

The federal Supplemental Nutrition Assistance Program is authorized by Chapter 51 of Title 7 of the United States Code (USC). Pursuant to 7 USC § 2011, the federal Supplemental Nutrition Assistance Program promotes the general welfare and safeguards the health and well-being of the nation's population by raising levels of nutrition among low-income households.

Pursuant to 7 USC § 2013, the federal Secretary of Agriculture is authorized to administer the federal Supplemental Nutrition Assistance Program under which, at the request of the State agency, eligible households within the State will be provided an opportunity to obtain Supplemental Nutrition Assistance Program benefits.

Social Services Law (SSL) § 95, as amended by Chapter 41 of the Laws of 2012, authorizes the Office of Temporary and Disability Assistance (OTDA) to administer the Supplemental Nutrition Assistance Program, formerly named the Food Stamp Program, in New York State and to perform such functions as may be appropriate, permitted or required by or pursuant to federal law.

##### 2. Legislative objectives:

The proposed regulations would implement Chapter 41 of the Laws of 2012 in a manner consistent with the purpose of the chapter. It was the intent of the Legislature in enacting the above statutes that OTDA establish rules, regulations and policies so that adequate provision is made for those persons unable to provide for themselves so that, whenever possible, such persons can be restored to a condition of self-support and self-care.

##### 3. Needs and benefits:

Chapter 41 of the Laws of 2012 changed the name of the Food Stamp Program to the Supplemental Nutrition Assistance Program. References in the regulations to the Food Stamp Program will refer to the Supplemental Nutrition Assistance Program.

##### 4. Costs:

To the extent that the implementation of Chapter 41 of the Laws of 2012 could result in additional administrative expenses, such expenses would be nominal and could be absorbed within existing agency resources.

##### 5. Local government mandates:

OTDA will be updating existing notices and forms for the social services districts to use in the ordinary course of business. Also, OTDA will be providing outreach posters and materials for social services districts' offices. It is anticipated that social services districts may need to update their own forms and notices that are not provided by OTDA.

##### 6. Paperwork:

Existing notices and forms used by the social services districts will be updated to reflect the new name, the Supplemental Nutrition Assistance Program. The proposed amendments would not impose any new reporting requirements on the social services districts.

##### 7. Duplication:

The proposed amendments would not duplicate, overlap or conflict with any existing State or federal statutes or regulations.

##### 8. Alternatives:

An alternative to the proposed amendments would be to retain the existing regulations. However, these regulatory amendments are necessary to bring the State regulations into compliance with Chapter 41 of the Laws of 2012.

##### 9. Federal standards:

The proposed amendments are consistent with the federal standards for the Supplemental Nutrition Assistance Program.

##### 10. Compliance schedule:

The program's name was changed effective August 29, 2012 pursuant to Chapter 41 of the Laws of 2012.

#### Assessment of Public Comment

During the public comment period, the Office of Temporary and Disability Assistance (OTDA) received three comments regarding the proposed rule. There were two comments submitted by social services districts. One social services district expressed no comment, and another social services district recommended a federal policy change for the Supplemental Nutrition Assistance Program (SNAP) regarding which food items could be purchased with SNAP benefits. However, a federal policy change is outside the scope of the changes in this proposed rule, which will update State regulations to reflect the program's name change in Social Services Law § 95, as amended by Chapter 41 of the Laws of 2012.

OTDA received one comment from an organization that did not oppose the goal of the rule, but was critical of the method used to change the program's name in the proposed amendments. The commenter recommended that OTDA submit another proposed rule to update each reference to the former program name throughout Part 387. The commenter also recommended that OTDA submit other regulatory amendments to update numerous other regulatory provisions. The commenter's concerns are noted; however, upon consideration of these comments, it has been determined that no changes to this proposed rule are necessary.

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

#### Fair Hearings Process for the Home Energy Assistance Program

**I.D. No.** TDA-36-12-00001-P

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

**Proposed Action:** Amendment of sections 358-3.5(b)(4) and 393.5(e) of Title 18 NYCRR.

**Statutory authority:** Social Services Law, sections 20(3)(d), 22(8) and 97; 42 USC section 8621, et seq.

**Subject:** Fair Hearings Process for the Home Energy Assistance Program.

**Purpose:** Eliminate the requirement that a fair hearing request concerning

the Home Energy Assistance Program (HEAP) must be made within 105 days of the social services district's termination of the receipt of HEAP applications for the program year.

**Text of proposed rule:** Paragraph (4) of subdivision (b) of section 358-3.5 of Title 18 NYCRR is amended to read as follows:

(4) A request for a fair hearing to review the denial of, the failure to act on an application for, or [to dispute] the adequacy of a HEAP [benefits] benefit must be [requested] made no later than 60 days after the mailing of the notice [; however, in no event may a hearing request made more than 105 days after the district terminates the receipt of applications for the program year be accepted]. *Notwithstanding the provisions of this Part and Part 393 of this Title, no person shall be certified as eligible to receive a HEAP benefit as a result of a fair hearing if no federal funds are available for such purpose. Federal funds are available for the provision of a HEAP benefit until the end of the federal fiscal year succeeding the end of the HEAP program year for which such benefit is claimed. The issuance of a HEAP benefit in compliance with a fair hearing decision can only be provided if the hearing request is made during the period of time when federal funds are available.*

Subdivision (e) of section 393.5 of Title 18 NYCRR is amended to read as follows:

(e) Hearings provided for under this section must be requested no later than 60 days after the [sending] mailing of [appropriate] the notice. [In no event shall a hearing request made more than 105 days after the district terminates the receipt of applications for the program year be accepted.] *Notwithstanding the provisions of this Part and Part 358 of this Title, no person shall be certified as eligible to receive a HEAP benefit as a result of a fair hearing if no federal funds are available for such purpose. Federal funds are available for the provision of a HEAP benefit until the end of the federal fiscal year succeeding the end of the HEAP program year for which such benefit is claimed. The issuance of a HEAP benefit in compliance with a fair hearing decision can only be provided if the hearing request is made during the period of time when federal funds are available.*

**Text of proposed rule and any required statements and analyses may be obtained from:** Jeanine S. Behuniak, New York State Office of Temporary and Disability Assistance, 40 North Pearl Street, 16C, Albany, NY 12243-0001, (518) 474-9779, email: Jeanine.Behuniak@otda.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:

Social Services Law (SSL) § 20(3)(d) authorizes the Office of Temporary and Disability Assistance (OTDA) to promulgate regulations to carry out its powers and duties.

SSL § 22(8) requires OTDA to promulgate regulations as may be necessary to administer its fair hearings process.

SSL § 97 requires that each social services district participate in the federal Low-Income Home Energy Assistance Program (LIHEAP) to assist eligible households in obtaining home energy assistance benefits.

The federal LIHEAP statutes at 42 USC § 8621, et seq. authorize the Secretary of the United States Department of Health and Human Services to provide grants to States to assist low income households, primarily those with the lowest incomes that pay a high proportion of household income for home energy, in meeting their immediate home energy needs. New York State OTDA operates the Home Energy Assistance Program (HEAP) with the federal block grant funds provided for under the LIHEAP statutes.

##### 2. Legislative objectives:

It was the intent of the Legislature in enacting SSL § 97 that OTDA establish rules, regulations and policies so that eligible households may obtain home energy assistance in accordance with federal and state requirements and standards promulgated by OTDA. Additionally, it was the intent of the Legislature in enacting the above statutes that OTDA establish rules in order to assure that the due process rights of applicants for and recipients of HEAP are adequately protected. Furthermore, these statutes give OTDA the authority to promulgate regulations concerning the administration of the fair hearings process.

##### 3. Needs and benefits:

The regulations governing the fair hearings process for HEAP are contained in Parts 358 and 393 of Title 18 NYCRR. These proposed amendments are necessary due to a recent court order and stipulation of settlement in the Pedersen v. Hansell case. On May 10, 2010, the United States District Court, Eastern District of New York ordered that OTDA commence rule making proceedings to eliminate the 105 day rule set forth in 18 NYCRR § 358-3.5(b)(4) and § 393.5(e). These amendments would eliminate the 105 day statute of limitations imposed on requesting a HEAP fair hearing and clarify that federal HEAP funds are available for a finite

period of time. If a decision after a fair hearing finds that an individual was eligible for a regular HEAP benefit or a larger regular HEAP benefit, federal funds are available only until the end of the federal fiscal year succeeding the end of the HEAP program year for which such benefit is claimed. The issuance of a regular HEAP benefit in compliance with a fair hearing decision can only be provided if the hearing request is made during the period of time when federal funds are available.

##### 4. Costs:

Any additional HEAP benefits to be awarded as a result of the elimination of the 105 day statute of limitations would be 100% federally-funded. As a result, there would be no additional programmatic costs to the State or the social services districts resulting from this amendment.

It is not anticipated that there would be administrative costs associated with the elimination of the 105 day statute of limitations. This amendment would only have a limited impact on the volume of requests for fair hearings. As a result, the State and the social services districts should be able to address any increase in fair hearing requests, appearances and decisions by means of existing personnel, processes and procedures.

##### 5. Local government mandates:

The proposed amendments may have a nominal impact on local social services districts. Social services districts are required to send a representative to attend the underlying hearing and to be prepared to defend the case on the merits. Under the proposed amendments, the administrative hearing would proceed to the merits rather than be dismissed on procedural grounds. As such, there may be an increased likelihood of action necessary by the social services districts to comply with resulting client-favorable fair hearing decisions that prior to the regulatory amendments might have resulted in procedural dismissals of the hearing requests. However, the social services districts already have the necessary processes and procedures in place to comply with a potential increase in the number of client-favorable fair hearing decisions resulting from this amendment.

These proposed amendments would not impose any additional programs, services, duties or responsibilities upon the social services districts, other than the above.

##### 6. Paperwork:

There would be no additional forms required to support this process.

##### 7. Duplication:

These proposed amendments would not duplicate, overlap or conflict with any existing State or Federal regulations. This change is necessary to be in compliance with a court ordered stipulation of settlement.

##### 8. Alternatives:

The alternative is to leave Parts 358 and 393 intact. However, this would subject OTDA and the social services districts to additional litigation since these regulatory amendments were so ordered by the Federal District Court.

##### 9. Federal standards:

The proposed amendments would not conflict with federal standards for LIHEAP.

##### 10. Compliance schedule:

Social services districts will be in compliance with this rule upon the effective date of the regulation.

#### Regulatory Flexibility Analysis

##### 1. Effect of rule:

The proposed regulatory amendments would not affect small businesses. The proposed amendments may have a nominal impact on social services districts. Social services districts are required to send a representative to attend the underlying hearing and to be prepared to defend the case on the merits. Under the proposed amendments, the administrative hearing would proceed to the merits rather than be dismissed on procedural grounds. As such, there may be an increased likelihood of action necessary by the social services districts to comply with resulting client-favorable fair hearing decisions that prior to the regulatory amendments might have resulted in procedural dismissals of the hearing requests. However, the social services districts already have the necessary processes and procedures in place to comply with a potential increase in the number of client-favorable fair hearing decisions resulting from this amendment.

##### 2. Compliance requirements:

These proposed amendments are necessary due to a recent court order and stipulation of settlement in the Pedersen v. Hansell case. On May 10, 2010, the United States District Court, Eastern District of New York ordered that OTDA commence rule making proceedings to eliminate the 105 day rule set forth in 18 NYCRR § 358-3.5(b)(4) and § 393.5(e). These amendments would eliminate the 105 day statute of limitations imposed on requesting a HEAP fair hearing and clarify that federal HEAP funds are available for a finite period of time. If a decision after a fair hearing finds that an individual was eligible for a regular HEAP benefit or a larger regular HEAP benefit, federal funds are available only until the end of the federal fiscal year succeeding the end of the HEAP program year for which such benefit is claimed. The issuance of a regular HEAP benefit in compliance with a fair hearing decision can only be provided if the hearing request is made during the period of time when federal funds are available.

## 3. Professional service:

The proposed amendments would not require small businesses or local governments to hire additional professional services.

## 4. Compliance costs:

Any additional HEAP benefits to be awarded as a result of the elimination of the 105 day statute of limitations would be 100% federally-funded. As a result, there would be no additional programmatic costs to the State or the social services districts resulting from this amendment.

It is not anticipated that there would be administrative costs associated with the elimination of the 105 day statute of limitations. This amendment would only have a limited impact on the volume of requests for fair hearings. As a result, the State and the social services districts should be able to address any increase in fair hearing requests, appearances and decisions by means of existing personnel, processes and procedures.

## 5. Economic and technological feasibility:

All small businesses and local governments have the economic and technological ability to comply with these proposed regulations.

## 6. Minimizing adverse impact:

It is anticipated that there will be no adverse economic impact on local governments and small businesses.

## 7. Small business and local government participation:

Local districts did not participate in the development of the proposed amendments because this proposal is not optional. It is necessary to comply with the court order and stipulation of settlement in *Pedersen v. Hansell*. An Informational Letter (10-INF-19) was distributed to all social services districts on August 31, 2010 explaining the stipulation of settlement in *Pedersen v. Hansell*. The Informational Letter provided contact information in case the social services districts had questions or concerns. Thus far, OTDA has not received any negative comments from the social services districts regarding the elimination of the 105 day rule for requesting a HEAP fair hearing, which was explained in the Informational Letter.

**Rural Area Flexibility Analysis**

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

The proposed regulatory amendments may have a nominal impact on the 44 rural social services districts in the State. Social services districts are required to send a representative to attend the underlying hearing and to be prepared to defend the case on the merits. Under the proposed amendments, the administrative hearing would proceed to the merits rather than be dismissed on procedural grounds. As such, there may be an increased likelihood of action necessary by the rural districts to comply with resulting client-favorable fair hearing decisions that prior to the regulatory amendments might have resulted in procedural dismissals of the hearing requests. However, the social services districts already have the necessary processes and procedures in place to comply with a potential increase in the number of client-favorable fair hearing decisions resulting from this amendment.

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

No additional reporting, recordkeeping or compliance would be required by the rural social services districts, other than noted above.

## 3. Costs:

Any additional HEAP benefits to be awarded as a result of the elimination of the 105 day statute of limitations would be 100% federally-funded. As a result, there would be no additional programmatic costs to the rural social services districts resulting from this amendment.

It is not anticipated that there would be administrative costs associated with the elimination of the 105 day statute of limitations. This amendment would only have a limited impact on the volume of requests for fair hearings. As a result, the rural social services districts should be able to address any increase in fair hearing requests, appearances and decisions by means of existing personnel, processes and procedures.

## 4. Minimizing adverse impact:

It is anticipated that there will be no adverse economic impact on rural social services districts.

## 5. Rural area participation:

Social services districts in rural areas did not participate in the development of the proposed amendments because this proposal is necessary to comply with the court order and stipulation of settlement in *Pedersen v. Hansell*. An Informational Letter (10-INF-19) was distributed to all social services districts on August 31, 2010 explaining the stipulation of settlement in *Pedersen v. Hansell*. The Informational Letter provided contact information in case the social services districts had questions or concerns. Thus far, OTDA has not received any negative comments from the social services districts, including the rural districts, regarding the elimination of the 105 day rule for requesting a HEAP fair hearing, which was explained in the Informational Letter.

**Job Impact Statement**

A Job Impact Statement is not required for the proposed amendments. It is apparent from the nature and the purpose of the proposed amendments

that they would not have a substantial adverse impact on jobs and employment opportunities. The proposed amendments would not substantively affect the jobs of the employees of the local social services districts or OTDA. Thus the changes would not have any adverse impact on jobs and employment opportunities in New York State.

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## Workers' Compensation Board

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### EMERGENCY RULE MAKING

#### Filing Written Reports of Independent Medical Examinations (IMEs)

**I.D. No.** WCB-36-12-00002-E

**Filing No.** 843

**Filing Date:** 2012-08-15

**Effective Date:** 2012-08-15

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

**Action taken:** Amendment of section 300.2(d)(11) of Title 12 NYCRR.

**Statutory authority:** Workers' Compensation Law, sections 117 and 137

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

**Specific reasons underlying the finding of necessity:** This amendment is adopted as an emergency measure because time is of the essence. Memorandum of Decisions issued by Panels of three members of the Workers' Compensation Board (Board) have interpreted the current regulation as requiring reports of independent medical examinations be received by the Board within ten calendar days of the exam. Due to the time it takes to prepare the report and mail it, the fact the Board is not open on legal holidays, Saturdays and Sundays to receive the report, and the U.S. Postal Service is not open on legal holidays and Sundays, it is extremely difficult to timely file said reports. If a report is not timely filed it is not accepted into evidence and is not considered when a decision is rendered. As the medical professional preparing the report must send the report on the same day and in the same manner to the Board, the workers' compensation insurance carrier/self-insured employer, the claimant's treating provider, the claimant's representative and the claimant it is not possible to send the report by facsimile or electronic means. The Decisions have greatly, negatively impacted the professionals who conduct independent medical examinations and the entities that arrange and facilitate these exams, as well as the workers' compensation insurance carriers and self-insured employers. When untimely reports are not accepted into evidence, the insurance carriers and self-insured employers are prevented from adequately defending their position in a workers' compensation claim. Accordingly, emergency adoption of this rule is necessary.

**Subject:** Filing written reports of Independent Medical Examinations (IMEs).

**Purpose:** To amend the time for filing written reports of IMEs with the Board and furnished to all others.

**Text of emergency rule:** Paragraph (11) of subdivision (d) of section 300.2 of Title 12 NYCRR is amended to read as follows:

(11) A written report of a medical examination duly sworn to, shall be filed with the Board, and copies thereof furnished to all parties as may be required under the Workers' Compensation Law, within 10 *business* days after the examination, or sooner if directed, except that in cases of persons examined outside the State, such reports shall be filed and furnished within 20 *business* days after the examination. *A written report is filed with the Board when it has been received by the Board pursuant to the requirements of the Workers' Compensation Law.*

**This notice is intended** to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires November 12, 2012.

**Text of rule and any required statements and analyses may be obtained from:** Heather MacMaster, Workers' Compensation Board, Office of General Counsel, 328 State Street, Schenectady, NY 12305-2318, (518) 486-9564, email: regulations@wcb.ny.gov

**Regulatory Impact Statement**

## 1. Statutory authority:

The Workers' Compensation Board (hereinafter referred to as Board) is authorized to amend 12 NYCRR 300.2(d)(11). Workers' Compensation Law (WCL) Section 117(1) authorizes the Chair to make reasonable

regulations consistent with the provisions of the Workers' Compensation Law and the Labor Law. Section 141 of the Workers' Compensation Law authorizes the Chair to make administrative regulations and orders providing, in part, for the receipt, indexing and examining of all notices, claims and reports, and further authorizes the Chair to issue and revoke certificates of authorization of physicians, chiropractors and podiatrists as provided in sections 13-a, 13-k, and 13-l of the Workers' Compensation Law. Section 137 of the Workers' Compensation Law mandates requirements for the notice, conduct and reporting of independent medical examinations. Specifically, paragraph (a) of subdivision (1) requires a copy of each report of an independent medical examination to be submitted by the practitioner on the same day and in the same manner to the Board, the carrier or self-insured employer, the claimant's treating provider, the claimant's representative and the claimant. Sections 13-a, 13-k, 13-l and 13-m of the Workers' Compensation Law authorize the Chair to prescribe by regulation such information as may be required of physicians, podiatrists, chiropractors and psychologists submitting reports of independent medical examinations.

#### 2. Legislative objectives:

Chapter 473 of the Laws of 2000 amended Sections 13-a, 13-b, 13-k, 13-l and 13-m of the Workers' Compensation Law and added Sections 13-n and 137 to the Workers' Compensation Law to require authorization by the Chair of physicians, podiatrists, chiropractors and psychologists who conduct independent medical examinations, guidelines for independent medical examinations and reports, and mandatory registration with the Chair of entities that derive income from independent medical examinations. This rule would amend one provision of the regulations adopted in 2001 to implement Chapter 473 regarding the time period within which to file written reports from independent medical examinations.

#### 3. Needs and benefits:

Prior to the adoption of Chapter 473 of the Laws of 2000, there were limited statutory or regulatory provisions applicable to independent medical examiners or examinations. Under this statute, the Legislature provided a statutory basis for authorization of independent medical examiners, conduct of independent medical examinations, provision of reports of such examinations, and registration of entities that derive income from such examinations. Regulations were required to clarify definitions, procedures and standards that were not expressly addressed by the Legislature. Such regulations were adopted by the Board in 2001.

Among the provisions of the regulations adopted in 2001 was the requirement that written reports from independent medical examinations be filed with the Board and furnished to all parties as required by the WCL within 10 days of the examination. Guidance was provided in 2002 to some participants in the process from executives of the Board that filing was accomplished when the report was deposited in a U.S. mailbox and that "10 days" meant 10 calendar days. In 2003 claimants began raising the issue of timely filing with the Board of the written report and requesting that the report be excluded if not timely filed. In response some representatives for the carriers/self-insured employers presented the 2002 guidance as proof they were in compliance. In some cases the Workers' Compensation Law Judges (WCLJs) found the report to be timely, while others found it to be untimely. Appeals were then filed to the Board and assigned to Panels of Board Commissioners. Due to the differing WCLJ decisions and the appeals to the Board, Board executives reviewed the matter and additional guidance was issued in October 2003. The guidance clarified that filing is accomplished when the report is received by the Board, not when it is placed in a U.S. mailbox. In November 2003, the Board Panels began to issue decisions relating to this issue. The Panels held that the report is filed when received by the Board, not when placed in a U.S. mailbox, the CPLR provision providing a 5-day grace period for mailing is not applicable to the Board (WCL Section 118), and therefore the report must be filed within 10 days or it will be precluded.

Since the issuance of the October 2003 guidance and the Board Panel decisions, the Board has been contacted by numerous participants in the system indicating that ten calendar days from the date of the examination is not sufficient time within which to file the report of the exam with the Board. This is especially true if holidays fall within the ten day period as the Board and U.S. Postal Service do not operate on those days. Further the Board is not open to receive reports on Saturdays and Sundays. If a report is precluded because it is not filed timely, it is not considered by the WCLJ in rendering a decision.

By amending the regulation to require the report to be filed within ten business days rather than calendar days, there will be sufficient time to file the report as required. In addition by stating what is meant by filing there can be no further arguments that the term "filed" is vague.

#### 4. Costs:

This proposal will not impose any new costs on the regulated parties, the Board, the State or local governments for its implementation and continuation. The requirement that a report be prepared and filed with the

Board currently exists and is mandated by statute. This rule merely modifies the manner in which the time period to file the report is calculated and clarifies the meaning of the word "filed".

#### 5. Local government mandates:

Approximately 2511 political subdivisions currently participate as municipal employers in self-insured programs for workers' compensation coverage in New York State. These self-insured municipal employers will be affected by the proposed rule in the same manner as all other employers who are self-insured for workers' compensation coverage. As with all other participants, this proposal merely modifies the manner in which the time to file a report is calculated, and clarifies the meaning of the word "filed".

#### 6. Paperwork:

This proposed rule does not add any reporting requirements. The requirement that a report be provided to the Board, carrier, claimant, claimant's treating provider and claimant's representative in the same manner and at the same time is mandated by WCL Section 137(1). Current regulations require the filing of the report with the Board and service on all others within ten days of the examination. This rule merely modifies the manner in which the time period to file the report is calculated and clarifies the meaning of the word "filed".

#### 7. Duplication:

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

#### 8. Alternatives:

One alternative discussed was to take no action. However, due to the concerns and problems raised by many participants, the Board felt it was more prudent to take action. In addition to amending the rule to require the filing within ten business days, the Board discussed extending the period within which to file the report to fifteen days. In reviewing the law and regulations the Board felt the proposed change was best. Subdivision 7 of WCL Section 137 requires the notice of the exam be sent to the claimant within seven business days, so the change to business days is consistent with this provision. Further, paragraphs (2) and (3) of subdivision 1 of WCL Section 137 require independent medical examiners to submit copies of all requests for information regarding a claimant and all responses to such requests within ten days of receipt or response. Further, in discussing this issue with participants to the system, it was indicated that the change to business days would be adequate.

The Medical Legal Consultants Association, Inc., suggested that the Board provide for electronic acceptance of IME reports directly from IME providers. However, at this time the Board cannot comply with this suggestion as WCL Section 137(1)(a) requires reports to be submitted by the practitioners on the same day and in the same manner to the Board, the insurance carrier, the claimant's attending provider and the claimant. Until such time as the report can be sent electronically to all of the parties, the Board cannot accept it in this manner.

#### 9. Federal standards:

There are no federal standards applicable to this proposed rule.

#### 10. Compliance schedule:

It is expected that the affected parties will be able to comply with this change immediately.

### **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. Any independent medical exams conducted at their request must be filed by the physician, chiropractor, psychologist or podiatrist conducting the exam or by an independent medical examination (IME) entity. Workers' Compensation Law § 137(1)(a) does not permit self-insured employers or insurance carriers to file these reports, therefore there is no direct action a self-insured local government must or can take with respect to this rule. However, self-insured local governments are concerned about the timely filing of an IME report as one filed late will not be admissible as evidence in a workers' compensation proceeding. This rule makes it easier for a report to be timely filed as it expands the timeframe from 10 calendar days to 10 business days. Small businesses that are self-insured will also be affected by this rule in the same manner as self-insured local governments.

Small businesses that derive income from independent medical examinations are a regulated party and will be required to file reports of independent medical examinations conducted at their request within ten business days of the exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

Individual providers of independent medical examinations who own their own practices or are engaged in partnerships or are members of corporations that conduct independent medical examinations also constitute small businesses that will be affected by the proposed rule. These individual providers will be required to file reports of independent medical

examinations conducted at their request within ten business days of the exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

2. Compliance requirements:

This rule requires the filing of IME reports within 10 business days rather than 10 calendar days. Prior to this rule medical providers authorized to conduct IMEs and IME entities hired to perform administrative functions for IME examiners, such as filing the report with the Board, had less time to file such reports. Self-insured local governments and small employers, who are not authorized or registered with the Chair to perform IMEs or related administrative services, are not required to take any action to comply with this rule. As noted above, WCL § 137(1)(a) does not permit self-insured employers or insurance carriers to file IME reports with the Board. The new requirement is solely the manner in which the time period to file reports of independent medical examinations is calculated.

3. Professional services:

It is believed that no professional services will be needed to comply with this rule.

4. Compliance costs:

This proposal will not impose any compliance costs on small business or local governments. The rule solely changes the manner in which a time period is calculated and only requires the use of a calendar.

5. Economic and technological feasibility:

No implementation or technology costs are anticipated for small businesses and local governments for compliance with the proposed rule. Therefore, it will be economically and technologically feasible for small businesses and local governments affected by the proposed rule to comply with the rule.

6. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impacts due to the current regulations for small businesses and local governments. This rule provides only a benefit to small businesses and local governments.

7. Small business and local government participation:

The Board received input from a number of small businesses who derive income from independent medical examinations, some providers of independent medical examinations and the Medical Legal Consultants Association, Inc. which is a non-for-profit association of independent medical examination firms and practitioners across the State.

**Rural Area Flexibility Analysis**

1. Types and estimated numbers of rural areas:

This rule applies to all claimants, carriers, employers, self-insured employers, independent medical examiners and entities deriving income from independent medical examinations, in all areas of the state.

2. Reporting, recordkeeping and other compliance requirements:

Regulated parties in all areas of the state, including rural areas, will be required to file reports of independent medical examinations within ten business days, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding. The new requirement is solely the manner in which the time period to file reports of independent medical examinations is calculated.

3. Costs:

This proposal will not impose any compliance costs on rural areas. The rule solely changes the manner in which a time period is calculated and only requires the use of a calendar.

4. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impact for small businesses and local government that already exist in the current regulations. This rule provides only a benefit to small businesses and local governments.

5. Rural area participation:

The Board received input from a number of entities who derive income from independent medical examinations, some providers of independent medical examinations and the Medical Legal Consultants Association, Inc. which is a non-for-profit association of independent medical examination firms and practitioners across the State.

**Job Impact Statement**

The proposed regulation will not have an adverse impact on jobs. The regulation merely modifies the manner in which the time period to file a written report of an independent medical examination is filed and clarifies the meaning of the word "filed". These regulations ultimately benefit the participants to the workers' compensation system by providing a fair time period in which to file a report.

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

**Pharmacy and Durable Medical Equipment Fee Schedules and Requirements for Designated Pharmacies**

I.D. No. WCB-36-12-00003-P

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

**Proposed Action:** Addition of Parts 440 and 442 to Title 12 NYCRR.

**Statutory authority:** Workers' Compensation Law, sections 117, 13 and 13-o

**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 proposed rule (Full text is posted at the following State website: [wcb.ny.gov](http://wcb.ny.gov)):** 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 substance, generic drug, independent pharmacy, insurance carrier, pharmacy benefits management, pharmacy benefits manager, pharmacy chain, pharmacy processing agent, remote pharmacy, rural area, self-insured employer 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 for compounded medications and 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, the claimant's representative, the pharmacy or pharmacy benefits manager, or other third party submitting the bill on the same day and 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 employ-

er'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 that the Chair will enforce the rule by exercising his authority pursuant to Workers' Compensation Law § 111 to request documents and may refer matters to appropriate agencies for violations.

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.

**Text of proposed rule and any required statements and analyses may be obtained from:** Heather MacMaster, Workers' Compensation Board, Office of General Counsel, 328 State Street, Schenectady, NY 12305-2318, (518) 486-9564, email: regulations@wcb.ny.gov

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

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

#### **Summary of Regulatory Impact Statement**

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 savings 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 necessary 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.