

# RULE MAKING ACTIVITIES

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

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

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

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## Department of Civil Service

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

#### Jurisdictional Classification

**I.D. No.** CVS-33-13-00015-P

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

**Proposed Action:** Amendment of 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 of proposed rule:** Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Corrections and Community Supervision, by adding thereto the position of Coordinator Cultural and Language Access Services (1) and by increasing the number of positions of Correctional Facility Operations Specialist from 5 to 7.

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us

**Data, views or arguments may be submitted to:** Ilene Lees, Counsel, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-2624, email: ilene.lees@cs.state.ny.us

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

#### Regulatory Impact Statement

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was

previously printed under a notice of proposed rule making, I.D. No. CVS-02-13-00002-P, Issue of January 9, 2013.

#### Regulatory Flexibility Analysis

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-02-13-00002-P, Issue of January 9, 2013.

#### Rural Area Flexibility Analysis

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#### Job Impact Statement

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

#### Jurisdictional Classification

**I.D. No.** CVS-33-13-00016-P

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

**Proposed Action:** Amendment of 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 of proposed rule:** Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of State under the subheading “Joint Commission on Public Ethics,” by increasing the number of positions of Compliance Auditor (JCOPE) from 3 to 8 and Training Associate from 2 to 3.

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us

**Data, views or arguments may be submitted to:** Ilene Lees, Counsel, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-2624, email: ilene.lees@cs.state.ny.us

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**Job Impact Statement**

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

**Jurisdictional Classification**

**I.D. No.** CVS-33-13-00017-P

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

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

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

**Subject:** Jurisdictional Classification.

**Purpose:** To delete a subheading and positions from and classify a subheading and positions in the exempt class.

**Text of proposed rule:** Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Executive Department, by deleting therefrom the subheading "Office for Technology," and the positions of Counsel, Director Affirmative Action Programs, Director of Internal Audit, Director Public Information, NYS Chief Information Officer, NYS Deputy Chief Information Officer (5), Program Associate, Secretary, Special Assistant (6) and Statewide Interoperability Coordinator; in the Department of Transportation, by decreasing the number of positions of Assistant Commissioner from 7 to 6; in the Department of Family Assistance under the subheading "Office of Children and Family Services," by deleting therefrom the positions of Deputy Director and Program Manager and by decreasing the number of positions of Associate Commissioner from 11 to 10; in the Department of Labor under the subheading "Administration – General," by deleting therefrom the position of Chief Information Officer; in the Department of Family Assistance under the subheading "Department of Temporary and Disability Assistance," by deleting therefrom the position of Chief Information Officer; in the Executive Department under the subheading "Division of Homeland Security and Emergency Services," by deleting therefrom the position of Director Office of Cyber Security and by decreasing the number of positions of Counsel from 2 to 1; in the Executive Department under the subheading "Division of Criminal Justice Services," by decreasing the number of positions of Secretary from 3 to 2; in the Department of Mental Hygiene under the subheading "Office of Mental Health," by decreasing the number of positions of Deputy Commissioner from 5 to 4; in the Department of Health, by decreasing the number of positions of Division Director, Health Systems Management from 2 to 1; in the Labor Management Committees, by decreasing the number of positions of Employee Program Assistant from 31 to 28, Employee Program Associate from 31 to 24 and Employee Program Associate (PEF) from 3 to 2; in the Executive Department under the subheading "Office of Employee Relations," by decreasing the number of positions of Employee Relations Associate from 8 to 6 and by increasing the number of positions of Employee Program Assistant from 3 to 5 and Employee Program Associate from 4 to 8; in the Executive Department under the subheading "Office of General Services," by deleting therefrom the position of Manager Information Services; in the Executive Department under the subheading "Division of the Budget," by decreasing the number of positions of Special Office Assistant from 8 to 6; and, in the Executive Department, by adding thereto the subheading "Office of Information Technology Services," and the positions of Assistant Commissioner, Associate Commissioner, Chief Information Officer (2), Counsel (2), Deputy Commissioner (2), Deputy Director, Director Affirmative Action Programs, Director Internal Audit, Director Office Cyber Security, Director Public Information, Director Wagering Systems, Division Director Health Systems Management, Employee Program Assistant, Employee Program Associate, Employee Relations Associate (2), Manager Information Services, NYS Chief Information Officer, NYS Deputy Chief Information Officer (6), Program Associate, Program Manager, Secretary (2), Special Assistant (10) and Special Office Assistant.

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**Rural Area Flexibility Analysis**

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

**Jurisdictional Classification**

**I.D. No.** CVS-33-13-00018-P

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

**Proposed Action:** 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 classify positions in the non-competitive class.

**Text of proposed rule:** Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Taxation and Finance, by deleting therefrom the positions of Principal Fiscal Policy Analyst (3) and by adding thereto the positions of Tax Policy Analyst 5 (4).

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us

**Data, views or arguments may be submitted to:** Ilene Lees, Counsel, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-2624, email: ilene.lees@cs.state.ny.us

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**Regulatory Impact Statement**

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**Regulatory Flexibility Analysis**

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**Rural Area Flexibility Analysis**

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**Job Impact Statement**

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

**Jurisdictional Classification**

I.D. No. CVS-33-13-00019-P

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

**Proposed Action:** 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 to classify a position in the non-competitive class.

**Text of proposed rule:** Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Executive Department, by adding thereto the subheading "Statewide Financial System," and the position of Chief Information Security Officer 1 (1).

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us

**Data, views or arguments may be submitted to:** Ilene Lees, Counsel, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-2624, email: ilene.lees@cs.state.ny.us

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**Regulatory Impact Statement**

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**Rural Area Flexibility Analysis**

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**Job Impact Statement**

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## Delaware River Basin Commission

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### INFORMATION NOTICE

#### Information Notice

##### Revised Notice of Proposed Rulemaking and Public Hearing

The Delaware River Basin Commission ("DRBC" or "Commission") is a Federal interstate compact agency charged with managing the water resources of the Basin without regard to political boundaries. Its commissioners are the governors of the four Basin states – New York, New Jersey, Pennsylvania and Delaware – and a Federal representative, the North Atlantic Division Commander of the U.S. Army Corps of Engineers. The Commission is not subject to the requirements of the New York State Administrative Procedure Act. This notice is published by the Commission for information purposes.

**Proposed Amendments to the Water Quality Regulations, Water Code and Comprehensive Plan to Revise the Human Health Water Quality Criteria for PCBs in Zones 2 through 6 of the Delaware Estuary and Bay**

**Summary:** The Commission will hold a public hearing to receive comments on proposed amendments to the Commission's Water Quality Regulations, Water Code and Comprehensive Plan to revise the water

quality criteria for polychlorinated biphenyls ("PCBs") in the Delaware Estuary and Bay, DRBC Water Quality Management Zones 2 through 6, for the protection of human health from carcinogenic effects. The Commission will simultaneously solicit comment on a draft implementation strategy to support achievement of the criteria.

**Dates:** The public hearing will begin at 1:00 P.M. on Tuesday, September 10, 2013. The hearing will continue until all those wishing to testify have had an opportunity to do so. Written comments will be accepted and must be received by 5:00 P.M. on Friday, September 20, 2013. More information regarding the procedures for the hearing and comments is provided below.

**Addresses:** The public hearing will be held in the Goddard Conference Room at the Commission's office building located at 25 State Police Drive, West Trenton, NJ. As Internet mapping tools are inaccurate for this location, please use the driving directions posted on the Commission's website.

**Oral Testimony and Written Comments:** Persons wishing to testify at the hearing are asked to register in advance by phoning Paula Schmitt at 609-883-9500, ext. 224. Written comments may be submitted as follows: If by email, to paula.schmitt@drbc.state.nj.us; if by fax, to Commission Secretary at 609-883-9522; if by U.S. Mail, to Commission Secretary, DRBC, P.O. Box 7360, West Trenton, NJ 08628-0360; and if by overnight mail, to Commission Secretary, DRBC, 25 State Police Drive, West Trenton, NJ 08628-0360. Comments also may be delivered by hand at any time during the Commission's regular office hours (Monday through Friday, 8:30 A.M. through 5:00 P.M. except on national holidays) until the close of the comment period at 5:00 P.M. on Friday, September 20. In all cases, please include the commenter's name, address and affiliation, if any, in the comment document and "PCB Rulemaking" in the subject line.

**For Further Information:** The rule text, basis and background document, and draft Implementation Strategy are available on the DRBC website, DRBC.net. A May 10, 2012 PowerPoint presentation that illustrates PCB loading reductions achieved through the implementation of the Commission's PMP Rule is also posted on the website. For further information, please contact Commission Secretary Pamela M. Bush, 609-883-9500 ext. 203.

**Supplementary Information:**

**Re-Proposal.** A notice of proposed rulemaking to amend the current PCB criteria and to invite comment on an implementation plan was published in the New York State Register on August 19, 2009, as well as in the Federal Register (74 FR 41100) on August 14, 2009. The Commission deferred action on the proposal, however, pending the refinement of implementation strategies for point sources. Today, the uniform criterion of 16 picograms per liter is re-proposed, and a draft implementation strategy that has been revised for point sources is simultaneously published for comment.

**Current Criteria.** The human health water quality criteria for PCBs currently in effect in Zones 2 through 5 of the Delaware Estuary were established by the Commission in 1996 (see 61 FR 58047 and incorporation by reference at 18 C.F.R. Part 410). The 1996 criterion applicable to the lower portion of Zone 5 was extended to Zone 6, Delaware Bay, in 2010, effective the following year (see 76 FR 16285). The development of these PCB criteria pre-dated the collection of site-specific bioaccumulation data for the Estuary and Bay and site-specific fish-consumption data for Zones 2 through 4 that are relevant to the development of human health water quality criteria. They are also inconsistent with current guidance issued by the U.S. Environmental Protection Agency ("EPA") for the development of such criteria, and they vary by water quality zone, adding undue complexity to application of the criteria in these tidal waters.

**Development of New Criteria.** By Resolution No. 2003-11 on March 19, 2003 the Commission directed the executive director to initiate rulemaking on a proposal to revise the Commission's water quality criteria for PCBs for the protection of human health from carcinogenic effects to reflect site-specific data on fish consumption, site-specific bioaccumulation factors, and current EPA guidance on development of human health criteria. Amendment of the PCB criteria was delayed, however, pending ongoing work by the Commission's Toxics Advisory Committee ("TAC") to develop the new criterion and a simultaneous initiative by the Commission and diverse stakeholders to develop an implementation plan. The TAC is a standing committee of stakeholders, including regulators, municipal and industrial dischargers and environmental organizations that advises the Commission on technical matters relating to the control of toxic contaminants in shared waters of the Basin.

Rigorously applying the most current available data and methodology, including site-specific data on fish consumption, site-specific bioaccumulation factors, and the current EPA methodology for the

development of human health criteria for toxic pollutants (see EPA-822-B-00-004, October 2000), the TAC in July 2005 completed development of a revised PCB water quality criterion for the protection of human health from carcinogenic effects for the Delaware Estuary and Bay, recommending adoption of a uniform criterion of 16 picograms per liter for Water Quality Management Zones 2 through 6. By Resolution No. 2005-19 on December 7, 2005, the Commission again directed the executive director to conduct rulemaking, specifically to replace the existing criteria for PCBs with the uniform criterion of 16 picograms per liter.

Over the course of the next three-and-a-half years, the Commission continued to work with co-regulators on an implementation strategy for point and non-point sources to accompany the proposed uniform criterion. A notice of proposed rulemaking to amend the current PCB criteria and to invite comment on an implementation plan was issued in August 2009 (see 74 FR 41100). The Commission deferred action on the proposal, however, pending the refinement of implementation strategies for point sources. The updated, uniform criterion of 16 picograms per liter is now re-proposed, and a draft implementation strategy that has been revised for point sources is simultaneously published for comment.

Water Quality Impairment for PCBs. Because high levels of PCBs have resulted in state-issued fish consumption advisories for certain species caught in the Estuary and Bay, these waters are listed by the bordering states as impaired under Section 303(d) of the federal Clean Water Act ("CWA"), and a total maximum daily load ("TMDL") is required to be established for them. A TMDL expresses the maximum amount of a pollutant that a water body can receive and still attain water quality standards. Once the TMDL is calculated, it is allocated to all sources in the watershed – point and nonpoint. In order to ensure the attainment and maintenance of water quality standards, a source must not discharge a load in excess of its allocated share of the TMDL.

The EPA established TMDLs for PCBs on behalf of the states in December of 2003 for the Delaware Estuary and in December of 2006 for the Delaware Bay ("Stage 1 TMDLs"). Upon adoption of revised human health water quality criteria for PCBs in the Delaware Estuary and Bay, it is anticipated that EPA will establish new TMDLs ("Stage 2 TMDLs") corresponding to the updated criteria.

Implementing PCB Load Reductions. To initiate PCB reductions, by Resolution No. 2005-9 in May 2005, the Commission amended its Water Quality Regulations ("WQR") to establish a requirement for PCB Pollutant Minimization Plans ("PMPs") (see Section 4.30.9 of the WQR, incorporated by reference at 18 C.F.R. Part 410) ("the PMP Rule"). In accordance with the PMP Rule the largest point source dischargers of PCBs to the Delaware Estuary and Bay undertook the development and implementation of PMPs, including a variety of track-down and load reduction strategies. Ambient and effluent data collected between 2005 and 2011 show that their efforts over the past 12 years (and in some cases longer) have substantially reduced point source PCB loadings to the Estuary and Bay. However, because PCBs persist in the environment, including in soils that drain to municipal and industrial discharge facilities, most dischargers will require more time, including in some instances decades, to achieve the PCB loading reductions needed to meet their assigned wasteload allocations.

The draft document entitled Implementation Strategy for Polychlorinated Biphenyls for Zones 2 - 6 of the Delaware River Estuary ("Implementation Strategy") builds on the approach embodied by the PMP Rule. Among other things, it attempts to better integrate PMP requirements with the National Pollutant Discharge Elimination System (NPDES) permit program administered by the Estuary states of Delaware, New Jersey and Pennsylvania pursuant to the CWA.

Notably, the 2003 Delaware Estuary TMDL report projected that "due to the scope and complexity of the problem that has been defined through these TMDLs, achieving the estuary water quality standards for PCBs will take decades." (EPA 2003, Executive Summary, p. xiii). Adoption of an updated, uniform criterion for the Delaware Estuary and Bay and implementation of the criterion by means of the proposed strategy will not alter this prognosis. However, the proposed criterion and Implementation Strategy are intended to align the Commission's water quality criteria with current science and to ensure that increasingly protective pollutant levels in fish and ambient water are achieved at an aggressive pace until the protected use – fishable waters – is restored.

Subjects on Which Comment is Expressly Solicited. Public comment is solicited on all aspects of the proposed rule. These include but are not limited to the assumptions applied in developing the criterion, as set forth in a basis and background document that is available on the DRBC website, DRBC.net. Comment on the proposed Implementation Strategy for the new criterion, also posted on the website, is simultaneously requested.

Dated: July 26, 2013

PAMELA M. BUSH, ESQ.  
Commission Secretary

*Text of proposed amendments:*

It is proposed to amend the Comprehensive Plan, Article 3 of the Water Quality Regulations (WQR) and Article 3 of the Water Code (WC) as set forth below. Editor's instructions are denoted by underscore *thus*. Added text is denoted by boldface **thus**.

*Amend Table 6 of Section 3.30 of Article 3 of the WQR and WC as follows:*

*For the parameter "PCBs (Total)", in the column headed "Freshwater Objectives (ug/l): Fish & Water Ingestion," remove the number "0.0000444" and insert "0.000016"; in the column headed "Freshwater Objectives (ug/l): Fish Ingestion Only," remove the number "0.0000448" and insert "0.000016"; and in the column headed "Marine Objectives (ug/l): Fish Ingestion Only," remove the number "0.0000079" and insert "0.000016".*

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## Education Department

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### EMERGENCY/PROPOSED

### RULE MAKING

### NO HEARING(S) SCHEDULED

#### English Language Arts (ELA) and Mathematics Common Core Learning Standards (CCLS)

**I.D. No.** EDU-33-13-00022-EP

**Filing No.** 790

**Filing Date:** 2013-07-30

**Effective Date:** 2013-07-30

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

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

**Statutory authority:** Education Law, sections 101 (not subdivided), 207 (not subdivided), 208 (not subdivided), 209 (not subdivided), 305(1) and (2), 308 (not subdivided), 309 (not subdivided) and 3204(3)

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

**Specific reasons underlying the finding of necessity:** The proposed amendment establishes requirements to transition to the new Regents Examinations in English Language Arts (ELA) (Common Core) and in mathematics which measure the New York State Common Core Learning Standards (CCLS).

Pursuant to the proposed amendment, the transition plan for the new Regents Examination in ELA (Common Core) includes the following:

- Students who first enter grade 9 in September 2013 and thereafter shall meet the English requirement for graduation by passing the Regents Examination in English Language Arts (Common Core) or an approved alternative.

- Students who first entered Grade 9 prior to September 2013 shall meet the English requirement for graduation by passing the new Regents Examination in ELA (Common Core) or by passing the Regents Comprehensive Examination in English, while that exam is still being offered. For the June 2014 and August 2014 administrations only, students enrolled in Common Core English courses may, at local discretion, take the Regents Comprehensive Exam in English in addition to the Regents Examination in ELA (Common Core), and may meet the English requirement for graduation by passing either examination.

With respect to the transition plan for the new Regents Examinations in mathematics (Common Core), the proposed amendment would require that:

- Students who first begin instruction in a commencement level mathematics course aligned to the CCLS in September 2013 and thereafter shall meet the mathematics requirement for graduation by passing a commencement level Regents Examination in mathematics that measures the CCLS, or an approved alternative.

- Students who first began or will complete an Integrated Algebra, Geometry, or Algebra 2/Trigonometry course prior to September 2013 shall meet the mathematics requirements for graduation by passing the corresponding commencement level Regents, while those examinations are still being offered. For the June 2014, August 2014 and January 2015 administrations only, students receiving Algebra I (Common Core) instruction

may, at local discretion, take the Regents Examination in Integrated Algebra in addition to the Regents Examination in Algebra I (Common Core), and may meet graduation requirements by passing either examination.

Because the Board of Regents meets at scheduled intervals, and generally does not meet in the month of August, the earliest the proposed amendment could be presented for regular (non-emergency) adoption, after publication in the State Register and expiration of the 45-day public comment period provided for in State Administrative Procedure Act (SAPA) section 202(1) and (5), is the October 21-22, 2013 Regents meeting. Furthermore, pursuant to SAPA section 203(1), the earliest effective date of the proposed amendment, if adopted at the October meeting, would be November 6, 2013, the date a Notice of Adoption would be published in the State Register. However, emergency action to adopt the proposed rule is necessary now for the preservation of the general welfare to ensure that that school districts and students are given sufficient and timely notice of the requirements for transitioning to the new CCLS Regents Examinations in English Language Arts (Common Core) and in Mathematics (Algebra I, Geometry and Algebra II), in order to enable them to prepare for and timely implement these requirements.

It is anticipated that the emergency rule will be presented to the Board of Regents for adoption as a permanent rule at the October 21-22, 2013 Regents meeting, which is the first scheduled meeting after expiration of the 45-day public comment period mandated by the State Administrative Procedure Act for proposed rulemakings.

**Subject:** English Language Arts (ELA) and Mathematics Common Core Learning Standards (CCLS).

**Purpose:** Establish transition requirements for the Regents ELA and Mathematics examinations aligned to the CCLS.

**Text of emergency/proposed rule:** 1. Subdivision (a) of section 100.5 of the Regulations of the Commissioner is amended, effective July 30, 2013, as follows:

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

- (1) . . .
- (2) . . .
- (3) . . .
- (4) . . .
- (5) . . .
- (6) . . .
- (7) . . .
- (8) . . .

2. Subdivision (b) of section 100.5 of the Regulations of the Commissioner is amended, effective July 30, 2013, as follows:

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

- (1) . . .
- (2) . . .
- (3) . . .
- (4) . . .
- (5) . . .
- (6) . . .
- (7) . . .

3. Subdivision (c) of section 100.5 of the Regulations of the Commissioner is amended, effective July 30, 2013, as follows:

(c) Additional requirements for the local diploma. Except as provided in paragraph (d)(6) and subdivision (g) of this section, the following additional requirements shall apply for a local diploma.

- (1) . . .
- (2) . . .
- (3) . . .
- (4) . . .
- (5) . . .
- (6) . . .

4. Subdivision (g) of section 100.5 of the Regulations of the Commissioner is added, effective July 30, 2013, as follows:

(g) *Notwithstanding the provisions of this section, the following provisions shall apply to the specified student cohorts for purposes of meeting the English and Mathematics requirements for a Regents or local diploma:*

- (1) *English.*

(i) *Students who first enter grade 9 in September 2013 and thereafter shall meet the English requirement for graduation in clause 100.5(a)(5)(i)(a) of this section by passing the Regents Examination in English Language Arts (Common Core) or an approved alternative pursuant to section 100.2(f) of this Part.*

(ii) *Students who first enter grade 9 prior to September 2013 shall meet the English requirement for graduation in clause 100.5(a)(5)(i)(a) of this section by (a) successfully completing a course in English Language Arts (Common Core) and passing the Regents Examination in English Language Arts (Common Core) or an approved alternative pursuant to section 100.2(f) of this Part; or (b) successfully completing a course in English aligned to the 2005 Learning Standards and passing the Regents Comprehensive Examination in English or an approved alternative pursuant to section 100.2(f) of this Part; provided that for the June 2014 and August 2014 administrations only, students enrolled in English Language Arts (Common Core) courses may, at the discretion of the applicable school district, take the Regents Comprehensive Examination in English in addition to the Regents Examination in English Language Arts (Common Core), and may meet such English requirement by passing either examination.*

(2) *Mathematics.*

(i) *Students who first begin instruction in a commencement level mathematics course aligned to the Common Core Learning Standards in September 2013 and thereafter shall meet the mathematics requirement for graduation in clause 100.5(a)(5)(i)(b) of this section by passing a commencement level Regents Examination in mathematics that measures the Common Core Learning Standards, or an approved alternative pursuant to section 100.2(f) of this Part.*

(ii) *Students who first began or will complete an Integrated Algebra, Geometry, or Algebra 2/Trigonometry course prior to September 2013 shall meet the mathematics requirement for graduation in clause 100.5(a)(5)(i)(b) of this section by passing the corresponding commencement level Regents Examinations in mathematics or an approved alternative pursuant to section 100.2(f) of this Part; provided that for the June 2014, August 2014 and January 2015 administrations only, students receiving Algebra I (Common Core) instruction may, at the discretion of the applicable school district, take the Regents Examination in Integrated Algebra in addition to the Regents Examination in Algebra I (Common Core), and may meet the mathematics requirement for graduation in clause 100.5(a)(5)(i)(b) of this section by passing either examination.*

**This notice is intended:** to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire October 27, 2013.

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

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

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

**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 empowers the Board of Regents and the Commissioner to adopt rules and regulations to carry out laws of the State regarding education and the functions and duties conferred on the Department by law.

Education Law section 208 authorizes the Regents to establish examinations as to attainments in learning and to award and confer suitable certificates, diplomas and degrees on persons who satisfactorily meet the requirements prescribed.

Education Law section 209 authorizes the Regents to establish secondary school examinations in studies furnishing a suitable standard of graduation and of admission to colleges; to confer certificates or diplomas on students who satisfactorily pass such examinations; and requires the admission to these examinations of any person who shall conform to the rules and pay the fees prescribed by the Regents.

Education Law section 305 (1) and (2) provide that the Commissioner, as chief executive officer of the State system of education and of the Board of Regents, shall have general supervision over all schools and institutions subject to the provisions of the Education Law, or of any statute relating to education, and shall execute all educational policies determined by the Board of Regents.

Education Law section 308 authorizes the Commissioner to enforce and give effect to any provision in the Education Law or in any other general or special law pertaining to the school system of the State or any rule or direction of the Regents.

Education Law section 309 charges the Commissioner with the general supervision of boards of education and their management and conduct of all departments of instruction.

Education Law section 3204 (3) provides for required courses of study in the public schools and authorizes the State education department to alter the subjects of required instruction.

#### 2. LEGISLATIVE OBJECTIVES:

The proposed rule is consistent with the authority conferred by the above statutes and is necessary to implement policy enacted by the Board of Regents relating to State learning standards, State assessments, graduation and diploma requirements, and higher levels of student achievement.

#### 3. NEEDS AND BENEFITS:

The Board of Regents adopted the Common Core State Standards (CCSS) for English Language Arts & Literacy (ELA) and Mathematics at its July 2010 meeting and incorporated New York-specific additions, creating the New York State Common Core Learning Standards (CCLS) at its January 2011 meeting.

The proposed amendment is necessary to implement requirements for transitioning to the new Regents examinations in ELA (Common Core) and in Mathematics (Algebra I, Geometry and Algebra II) which measure the New York State CCLS.

#### 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 does not impose any direct costs to the State, school districts, charter schools or the State Education Department. The proposed amendment establishes requirements to transition to the new Regents Examinations in ELA (Common Core) and in mathematics which measure the CCLS. It is anticipated that any indirect costs associated with these requirements will be minimal and capable of being absorbed using existing school resources.

#### 5. LOCAL GOVERNMENT MANDATES:

Consistent with the Board of Regents' adoption of the New York State Common Core Learning Standards (CCLS) at its January 2011 meeting, the proposed amendment is necessary to implement requirements for transitioning to the new Regents examinations in ELA (Common Core) and in Mathematics (Algebra I, Geometry and Algebra II) which measure the New York State Common Core Learning Standards (CCLS).

Pursuant to the proposed amendment, the transition plan for the new Regents Examination in ELA (Common Core) includes the following:

- Students who first enter grade 9 in September 2013 and thereafter shall meet the English requirement for graduation by passing the Regents Examination in English Language Arts (Common Core) or an approved alternative.
- Students who first entered Grade 9 prior to September 2013 shall meet the English requirement for graduation by: (a) successfully completing a course in English Language Arts (Common Core) and passing the new Regents Examination in ELA (Common Core) or an approved alternative or (b) successfully completing a course in English aligned to the 2005 Learning Standards and passing the Regents Comprehensive Examination in English, while that exam is still being offered; provided that for the June 2014 and August 2014 administrations only, students enrolled in ELA (Common Core) courses may, at local discretion, take the Regents Comprehensive Exam in English in addition to the Regents Examination in ELA (Common Core), and may meet the English requirement for graduation by passing either examination.

With respect to the transition plan for the new Regents Examinations in mathematics (Common Core), the proposed amendment would require that:

- Students who first begin instruction in a commencement level mathematics course aligned to the CCLS in September 2013 and thereafter shall meet the mathematics requirement for graduation by passing a commencement level Regents Examination in mathematics that measures the CCLS, or an approved alternative.
- Students who first began or will complete an Integrated Algebra, Geometry, or Algebra 2/Trigonometry course prior to September 2013 shall meet the mathematics requirements for graduation by passing the corresponding commencement level Regents Examination, while those examinations are still being offered. For the June 2014, August 2014 and January 2015 administrations only, students receiving Algebra I (Common Core) instruction may, at local discretion, take the Regents Examination in Integrated Algebra in addition to the Regents Examination in Algebra I (Common Core), and may meet graduation requirements by passing either examination.

#### 6. PAPERWORK:

The proposed amendment does not impose any specific recordkeeping, reporting or other paperwork requirements.

#### 7. DUPLICATION:

The proposed amendment does not duplicate existing State or federal requirements.

#### 8. ALTERNATIVES:

There are no significant alternatives to the proposed amendment and none were considered. The Board of Regents adopted the Common Core State Standards (CCSS) for English Language Arts & Literacy (ELA) and Mathematics at its July 2010 meeting and incorporated New York-specific additions, creating the New York State Common Core Learning Standards (CCLS) at its January 2011 meeting. The proposed amendment is necessary to implement requirements for transitioning to the new Regents examinations in ELA (Common Core) and in Mathematics (Algebra I, Geometry and Algebra II).

#### 9. FEDERAL STANDARDS:

There are no related federal standards in this area.

#### 10. COMPLIANCE SCHEDULE:

It is anticipated regulated parties will be able to achieve compliance with the proposed amendment by its effective date. To ensure implementation of the CCLS in line with the Regents Reform Agenda and the State's winning Race to the Top (RTTT) application, the proposed amendment requires that all students entering grade nine in September 2013 and thereafter must pass the new Regents Examination in English Language Arts (Common Core); and that any student who in September 2013 or thereafter, regardless of grade of enrollment, begins their first commencement-level mathematics course culminating in a Regents Examination in June 2014 or later must take the CCLS Regents Examination in mathematics that corresponds to that course, as available, and be provided with Common Core instruction. Students who first entered Grade 9 prior to September 2013 must pass the new Regents Examination in ELA (Common Core) or the Regents Comprehensive Examination in English, while that exam is still being offered; provided that for the June 2014 and August 2014 administrations only, students enrolled in Common Core English courses may, at local discretion, take the Regents Comprehensive Exam in English in addition to the Regents Examination in ELA (Common Core), and may meet the English requirement for graduation by passing either examination. Students who first began or will complete an Integrated Algebra, Geometry, or Algebra 2/Trigonometry course prior to September 2013 must pass the corresponding commencement level Regents Examination, while those examinations are still being offered; provided that for the June 2014, August 2014 and January 2015 administrations only, students receiving Algebra I (Common Core) instruction may, at local discretion, take the Regents Examination in Integrated Algebra in addition to the Regents Examination in Algebra I (Common Core), and may meet graduation requirements by passing either examination.

The new Regents Examination in ELA (Common Core) is designed to be administered at the end of Grade 11, similar to typical practice with the current Regents Comprehensive Examination in English. The last administration of the current Regents Comprehensive Examination in English will occur in June 2016. The last administrations of the current Regents Examinations in Integrated Algebra, Geometry and Algebra 2/Trigonometry will be in January 2015, January 2016, and January 2017, respectively. Based on feedback from the field and the recommendation to teach math courses in a sequential manner, the Department has decided to postpone the first administrations of the CCLS exams in Geometry and Algebra II until June 2015 and June 2016, respectively.

#### *Regulatory Flexibility Analysis*

##### *Small Businesses:*

The proposed amendment is necessary to implement requirements for transitioning to the new Regents examinations in English Language Arts (ELA) (Common Core) and in Mathematics (Algebra I, Geometry and Algebra II) which measure the New York State Common Core Learning Standards (CCLS). The proposed amendment relates to State learning standards, State assessments, graduation and diploma requirements and higher levels of student achievement, and 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 Government:*

#### 1. EFFECT OF RULE:

The proposed amendment applies to each of the 695 public school districts in the State, and to charter schools that are authorized to issue Regents diplomas with respect to State assessments and high school graduation and diploma requirements. At present, there are 34 charter schools authorized to issue Regents diplomas.

**2. COMPLIANCE REQUIREMENTS:**

Consistent with the Board of Regents' adoption of the New York State Common Core Learning Standards (CCLS) at its January 2011 meeting, the proposed amendment is necessary to implement requirements for transitioning to the new Regents examinations in ELA (Common Core) and in Mathematics (Algebra I, Geometry and Algebra II) which measure the New York State Common Core Learning Standards (CCLS).

Pursuant to the proposed amendment, the transition plan for the new Regents Examination in ELA (Common Core) includes the following:

- Students who first enter grade 9 in September 2013 and thereafter shall meet the English requirement for graduation by passing the Regents Examination in English Language Arts (Common Core) or an approved alternative.

- Students who first entered Grade 9 prior to September 2013 shall meet the English requirement for graduation by: (a) successfully completing a course in English Language Arts (Common Core) and passing the new Regents Examination in ELA (Common Core) or an approved alternative or (b) successfully completing a course in English aligned to the 2005 Learning Standards and passing the Regents Comprehensive Examination in English, while that exam is still being offered; provided that for the June 2014 and August 2014 administrations only, students enrolled in ELA (Common Core) courses may, at local discretion, take the Regents Comprehensive Exam in English in addition to the Regents Examination in ELA (Common Core), and may meet the English requirement for graduation by passing either examination.

With respect to the transition plan for the new Regents Examinations in mathematics (Common Core), the proposed amendment would require that:

- Students who first begin instruction in a commencement level mathematics course aligned to the CCLS in September 2013 and thereafter shall meet the mathematics requirement for graduation by passing a commencement level Regents Examination in mathematics that measures the CCLS, or an approved alternative.

- Students who first began or will complete an Integrated Algebra, Geometry, or Algebra 2/Trigonometry course prior to September 2013 shall meet the mathematics requirements for graduation by passing the corresponding commencement level Regents, while those examinations are still being offered. For the June 2014, August 2014 and January 2015 administrations only, students receiving Algebra I (Common Core) instruction may, at local discretion, take the Regents Examination in Integrated Algebra in addition to the Regents Examination in Algebra I (Common Core), and may meet graduation requirements by passing either examination.

**3. PROFESSIONAL SERVICES:**

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

**4. COMPLIANCE COSTS:**

The proposed amendment does not impose any direct costs to school districts or charter schools. The proposed amendment establishes requirements to transition to the new Regents Examinations in ELA (Common Core) and in mathematics which measure the CCLS. It is anticipated that any indirect costs associated with these requirements will be minimal and capable of being absorbed using existing school resources.

**5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:**

The proposed amendment does not impose any new technological requirements on school districts or charter schools. Economic feasibility is addressed in the Costs section above.

**6. MINIMIZING ADVERSE IMPACT:**

Consistent with the Board of Regents' adoption of the New York State Common Core Learning Standards (CCLS) at its January 2011 meeting, the proposed amendment is necessary to implement requirements for transitioning to the new Regents examinations in English Language Arts and Literacy (ELA - Common Core) and in Mathematics (Algebra I, Geometry and Algebra II). Because the Regents policy upon which the proposed amendment is based applies to all school districts in the State and to charter schools authorized to issue Regents diplomas, it is not possible to establish differing compliance or reporting requirements or timetables or to exempt school districts or charter schools from coverage by the proposed amendment. The proposed amendment does not directly impose any additional compliance requirements or costs on school districts. It is anticipated that any indirect costs associated with the proposed amendment will be minimal and capable of being absorbed using existing school resources.

**7. LOCAL GOVERNMENT PARTICIPATION:**

Copies of the proposed amendment have been provided to District Superintendents with the request that they distribute them to school districts within their supervisory districts for review and comment. Copies were also provided for review and comment to the chief school officers of the five big city school districts and to charter schools.

**8. INITIAL REVIEW OF RULE (SAPA § 207):**

Pursuant to State Administrative Procedure Act section 207(1)(b), the State Education Department proposes that the initial review of this rule shall occur in the fifth calendar year after the year in which the rule is adopted, instead of in the third calendar year. The justification for a five year review period is that the proposed amendment is necessary to implement long-range Regents policy providing for a transition to the New York State Common Core Learning Standards (CCLS) adopted at the January 2011 Regents meeting. To ensure implementation of the CCLS in line with the Regents Reform Agenda and the State's winning Race to the Top (RTTT) application, the proposed amendment requires that all students entering grade nine in September 2013 and thereafter must pass the Regents Examination in English Language Arts (Common Core); and that any student who in September 2013 or thereafter, regardless of grade of enrollment, begins their first commencement-level mathematics course culminating in a Regents Examination in June 2014 or later must take the CCLS Regents Examination in mathematics that corresponds to that course, as available, and be provided with Common Core instruction. The new Regents Examination in ELA (Common Core) is designed to be administered at the end of Grade 11, similar to typical practice with the current Regents Comprehensive Examination in English. The last administration of the current Regents Comprehensive Examination in English will occur in June 2016. The last administrations of the current Regents Examinations in Integrated Algebra, Geometry and Algebra 2/Trigonometry will be in January 2015, January 2016, and January 2017, respectively. Based on feedback from the field and the recommendation to teach math courses in a sequential manner, the Department has decided to postpone the first administrations of the CCLS exams in Geometry and Algebra II until June 2015 and June 2016, respectively. Accordingly, there is no need for a shorter review period.

The Department invites public comment on the proposed five year review period for this rule. Comments should be sent to the agency contact listed in item 16. of the Notice of Emergency Adoption and Proposed Rule Making published herewith, and must be received within 45 days of the State Register publication date of the Notice.

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

The proposed amendment applies to each of the 695 public school districts 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. The proposed amendment also applies to charter schools in such areas, to the extent they offer instruction in the high school grades and issue Regents diplomas. At present, there is one charter school located in a rural area that is authorized to issue Regents diplomas.

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

Consistent with the Board of Regents' adoption of the New York State Common Core Learning Standards (CCLS) at its January 2011 meeting, the proposed amendment is necessary to implement requirements for transitioning to the new Regents examinations in ELA (Common Core) and in Mathematics (Algebra I, Geometry and Algebra II) which measure the New York State Common Core Learning Standards (CCLS).

Pursuant to the proposed amendment, the transition plan for the new Regents Examination in ELA (Common Core) includes the following:

- Students who first enter grade 9 in September 2013 and thereafter shall meet the English requirement for graduation by passing the Regents Examination in English Language Arts (Common Core) or an approved alternative.

- Students who first entered Grade 9 prior to September 2013 shall meet the English requirement for graduation by: (a) successfully completing a course in English Language Arts (Common Core) and passing the new Regents Examination in ELA (Common Core) or an approved alternative or (b) successfully completing a course in English aligned to the 2005 Learning Standards and passing the Regents Comprehensive Examination in English, while that exam is still being offered; provided that for the June 2014 and August 2014 administrations only, students enrolled in ELA (Common Core) courses may, at local discretion, take the Regents Comprehensive Exam in English in addition to the Regents Examination in ELA (Common Core), and may meet the English requirement for graduation by passing either examination.

With respect to the transition plan for the new Regents Examinations in mathematics (Common Core), the proposed amendment would require that:

- Students who first begin instruction in a commencement level mathematics course aligned to the CCLS in September 2013 and thereafter shall meet the mathematics requirement for graduation by passing a commencement level Regents Examination in mathematics that measures the CCLS, or an approved alternative.

- Students who first began or will complete an Integrated Algebra, Geometry, or Algebra 2/Trigonometry course prior to September 2013 shall

meet the mathematics requirements for graduation by passing the corresponding commencement level Regents, while those examinations are still being offered. For the June 2014, August 2014 and January 2015 administrations only, students receiving Algebra I (Common Core) instruction may, at local discretion, take the Regents Examination in Integrated Algebra in addition to the Regents Examination in Algebra I (Common Core), and may meet graduation requirements by passing either examination.

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

### 3. COMPLIANCE COSTS:

The proposed amendment does not impose any direct costs to school districts or charter schools. The proposed amendment establishes requirements to transition to the new Regents Examinations in ELA (Common Core) and in mathematics which measure the CCLS. It is anticipated that any indirect costs associated with these requirements will be minimal and capable of being absorbed using existing school resources.

### 4. MINIMIZING ADVERSE IMPACT:

Consistent with the Board of Regents' adoption of the New York State Common Core Learning Standards (CCLS) at its January 2011 meeting, the proposed amendment is necessary to implement requirements for transitioning to the new Regents examinations in English Language Arts and Literacy (ELA - Common Core) and in Mathematics (Algebra I, Geometry and Algebra II). Because the Regents policy upon which the proposed amendment is based applies to all school districts and BOCES in the State and to charter schools authorized to issue Regents diplomas, it is not possible to establish differing compliance or reporting requirements or timetables or to exempt schools in rural areas from coverage by the proposed amendment. The proposed amendment does not directly impose any additional compliance requirements or costs on school districts or charter schools in rural areas. It is anticipated that any indirect costs associated with the proposed amendment will be minimal and capable of being absorbed using existing school resources.

### 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.

### 6. INITIAL REVIEW OF RULE (SAPA § 207):

Pursuant to State Administrative Procedure Act section 207(1)(b), the State Education Department proposes that the initial review of this rule shall occur in the fifth calendar year after the year in which the rule is adopted, instead of in the third calendar year. The justification for a five year review period is that the proposed amendment is necessary to implement long-range Regents policy providing for a transition to the New York State Common Core Learning Standards (CCLS) adopted at the January 2011 Regents meeting. To ensure implementation of the CCLS in line with the Regents Reform Agenda and the State's winning Race to the Top (RTTT) application, the proposed amendment requires that all students entering grade nine in September 2013 and thereafter must pass the Regents Examination in English Language Arts (Common Core); and that any student who in September 2013 or thereafter, regardless of grade of enrollment, begins their first commencement-level mathematics course culminating in a Regents Examination in June 2014 or later must take the CCLS Regents Examination in mathematics that corresponds to that course, as available, and be provided with Common Core instruction. The new Regents Examination in ELA (Common Core) is designed to be administered at the end of Grade 11, similar to typical practice with the current Regents Comprehensive Examination in English. The last administration of the current Regents Comprehensive Examination in English will occur in June 2016. The last administrations of the current Regents Examinations in Integrated Algebra, Geometry and Algebra 2/Trigonometry will be in January 2015, January 2016, and January 2017, respectively. Based on feedback from the field and the recommendation to teach math courses in a sequential manner, the Department has decided to postpone the first administrations of the CCLS exams in Geometry and Algebra II until June 2015 and June 2016, respectively. Accordingly, there is no need for a shorter review period.

The Department invites public comment on the proposed five year review period for this rule. Comments should be sent to the agency contact listed in item 16. of the Notice of Emergency Adoption and Proposed Rule Making published herewith, and must be received within 45 days of the State Register publication date of the Notice.

### Job Impact Statement

The proposed amendment is necessary to implement requirements for transitioning to the new Regents examinations in English Language Arts (ELA) (Common Core) and in Mathematics (Algebra I, Geometry and Algebra II) which measure the New York State Common Core Learning Standards (CCLS). The proposed amendment relates to State learning standards, State assessments, graduation and diploma requirements, and

higher levels of student achievement, and will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the 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.

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Occupational Therapy

I.D. No. EDU-33-13-00023-P

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

**Proposed Action:** Amendment of section 76.10 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided), 212(3), 6504 (not subdivided), 6507(2)(a) and 7908(4), (5) and (6)

**Subject:** Occupational therapy.

**Purpose:** Permits continuing competency credits for independent study related to fieldwork education and mentoring from outside the field.

**Text of proposed rule:** 1. Clause (b) of subparagraph (iii) of paragraph (2) of subdivision (c) of section 76.10 of the Regulations of the Commissioner of Education is amended, effective November 6, 2013, as follows:

(b) Independent study. Acceptable learning activities may include independent study as defined in paragraph [(a)](2) of subdivision (a) of this section. A licensee who completes independent study to meet the mandatory continuing competency requirement shall prepare a narrative account of what was learned and an overall written evaluation of the learning activity. Such licensee shall maintain a copy of the narrative account and written evaluation for six years after completion of this learning activity. *Study in conjunction with supervision of fieldwork education conducted as part of a program of study as set forth in section 76.1 or 76.7 (b) of this Part or in conjunction with supervised experience conducted pursuant to section 76.2 of this Part may be considered independent study. A licensee who completes study in conjunction with such fieldwork supervision or supervised experience shall prepare and retain a narrative account of the preparation associated with the supervision in addition to the other requirements of this clause, and shall retain a letter of verification or certificate from the program that includes the dates of fieldwork.* Three clock hours of independent study shall equal one continuing competency hour. No more than [one-sixth] *one-third* of the mandatory continuing competency requirement may be completed through independent study.

2. Subclause (2) of clause (c) of subparagraph (iii) of paragraph (2) of subdivision (c) of section 76.10 of the Regulations of the Commissioner of Education is amended, effective November 6, 2013, as follows:

(2) The mentor shall be licensed as an occupational therapist or occupational therapy assistant[, as applicable], *or in another profession licensed pursuant to Title VIII of the Education Law and have at least five years of post-licensure experience in the subject of the mentoring. The mentee shall be licensed as an occupational therapist or occupational therapy assistant.*

3. Paragraph (2) of subdivision (g) of section 76.10 of the Regulations of the Commissioner of Education is amended, effective November 6, 2013, as follows:

(2) In addition to meeting the recordkeeping requirement prescribed in paragraph (1) of this subdivision, each licensee who meets a portion of his or her continuing competency requirement through independent study, participation in a mentorship either as a mentor or as a mentee, *or participation in a professional study group[, fieldwork supervision or volunteer supervision]* shall meet the recordkeeping requirements prescribed in subparagraph (c)(2)(iii) of this section, applicable to that learning activity.

4. Subparagraph (i) of paragraph (2) of subdivision (i) of section 76.10 of the Regulations of the Commissioner of Education is amended, effective November 6, 2013, as follows:

(i) A sponsor of coursework or training that is approved by the *American Occupational Therapy Association, the National Board for Certification in Occupational Therapy, [or] the New York State Occupational Therapy Association, [or] the International Association for Continuing Education and Training, or an equivalent organization determined by the department to have adequate standards for approving sponsors of continuing education for professionals regulated by Title VIII of the Education Law that include but are not limited to standards that are equivalent to the standards prescribed in clauses (3)(ii)(a), (b), (c), (d), and (e) of this subdivision;* or

5. Subdivision (j) of section 76.10 of the Regulations of the Commissioner of Education is amended by adding a new paragraph (3) effective November 6, 2013, to read as follows:

*(3) Organizations desiring to offer coursework or training based upon a department review, pursuant to paragraph (i) (3) of this section, shall submit an application fee of \$900.00 with its application for approval to become a sponsor of coursework or training offered to occupational therapists and/or occupational therapy assistants to meet the continuing competency requirement. Application for a three-year renewal of the permit shall be accompanied by a fee of \$900.00.*

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

**Data, views or arguments may be submitted to:** Office of the Professions, Office of the Deputy Commissioner, State Education Department, 89 Washington Avenue, 2M, Albany, NY 12234, (518) 486-1765, email: opdepcom@mail.nysed.gov

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

#### **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.

Subdivision (3) of section 212 of the Education Law authorizes the State Education Department to determine and set fees for certifications and permits.

Section 6504 of the Education Law authorizes the Board of Regents to supervise the admission to and regulation of the practice of the professions.

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

Subdivision (4) of section 7908 of the Education Law defines acceptable learning activities as activities which contribute to professional practice in occupational therapy and which meet standards prescribed in the Regulations of the Commissioner of Education.

Subdivision (5) of section 7908 of the Education Law requires occupational therapists and occupational therapist assistants to maintain adequate documentation of compliance with the continuing education requirements and provide such documentation at the request of the State Education Department.

Subdivision (6) of section 7908 of the Education Law establishes a \$900 fee for sponsors of continuing competency activities.

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

The proposed amendment to clause (b) of subparagraph (iii) of paragraph (2) of subdivision (c) of section 76.10 of the Regulations of the Commissioner of Education carries out the intent of the aforementioned statutes in that it will, as directed by statute, establish standards relating to mandatory continuing competency for occupational therapists and occupational therapist assistants. Specifically, the rule would explicitly provide that an occupational therapist or occupational therapy assistant who engages in study in conjunction with the supervision of fieldwork education of students may receive credit under the category of independent study. In addition, licensees would be able to satisfy up to one-third of their continuing competency requirement through independent study; previously, the maximum had been one-sixth.

The proposed amendment to subclause (2) of clause (c) of subparagraph (iii) of paragraph (2) of subdivision (c) of section 76.10 of the Regulations of the Commissioner of Education carries out the intent of the aforementioned statutes in that it will, as directed by statute, establish standards relating to mandatory continuing competency for occupational therapists and occupational therapist assistants. Specifically, the rule would explicitly provide that an occupational therapist or occupational therapy assistant may receive mentoring from any professional licensed pursuant to Title VIII of the Education Law, rather than only from another occupational therapist or occupational therapy assistant.

The proposed amendment to paragraph (2) of subdivision (g) section 76.10 of the Regulations of the Commissioner carries out the intent of the aforementioned statutes in that it will correct a technical error in the existing regulations that references activities not recognized as acceptable learning activities for continuing competency credit by deleting extraneous words.

The proposed amendment to subparagraph (i) of paragraph (2) of subdivision (i) of section 76.10 of the Regulations of the Commissioner of Education carries out the intent of the aforementioned statutes in adding the American Occupational Therapy Association (AOTA) to those organizations whose approval of sponsors of continuing competency is recognized by the New York State Education Department.

The proposed addition of a new paragraph 3 to subdivision (j) of section 76.10 of the Regulations of the Commissioner of Education carries out the intent of the aforementioned statutes by establishing a fee for approval as a sponsor of continuing competency programs. The fee will provide the New York State Education Department with sufficient resources to review sponsors of coursework or training offered to occupational therapists and occupational therapist assistants who need to fulfill the continuing competency requirement.

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

Section 7908 of the Education Law authorizes the Commissioner of Education to promulgate regulations governing various aspects of the continuing competency requirement for occupational therapists and occupational therapy assistants. A comprehensive regulation package was adopted by the Board of Regents at its January 2013 meeting, effective February 13, 2013 (State Register, January 30, 2013; EDU-46-12-00015-A). The current proposed rule makes adjustments to that regulation.

The proposed amendment to clause (b) of subparagraph (iii) of paragraph (2) of subdivision (c) of section 76.10 of the Regulations of the Commissioner of Education will permit an occupational therapist or occupational therapy assistant to receive continuing competency credit for study in conjunction with supervision of fieldwork education. Supervisors spend time and effort in preparation for the responsibility of training students who are engaged in clinical work as part of their education, and this amendment to the regulations will permit the New York State Education Department to recognize this effort as independent study. Proper documentation will be required, in the form of a narrative account of the preparation associated with the supervision, and a letter of verification or certification from the student's school.

The proposed amendment to subclause (2) of clause (c) of subparagraph (iii) of paragraph (2) of subdivision (c) of section 76.10 of the Regulations of the Commissioner of Education will expand the mentors available to occupational therapists and occupational therapy assistants who seek continuing competency credit through mentorships to include any professional licensed pursuant to Title VIII of the Education Law. Currently, the regulations limit those mentors to other occupational therapists and occupational therapy assistants. This expansion will permit therapists to benefit from the expertise of medical professionals such as physicians and podiatrists in building their competency to practice occupational therapy.

The proposed amendment to paragraph (2) of subdivision (g) section 76.10 of the Regulations of the Commissioner will correct a technical error in the existing regulations that references activities not recognized as acceptable learning activities for continuing competency credit.

The proposed amendment to subparagraph (i) of paragraph (2) of subdivision (i) of section 76.10 of the Regulations of the Commissioner of Education will make it unnecessary for sponsors who are recognized by the American Occupational Therapy Association (AOTA) to seek separate approval from the Department to offer continuing competency courses. The AOTA is a recognized and respected organization, and requiring its approved sponsors to seek separate approval from the Department is an unnecessary burden to the Department and expense to the organizations seeking to become approved sponsors.

The proposed addition of a new paragraph 3 to subdivision (j) of section 76.10 of the Regulations of the Commissioner of Education will provide the Department with sufficient resources to review sponsors of coursework or training offered to occupational therapists and occupational therapy assistants who need to fulfill the continuing competency requirement by establishing a fee of \$900 to accompany an application for approval as a sponsor of continuing competency programs and for renewal of such approval.

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

(a) Costs to State government: None.

(b) Costs to local government: The proposed addition of a new paragraph 3 to subdivision (j) of section 76.10 of the Regulations of the Commissioner of Education will impose a \$900 triennial fee on local governments seeking approval from the Department to become sponsors of continuing competency courses.

(c) Cost to private regulated parties: The proposed addition of a new paragraph 3 to subdivision (j) of section 76.10 of the Regulations of the Commissioner of Education will impose a \$900 triennial fee on organizations seeking approval from the Department to become sponsors of continuing competency courses.

(d) Cost to the regulatory agency: None.

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

The proposed addition of a new paragraph 3 to subdivision (j) of section 76.10 of the Regulations of the Commissioner of Education would require a local government entity applying to the Department to become an approved sponsor of continuing education courses to pay a \$900 fee.

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

The proposed amendment to clause (b) of subparagraph (iii) of paragraph (2) of subdivision (c) of section 76.10 of the Regulations of the

Commissioner of Education would require occupational therapists and occupational therapy assistants who seek continuing competency credit for fieldwork supervision to maintain a narrative account of the preparation associated with that supervision, and verification or certification of the fieldwork placement. These records are necessary to verify the value of the fieldwork supervision activity, upon audit by the Department.

#### 7. DUPLICATION:

There are no other State or Federal requirements on the subject matter of the proposed rule. Therefore, the amendment does not duplicate other existing State or Federal requirements.

#### 8. ALTERNATIVES:

The proposed rule implements statutory requirements. There are no significant alternatives to the proposed rule and none were considered.

#### 9. FEDERAL STANDARDS:

There are no Federal standards for the continuing education of licensed occupational therapists or occupational therapist assistants.

#### 10. COMPLIANCE SCHEDULE:

The proposed rule expands the options available to occupational therapists and occupational therapy assistants to complete continuing competency requirements. It is anticipated that occupational therapists, occupational therapist assistants, and sponsors of continuing competency programs will be able to comply with the continuing competency requirements on the effective date of the proposed rule.

### *Regulatory Flexibility Analysis*

#### 1. EFFECT OF RULE:

The proposed rule applies to all occupational therapists, occupational therapy assistants, and occupational therapy continuing competency sponsors in the State, some of whom operate small businesses. In addition, school districts and boards of cooperative educational services (BOCES) may employ occupational therapists and occupational therapy assistants and may be, or wish to apply to become, sponsors of continuing competency coursework.

As of January 2013, there were 11,365 occupational therapists licensed in New York State and 4,049 authorized occupational therapy assistants. Reliable data on the number of these individuals employed by a small business is not available for New York State. However, a national workforce study conducted by the American Occupational Therapy Association in 2010 reflected that, nationally, 53% of these professionals work in either a hospital, a school setting or academia. If that pattern holds true for New York State, it follows that the potential maximum number of professionals employed by a small business would be the remaining 47%, or 7245. The number is likely to be substantially smaller than this.

Continuing competency coursework and training is provided by sponsors approved by the State Education Department, some of which are small businesses, school districts and BOCES. Current regulations provide that sponsors approved by the National Board for Certification in Occupational Therapy (NBCOT), the New York State Occupational Therapy Association (NYSOTA), the International Association for Continuing Education and Training, or an equivalent organization are deemed approved. The proposed rule would add the American Occupational Therapy Association (AOTA) to this list. For sponsors approved by such organizations, there is no fee required to be a sponsor. For sponsors that are required to apply to the New York State Education Department for approval, the proposed rule provides for a \$900 fee for a three year period of approval. Based upon the Department's experience in other licensed professions, which have similar sponsor approval procedures (e.g., podiatry, ophthalmic dispensing), only about 50 sponsors will seek approval through a Department review, an unknown number of which are small businesses.

#### 2. COMPLIANCE REQUIREMENTS:

There are compliance requirements for sponsors seeking approval through a New York State Education Department review. Every three years, organizations desiring to offer continuing education to licensed occupational therapists and occupational therapist assistants based upon a review by the Department must submit an application for advance approval as a sponsor at least 90 days prior to the date for the commencement of the continuing education. The applicant must document in the application: curricular areas of offerings, its organizational status as an educational entity or expertise in the professional area, the qualifications of course instructors, methods for assessing the learning of participants, and recordkeeping procedures. Applicants would be approved to offer continuing education to occupational therapists and occupational therapy assistants for a three-year term.

#### 3. PROFESSIONAL SERVICES:

No professional services are expected to be required by small businesses, school districts or BOCES to comply with the proposed rule. It is anticipated that affected parties will be able to complete the application needed for the review by the New York State Education Department, using existing staff and resources.

#### 4. COMPLIANCE COSTS:

An organization seeking approval as a sponsor providing continuing

learning activities to occupational therapists and occupational therapy assistants would be required to pay the Department a fee of \$900. Such fee would be paid once every three years, upon submission of the organization's application. Therefore, the annualized cost is \$300.

#### 5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed rule will not impose any technological requirements on regulated parties. See above Compliance Costs for the economic impact of the rule.

#### 6. MINIMIZING ADVERSE IMPACT:

The proposed rule was drafted to respond to concerns raised by affected parties, some of whom are small businesses, school districts and BOCES. A provision permitting some credit for fieldwork supervision of students, through the independent study process, was included. The opportunity to receive mentoring from licensed professionals other than occupational therapists or occupational therapy assistants was recognized. Sponsors of coursework recognized by the American Occupational Therapy Association (AOTA) will be deemed approved, avoiding a separate application to the State Education Department.

#### 7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:

Members of the State Board for Occupational Therapy, many of whom have experience in a small business environment, provided input in the development of the proposed rule. In addition, staff of the New York State Education Department have worked with the statewide and national professional associations and councils that represent occupational therapists and occupational therapy assistants by disseminating information concerning the proposed rule to these organizations and seeking their input. These organizations include members who own and operate small businesses.

In addition, copies of the proposed amendment have been provided to District Superintendents with the request that they distribute them to school districts within their supervisory districts for review and comment, and to the chief school officers of the Large City School Districts.

#### 8. INITIAL REVIEW OF RULE (SAPA § 207):

Pursuant to State Administrative Procedure Act section 207(1)(b), the State Education Department proposes that the initial review of this rule shall occur in the fifth calendar year after the year in which the rule is adopted, instead of in the third calendar year. The justification for a five year review period is that the proposed amendment is necessary to implement statutory requirements under Education Law section 7908 and therefore the substantive provisions of the proposed amendment cannot be repealed or modified unless there is a further statutory change. Accordingly, there is no need for a shorter review period. The Department invites public comment on the proposed five year review period for this rule. Comments should be sent to the agency contact listed in item 10. of the Notice of Proposed Rule Making published herewith, and must be received within 45 days of the State Register publication date of the Notice.

### *Rural Area Flexibility Analysis*

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

The proposed rule applies to all occupational therapists, occupational therapy assistants, and occupational therapy continuing competency sponsors in the State, including those who are 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.

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

Continuing competency coursework and training is provided by sponsors approved by the State Education Department. Current regulations provide that sponsors approved by the National Board for Certification in Occupational Therapy (NBCOT), the New York State Occupational Therapy Association (NYSOTA), the International Association for Continuing Education and Training, or an equivalent organization are deemed approved. The proposed rule would add the American Occupational Therapy Association (AOTA) to this list. For sponsors approved by such organizations, there is no fee required to be a sponsor. For sponsors that are required to apply to the Department for approval, the proposed rule provides for a \$900 fee for a three year period of approval. Based upon the Department's experience in other licensed professions, which have similar sponsor approval procedures (e.g., podiatry, ophthalmic dispensing), only about 50 sponsors will seek approval through a State Education Department review.

Professionals who perform independent study in preparation for supervising a student performing fieldwork will be required to maintain additional documentation consisting of a narrative account of the preparation associated with the supervision and a letter of verification or certificate from the program that includes the dates of fieldwork.

No professional services are expected to be required to comply with the proposed rule.

#### 3. COSTS:

An organization seeking approval as a sponsor providing continuing

learning activities to occupational therapists and occupational therapy assistants would be required to pay the Department a fee of \$900. Such fee would be paid once every three years, upon submission of the organization's application. Therefore, the annualized cost is \$300.

4. MINIMIZING ADVERSE IMPACT:

The proposed rule was drafted to respond to concerns raised by affected parties, some of whom reside in rural areas. A provision permitting some credit for study in preparation for the supervision of students participating in fieldwork education, through the independent study process, was included. The opportunity to receive mentoring from licensed professionals other than occupational therapists or occupational therapy assistants was recognized. Sponsors of coursework recognized by the American Occupational Therapy Association (AOTA) will be deemed approved. The proposed rule implements statutory requirements which are uniformly applicable to all occupational therapists, occupational therapy assistants, and occupational therapy continuing competency sponsors in the State, including those located in rural areas. Therefore, it was not possible to establish different requirements for individuals and entities in rural areas, or to exempt them from the rule's provisions.

5. RURAL AREAS PARTICIPATION:

Comments on the proposed rule were solicited from statewide organizations representing all parties having an interest in the practice of occupational therapy and occupational therapy assisting. Included in this group were the State Board for Occupational Therapy, and professional associations representing the occupational therapy profession. These groups have members who live or work in rural areas.

6. INITIAL REVIEW OF RULE (SAPA § 207):

Pursuant to State Administrative Procedure Act section 207(1)(b), the State Education Department proposes that the initial review of this rule shall occur in the fifth calendar year after the year in which the rule is adopted, instead of in the third calendar year. The justification for a five year review period is that the proposed amendment is necessary to implement statutory requirements under Education Law section 7908 and therefore the substantive provisions of the proposed amendment cannot be repealed or modified unless there is a further statutory change. Accordingly, there is no need for a shorter review period. The Department invites public comment on the proposed five year review period for this rule. Comments should be sent to the agency contact listed in item 10. of the Notice of Proposed Rule Making published herewith, and must be received within 45 days of the State Register publication date of the Notice.

Job Impact Statement

Section 7908 of the Education Law establishes mandatory continuing competency requirements for licensed occupational therapists and occupational therapy assistants authorized to practice in New York State. The proposed rule makes adjustments to existing regulations (8 NYCRR Part 76) which implemented that law. Any impact on jobs and employment opportunities by establishing a continuing competency requirement for occupational therapists and occupational therapy assistants is attributable to the statutory requirement, not the proposed rule, which simply establishes consistent standards as directed by statute.

Because it is evident from the nature of the proposed rule, which implements specific statutory requirements and directives, that the proposed rule will have no impact on jobs or employment opportunities attributable to its adoption or only a positive impact, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one was not prepared.

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## Department of Financial Services

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### EMERGENCY RULE MAKING

**Suitability in Annuity Transactions**

**I.D. No.** DFS-12-13-00003-E

**Filing No.** 786

**Filing Date:** 2013-07-29

**Effective Date:** 2013-07-29

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

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

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

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

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

As a result of a low interest rate environment, unsuitable annuities have been aggressively marketed to this state's most vulnerable residents, particularly senior citizens. In New York alone, life insurance companies wrote \$18.8 billion in annuity premiums in 2012. The increased complexity of annuities, including the significant investment risk assumed by purchasers of some annuity products, requires the immediate adoption of this Part, which provides critical consumer protections in all annuity sales transactions.

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

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

**Subject:** Suitability in Annuity Transactions.

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

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

*Section 224.0 Purpose.*

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

*Section 224.1 Applicability.*

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

*Section 224.2 Exemptions.*

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

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

*(b) a contract used to fund:*

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

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

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

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

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

*Section 224.3 Definitions.*

*For the purposes of this Part:*

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

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

*(c) Recommendation means advice provided by an insurance producer, or an insurer where no insurance producer is involved, to a consumer that*

results in a purchase or replacement of an annuity contract in accordance with that advice.

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

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

- (1) age;
- (2) annual income;
- (3) financial situation and needs, including the financial resources used for the funding of the annuity;
- (4) financial experience;
- (5) financial objectives;
- (6) intended use of the annuity;
- (7) financial time horizon;
- (8) existing assets, including investment and life insurance holdings;
- (9) liquidity needs;
- (10) liquid net worth;
- (11) risk tolerance; and
- (12) tax status.

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

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

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

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

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

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

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

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

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

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

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

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

(i) no recommendation is made;

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) filing a complaint with the superintendent; or

(3) cooperating with the investigation of a complaint.

#### Section 224.5 Insurer Responsibility.

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

#### Section 224.6 Recordkeeping.

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

#### Section 224.7 Violations.

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

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. DFS-12-13-00003-EP, Issue of March 4, 2013. The emergency rule will expire September 26, 2013.

**Text of rule and any required statements and analyses may be obtained from:** Michael Maffei, NYS Department of Financial Services, One State Street, New York, NY 10004, (212) 480-5027, email: michael.maffei@dfs.ny.gov

#### Regulatory Impact Statement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Needs and benefits: This rule requires insurers to set forth standards and procedures for recommendations to consumers with respect to annuity contracts so that the insurance needs and financial objectives of consumers at the time of the transaction are appropriately addressed. It regulates the activities of insurers and producers who make recommendations to consumers to purchase or replace annuity contracts to ensure that insurers and producers make suitable recommendations based on relevant information obtained from the consumers.

As a result of a low interest rate environment, unsuitable annuities have been aggressively marketed to this state's most vulnerable residents, particularly senior citizens. In New York alone, life insurance companies wrote \$18.8 billion in annuity premiums in 2012. The increased complexity of annuities, including the significant investment risk assumed by purchasers of some annuity products, requires the immediate adoption of this Part, which provides critical consumer protections in all annuity sales transactions. In fact, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Act") places such a high level of importance on state regulation of the suitability of annuities that, in an effort to provide incentives to states to adopt suitability requirements, the Act offers state agencies that promulgate suitability regulations federal grants of between \$100,000 to \$600,000 towards enhanced protection of seniors in connection with the sale and marketing of financial products.

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

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

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

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

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

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

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

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

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

An outreach draft of this regulation was posted on the Department's website for public comment. In addition to submitted written comments, the Life Insurance Council of New York (LICONY), a life insurance industry trade association, and the National Association of Insurance and Financial Advisors - New York State (NAIFA - New York State), an agent trade association, met with Department representatives to discuss the draft. Some revisions were made to the draft based on these comments and discussions. NAIFA-New York State remains concerned about producer education and training provisions in the regulation and supports the NAIC Model provisions, which permit an insurance producer to rely on insurer-provided product-specific training standards and materials to comply with the regulation. The NAIC's Model also sets forth requirements for training courses; reporting by course providers, among other things; and verification of course completion by insurers. After due consideration, the Department believes that listing the requirements set forth in the NAIC Model actually may limit information provided to producers, because the mere completion of general training courses would deem a producer qualified to sell all of an insurer's annuities, regardless of the annuities' complexity. Rather, a broad directive to an insurer to make certain that a producer is adequately trained ensures that the insurer remains responsible to train its producers.

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

10. Compliance schedule: The standards included in this rule were previously adopted on an emergency basis and have applied to any recommendation to purchase or replace an annuity contract made to a consumer on or after June 30, 2011 by an insurance producer or an insurer and therefore, insurance producers and insurers have been required to comply

with the requirements of the rule since such time. Therefore, this rule will be implemented upon its permanent adoption.

#### **Regulatory Flexibility Analysis**

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

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

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

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

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

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

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

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

7. Small business and local government participation: Affected small businesses had the opportunity to comment at suitability public hearings held by the Department in 2009 and on the outreach draft of the rule, which was posted on the Department website for a two-week comment period. Additionally, this rule has been proposed and was published in the March 20, 2013 State Register, and is posted on the Department's website.

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

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

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

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

3. Costs: The standards and procedures required by this rule are substantially similar to the National Association of Insurance Commissioners' "Suitability in Annuity Transactions" Model Regulation ("NAIC Model") for annuities, and the Financial Industry Regulatory Authority's current National Association of Securities Dealers ("NASD") Rule 2310 for securities. Accordingly, insurers that currently sell variable annuities will likely already have in place the required supervisory system and training procedures to comply with NASD Rule 2310 and this rule. Similarly, insurers that sell fixed annuities in states in which the NAIC Model previously has been adopted will likely have in place the required supervisory system and training procedures to comply with the requirements of the NAIC Model and this rule. As a result, most insurers will incur minimal additional costs in order to comply with the requirements of this rule.

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

5. Rural area participation: Affected parties doing business in rural areas of the State had the opportunity to comment at suitability public hearings held by the Department in 2009 and on the outreach draft of the rule, which was posted on the Department website for a two-week comment period. Additionally, this rule has been proposed and was published in the March 20, 2013 State Register, and is posted on the Department's website.

#### **Job Impact Statement**

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

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

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

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

## **EMERGENCY RULE MAKING**

### **Public Retirement Systems**

**I.D. No.** DFS-33-13-00002-E

**Filing No.** 782

**Filing Date:** 2013-07-24

**Effective Date:** 2013-07-24

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

**Action taken:** Amendment of Part 136 (Regulation 85) of Title 11 NYCRR.

**Statutory authority:** Financial Services Law, sections 202 and 302; and Insurance Law, sections 301, 314, 7401(a) and 7402(n)

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

**Specific reasons underlying the finding of necessity:** The Second Amendment to 11 NYCRR 136 (Insurance Regulation 85), effective November 19, 2008, established new standards of behavior with regard to investment of the assets of the New York State Common Retirement Fund ("Fund"), conflicts of interest, and procurement. In addition, it created new audit and actuarial committees, and greatly strengthened the investment advisory committee. The Second Amendment also set high ethical standards, strengthened internal controls and governance, enhanced the operational transparency of the Fund, and strengthened supervision by the Department.

Nevertheless, recent events surrounding how placement agents conduct business on behalf of their clients with regard to the Fund compel the Superintendent to conclude that the mere strengthening of the Fund's control environment is insufficient to protect the integrity of the state employee's retirement systems. Rather, only an immediate ban on the use of placement agents will ensure sufficient protection of the Fund's members and beneficiaries and safeguard the integrity of the Fund's investments.

This regulation was previously promulgated on an emergency basis on June 18, 2009, September 16, 2009, January 5, 2010, April 2, 2010, May 28, 2010, July 29, 2010, September 23, 2010, November 19, 2010, January 18, 2011, March 21, 2011, May 19, 2011, August 16, 2011, November 10, 2011, February 7, 2012, May 7, 2012, August 3, 2012, October 31, 2012, January 28, 2013, and April 26, 2013. The Department is currently working with the Governor's Office to make additional revisions to the regulation.

**Subject:** Public Retirement Systems.

**Purpose:** To ban the use of placement agents by investment advisors engaged by the state employees retirement system.

**Text of emergency rule:** Section 136-2.2 is amended to read as follows:  
§ 136-2.2 Definitions.

The following words and phrases, as used in this Subpart, unless a different meaning is plainly required by the context, shall have the following meanings:

[(a) Retirement system shall mean the New York State and Local Employees' Retirement System and the New York State and Local Police and Fire Retirement System.]

[(b) Fund shall mean the New York State Common Retirement Fund, a fund in the custody of the Comptroller as trustee, established pursuant to Section 422 of the Retirement and Social Security Law, which holds the assets of the retirement system.]

[(c)](a) Comptroller shall mean the Comptroller of the State of New York in his capacity as administrative head of the Retirement System and the sole trustee of the [fund] *Fund*.

[(d)] OSC shall mean the Office of the State Comptroller.]

[(e)](b) Consultant or advisor shall mean any person (other than an OSC employee) or entity retained by the [fund] *Fund* to provide technical or professional services to the [fund] *Fund* relating to investments by the [fund] *Fund*, including outside investment counsel and litigation counsel, custodians, administrators, broker-dealers, and persons or entities that identify investment objectives and risks, assist in the selection of [money] investment managers, securities, or other investments, or monitor investment performance.

(c) *Family member shall mean any person living in the same household as the Comptroller, and any person related to the Comptroller within the third degree of consanguinity or affinity.*

(d) *Fund shall mean the New York State Common Retirement Fund, a fund in the custody of the Comptroller as trustee, established pursuant to Section 422 of the Retirement and Social Security Law ("RSSL"), which holds the assets of the Retirement System.*

[(f)](e) Investment manager shall mean any person (other than an OSC employee) or entity engaged by the Fund in the management of part or all of an investment portfolio of the [fund] *Fund*. "Management" shall include, but is not limited to, analysis of portfolio holdings, and the purchase, sale, and lending thereof. For the purposes hereof, any investment made by the Fund pursuant to RSSL § 177(7) shall be deemed to be the investment of the Fund in such investment entity (rather than in the assets of such investment entity).

(f) *Investment policy statement shall mean a written document that, consistent with law, sets forth a framework for the investment program of the Fund.*

(g) *OSC shall mean the Office of the State Comptroller.*

[(g)](h) Placement agent or intermediary shall mean any person or entity, including registered lobbyists, directly or indirectly engaged and compensated by an investment manager (other than [an] a regular employee of the investment manager) to promote investments to or solicit investment by [assist the investment manager in obtaining investments by the fund, or otherwise doing business with] the [fund] *Fund*, whether compensated on a flat fee, a contingent fee, or any other basis. Regular employees of an investment manager are excluded from this definition unless they are employed principally for the purpose of securing or influencing the decision to secure a particular transaction or investment by the Fund. [obtaining investments or providing other intermediary services with respect to the fund.] For purpose of this paragraph, the term "employee" shall include any person who would qualify as an employee under the federal Internal Revenue Code of 1986, as amended, but shall not include a person hired, retained or engaged by an investment manager to secure or influence the decision to secure a particular transaction or investment by the Fund.

[(h)] Investment policy statement shall mean a written document that, consistent with law, sets forth a framework for the investment program of the fund.]

[(i)] Third party administrator shall mean any person or entity that contractually provides administrative services to the retirement system, including receiving and recording employer and employee contributions, maintaining eligibility rosters, verifying eligibility for benefits or paying benefits and maintaining any other retirement system records. Administrative services do not include services provided to the fund relating to fund investments.]

(i) *Retirement System shall mean the New York State and Local Employees' Retirement System and the New York State and Local Police and Fire Retirement System.*

(j) *Third party administrator shall mean any person or entity that contractually provides administrative services to the Retirement System, including receiving and recording employer and employee contributions, maintaining eligibility rosters, verifying eligibility for benefits, paying benefits or maintaining any other Retirement System records. "Administrative services" do not include services provided to the Fund relating to Fund investments.*

[(j)](k) Unaffiliated Person shall mean any person other than: (1) the Comptroller or a family member of the Comptroller, (2) an officer or employee of OSC, (3) an individual or entity doing business with OSC or the [fund] *Fund*, or (4) an individual or entity that has a substantial financial interest in an entity doing business with OSC or the [fund] *Fund*. For the purpose of this paragraph, the term "substantial financial interest" shall mean the control of the entity, whereby "control" means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of the entity, whether through the ownership of voting securities, by contract (except a commercial contract for goods or non-management services) or otherwise; but no individual shall be deemed to control an entity solely by reason of his being an officer or director of

such entity. Control shall be presumed to exist if any individual directly or indirectly owns, controls or holds with the power to vote 10 percent or more of the voting securities of such entity.

[(k)] Family member shall mean any person living in the same household as the Comptroller, and any person related to the Comptroller within the third degree of consanguinity or affinity.]

Section 136-2.4 (d) is amended to read as follows:

(d) Placement agents or intermediaries: In order to preserve the independence and integrity of the [fund] *Fund*, to [address] *preclude* potential conflicts of interest, and to assist the Comptroller in fulfilling his or her duties as a fiduciary to the [fund] *Fund*, [the Comptroller shall maintain a reporting and review system that must be followed whenever the fund] *the Fund shall not* [engages, hires, invests with, or commits] *engage, hire, invest with or commit* to[,] an outside investment manager who is using the services of a placement agent or intermediary to assist the investment manager in obtaining investments by the [fund] *Fund*. [, or otherwise doing business with the fund. The Comptroller shall require investment managers to disclose to the Comptroller and to his or her designee payments made to any such placement agent or intermediary. The reporting and review system shall be set forth in written guidelines and such guidelines shall be published on the OSC public website.]

Section 136-2.5 (g) is amended to read as follows:

(g) The Comptroller shall:

(1) file with the superintendent an annual statement in the format prescribed by Section 307 of the Insurance Law, including the [retirement system's] *Retirement System's* financial statement, together with an opinion of an independent certified public accountant on the financial statement;

(2) file with the superintendent the Comprehensive Annual Financial Report within the time prescribed by law, but no later than the time it is published on the OSC public website;

(3) disclose on the OSC public website, on at least an annual basis, all fees paid by the [fund] *Fund* to investment managers, consultants or advisors, and third party administrators;

[(4)] disclose on the OSC public website, on at least an annual basis, instances where an investment manager has paid a fee to a placement agent or intermediary;]

[(5)](4) disclose on the OSC public website the [fund's] *Fund's* investment policies and procedures; and

[(6)](5) require fiduciary and conflict of interest reviews of the [fund] *Fund* every three years by a qualified unaffiliated person.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire October 21, 2013.

**Text of rule and any required statements and analyses may be obtained from:** Michael Maffei, New York State Department of Financial Services, One State Street, New York, NY 10004, (212) 480-5027, email: michael.maffei@dfs.ny.gov

#### **Regulatory Impact Statement**

1. Statutory authority: The Superintendent's authority for the adoption of the rule to 11 NYCRR 136 is derived from sections 202 and 302 of the Financial Services Law ("FSL") and sections 301, 314, 7401(a), and 7402(n) of the Insurance Law.

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

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

Insurance Law section 314 vests the Superintendent with the authority to promulgate standards with respect to administrative efficiency, discharge of fiduciary responsibilities, investment policies and financial soundness of the public retirement and pension systems of the State of New York, and to make an examination into the affairs of every system at least once every five years in accordance with Insurance Law sections 310, 311 and 312. The implementation of the standards is necessarily through the promulgation of regulations.

As confirmed by the Court of Appeals in *Matter of Dinallo v. DiNapoli*, 9 N.Y. 3d 94 (2007), the Superintendent functions in two distinct capacities. The first is as regulator of the insurance industry. The second is as statutory receiver of financially distressed insurance entities. Article 74 of the Insurance Law sets forth the Superintendent's role and responsibilities in this latter capacity.

Insurance Law section 7401(a) sets forth the entities, including the public retirement systems, to which Article 74 applies.

Insurance Law section 7402(n) provides that it is a ground for rehabili-

tation if an entity subject to Article 74 has failed or refused to take such steps as may be necessary to remove from office any officer or director whom the Superintendent has found, after appropriate notice and hearing, to be a dishonest or untrustworthy person.

2. Legislative objectives: Insurance Law section 314 authorizes the Superintendent to promulgate and amend, after consultation with the respective administrative heads of public retirement and pension systems and after a public hearing, standards with respect to the public retirement and pension systems of the State of New York.

This rule, which in effect bans the use of an investment tool that has been found to be untrustworthy, is consistent with the public policy objectives that the Legislature sought to advance in enacting Insurance Law section 314, which provides the Superintendent with the powers to promulgate standards to protect the New York State Common Retirement Fund (the "Fund").

3. Needs and benefits: The Second Amendment to 11 NYCRR 136 (Regulation 85), effective November 19, 2008, established new standards with regard to investment of the assets of the Fund, conflicts of interest and procurement. In addition, the Second Amendment created new audit and actuarial committees, and greatly strengthened the investment advisory committee. The Second Amendment also set high ethical standards, strengthened internal controls and governance, enhanced the operational transparency of the Fund, and strengthened supervision by the Department.

Nevertheless, recent allegations regarding "pay to play" practices, whereby politically connected individuals reportedly sold access to investment opportunities with the Fund, compel the Superintendent to conclude that the mere strengthening of the Fund's control environment is insufficient to protect the integrity of the state employees' retirement systems. The Third Amendment to Regulation 85 will adopt an immediate ban on the use of placement agents to ensure sufficient protection of the Fund's members and beneficiaries, and safeguard the integrity of the Fund's investments. Further, the rule defines "placement agent or intermediary" in a manner that both thwarts evasion of the ban while ensuring that such ban not extend to persons otherwise acting lawfully on behalf of investment managers.

4. Costs: The rule does not impose any additional requirements on the Comptroller, and no additional costs are expected to result from the implementation of the ban imposed by this rule. There are no costs to the Department or other state government agencies or local governments. Investment managers, consultants and advisors who provide services to the Fund, which are required to discontinue the use of placement agents in connection with investment services they provide to the Fund, may lose opportunities to do business with the Fund.

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

6. Paperwork: No additional paperwork should result from the prohibition imposed by the rule.

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

8. Alternatives: The Superintendent considered other ways to limit the influence of placement agents, including a partial ban, increased disclosure requirements, and adopting alternative definitions of placement agent or intermediary. The Department considered limiting the ban to include intent on the part of the party using placement agents, or defining "placement agent" in more general terms.

In developing the rule, the Superintendent and State Comptroller not only consulted with one another, but also briefed representatives of: (1) New York State and New York City Public Employee Unions; (2) New York City Retirement and Pension Funds; (3) the Borough Presidents of the five counties of New York City; and (4) officials of the New York City Mayor's Office, Comptroller's Office and Finance Department. These entities agreed with the concerns expressed by the Department and intend to explore remedies most appropriate to the pension funds that they represent.

Initially, the Superintendent concluded that only an immediate total ban on the use of placement agents could provide sufficient protection of the Fund's members and beneficiaries and safeguard the integrity of the Fund's investments. The proposed rule was published in the State Register on March 17, 2010. A Public Hearing was held on April 28, 2010. The following comments were received:

Blackstone Group, a global investment manager and financial advisor, wrote to oppose the proposed ban on the use of placement agents by investment advisors engaged by the New York State Common Retirement Fund ("The Fund"). It stated that the rule would lessen the number of investment opportunities brought before the Fund, adversely affect small, medium-sized and women-and minority-owned investment firms seeking to do business with the Fund, and adversely affect a number of New York-headquartered financial institutions doing business as placement agents.

Blackstone suggested the inclusion of the following provisions in the rule instead:

- A ban on political contributions by any employee of any placement agent seeking to do business with the Fund;

- A requirement that any placement agent seeking to do business with the Fund be registered as a broker dealer with the SEC and ensure that its professionals have passed the appropriate Series qualifications administered by Financial Industry Regulatory Authority ("FINRA");

- A requirement that any placement agent seeking to do business in New York register with the Department; and

- A requirement that any placement agent representing an investment manager before the Fund fully disclose the contractual arrangement between it and the manager, including the fee arrangement and the scope of services to be provided.

The Securities Industry and Financial Markets Association ("SIFMA"), representing hundreds of securities firms, banks, and asset managers, commented that the proposed rule (1) inadvertently limits the access of smaller fund managers to the Fund; (2) restricts the number and types of advisers that could be utilized by the Fund; (3) creates an inherent conflict between federal and state law that would make it impossible to do business with the Fund while complying with both; and (4) adds duplicative regulation in an area already substantially regulated at the state level and that is primed for further federal regulation through the imminent imposition of a federal pay-to-play regime on all registered broker-dealers acting as placement agents. In addition, SIFMA provided language that it believes would be consistent with the existing federal requirements on the use of placement agents. SIFMA requested that the Department either exclude from the proposed rule those placement agents who are registered as broker-dealers under the Securities Exchange Act of 1934 or delay the enactment of the proposed rule until the federal and state placement agent initiatives are finalized.

The Superintendent did consider other ways to limit the influence of placement agents, including a partial ban, increased disclosure requirements, and adopting alternative definitions of placement agent or intermediary. The Department considered limiting the ban to include intent on the part of the party using placement agents, or defining "placement agent" in more general terms. At the time, the Superintendent concluded that only an immediate, total ban on the use of placement agents could provide sufficient protection of the Fund's members and beneficiaries and safeguard the integrity of the Fund's investments.

9. Federal standards: The Securities and Exchange Commission issued a "Pay-To-Play" regulation for financial advisors on July 1, 2010, which may have an impact on the issues addressed in the proposed rule.

10. Compliance schedule: The emergency adoption of this regulation on June 18, 2009 ensured that the ban would become enforceable immediately. The ban needs to remain in effect on an emergency basis until such time as an amended regulation can be made permanent.

#### **Regulatory Flexibility Analysis**

1. Effect of the rule: This rule strengthens standards for the management of the New York State and Local Employees' Retirement System and New York State and Local Police and Fire Retirement System (collectively, "the Retirement System"), and the New York State Common Retirement Fund ("the Fund").

The Second Amendment to 11 NYCRR 136 (Insurance Regulation 85), effective November 19, 2008, established new standards with regard to investment of the assets of the Fund, conflicts of interest and procurement. In addition, the Second Amendment created new audit and actuarial committees, and greatly strengthened the investment advisory committee. The Second Amendment also set high ethical standards, strengthened internal controls and governance, enhanced the operational transparency of the Fund, and strengthened supervision by the Department.

Nevertheless, recent allegations regarding "pay to play" practices, whereby politically connected individuals reportedly sold access to investment opportunities with the Fund, compel the Superintendent to conclude that the mere strengthening of the Fund's control environment is insufficient to protect the integrity of the state employees' retirement systems. The Third Amendment to Insurance Regulation 85 will adopt an immediate ban on the use of placement agents to ensure sufficient protection of the Fund's members and beneficiaries, and safeguard the integrity of the Fund's investments. Further, the rule defines "placement agent or intermediary" in a manner that both thwarts evasion of the ban while ensuring that such ban not extend to persons otherwise acting lawfully on behalf of investment managers.

These standards are intended to assure that the conduct of the business of the Retirement System and the Fund, and of the State Comptroller (as administrative head of the Retirement System and as sole trustee of the Fund), are consistent with the principles specified in the rule. Most among all affected parties, the State Comptroller, as a fiduciary whose responsibilities are clarified and broadened, is impacted by the rule. The State Comptroller is not a "small business" as defined in section 102(8) of the State Administrative Procedure Act.

This rule will affect investment managers and other intermediaries

(other than OSC employees) who provide technical or professional services to the Fund related to Fund investments. The rule will prohibit investment managers from using the services of a placement agent unless such agent is a regular employee of the investment manager and is acting in a broader capacity than just providing specific investment advice to the Fund. In addition, the rule is also directed to placement agents, who as a result of this rule, will no longer be engaged directly or indirectly by investment managers that do business with the Fund. Some investment managers and placement agents may come within the definition of "small business" set forth in section 102(8) of the State Administrative Procedure Act, because they are independently owned and operated, and employ 100 or fewer individuals.

The rule bans the use of placement agents in connection with investments by the Fund. This may adversely affect the business of placement agents, who will lose opportunities to earn profits in connection with investments by the Fund. Nevertheless, as a result of recent allegations regarding "pay to play" practices, whereby politically connected individuals reportedly sold access to investment opportunities with the Fund, the Superintendent has concluded that an immediate ban on the use of placement agents is necessary to protect the Fund's members and beneficiaries and to safeguard the integrity of the Fund's investments.

This rule will not impose any adverse compliance requirements or result in any adverse impacts on local governments. The basis for this finding is that this rule is directed at the State Comptroller; employees of the Office of State Comptroller; and investment managers, placement agents, consultant or advisors - none of which are local governments.

2. Compliance requirements: None.

3. Professional services: Investment managers, consultants and advisors who provide services to the Fund, and are required to discontinue the use of placement agents in connection with investment services they provide to the Fund, may need to employ other professional services.

4. Compliance costs: The rule does not impose any additional requirements on the Comptroller, and no additional costs are expected to result from the implementation of the ban imposed by this rule. There are no costs to the Department of Financial Services or other state government agencies or local governments. However, investment managers, consultants and advisors who provide services to the Fund, which are required to discontinue the use of placement agents in connection with investment services they provide to the Fund, may lose opportunities to do business with the Fund.

5. Economic and technological feasibility: The rule does not impose any economic and technological requirements on affected parties, except for placement agents who will lose the opportunity to earn profits in connection with investments by the Fund.

6. Minimizing adverse impact: The costs to placement agents are lost opportunities to earn profits in connection with investments by the Fund. The Superintendent considered other ways to limit the influence of placement agents, including a partial ban, increased disclosure requirements, and adopting alternative definitions of placement agent or intermediary. But in the end, the Superintendent concluded that only an immediate total ban on the use of placement agents could provide sufficient protection of the Fund's members and beneficiaries and safeguard the integrity of the Fund's investments.

7. Small business and local government participation: In developing the rule, the Superintendent and State Comptroller not only consulted with one another, but also briefed representatives of: (1) New York State and New York City Public Employee Unions; (2) New York City Retirement and Pension Funds; (3) the Borough Presidents of the five counties of New York City; and (4) officials of the New York City Mayor's Office, Comptroller's Office and Finance Department.

A public hearing was held on April 28, 2010. Comments were received from two entities recommending that the total ban on the use of placement agents be modified. The Department will continue to assess the comments that have been received and any others that may be submitted.

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

1. Types and estimated numbers of rural areas: Investment managers, placement agents, consultants or advisors that do business in rural areas as defined under State Administrative Procedure Act Section 102(10) will be affected by this rule. The rule bans the use of placement agents in connection with investments by the New York State Common Retirement Fund ("the Fund"), which may adversely affect the business of placement agents and of other entities that utilize placement agents and are involved in Fund investments.

2. Reporting, recordkeeping and other compliance requirements, and professional services: This rule will not impose any reporting, recordkeeping or other compliance requirements on public or private entities in rural areas, with the exception of requiring investment managers, consultants and advisors who provide services to the Fund to discontinue the use of placement agents.

3. Costs: The costs to placement agents are lost opportunities to earn profits in connection with investments by the Fund.

4. Minimizing adverse impact: The rule does not adversely impact rural areas.

5. Rural area participation: A public hearing was held on April 28, 2010. Comments were received from two entities recommending that the total ban on the use of placement agents be modified. The Department will continue to assess the comments that have been received and any others that may be submitted.

#### **Job Impact Statement**

The Department of Financial Services finds that this rule will have little or no impact on jobs and employment opportunities. The rule bans investment managers from using placement agents in connection with investments by the New York State Common Retirement Fund ("the Fund"). The rule may adversely affect the business of placement agents, who could lose the opportunity to earn profits in connection with investments by the Fund. Nevertheless, in view of recent events about how placement agents conduct business on behalf of their clients with regard to the Fund, the Superintendent has concluded that an immediate ban on the use of placement agents is necessary to protect the Fund's members and beneficiaries, and to safeguard the integrity of the Fund's investments.

## **EMERGENCY RULE MAKING**

### **Assessment of Entities Regulated by the Banking Division of the Department of Financial Services**

**I.D. No.** DFS-33-13-00012-E

**Filing No.** 783

**Filing Date:** 2013-07-25

**Effective Date:** 2013-07-25

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

**Action taken:** Addition of Part 501 to Title 3 NYCRR.

**Statutory authority:** Banking Law, section 17; and Financial Services Law, section 206

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

**Specific reasons underlying the finding of necessity:** Pursuant to the Financial Services Law ("FSL"), the New York State Banking Department ("Banking Department") and the New York State Insurance Department were consolidated, effective October 3, 2011, into the Department of Financial Services ("Department").

Prior to the consolidation, assessments of institutions subject to the Banking Law ("BL") were governed by Section 17 of the BL; effective on October 3, 2011, assessments are governed by Section 206 of the Financial Services Law, provided that Section 17 continues to apply to assessments for the fiscal year which commenced April 1, 2011.

Both Section 17 of the Banking Law and Section 206 of the Financial Services Law provide that all expenses (compensation, lease costs and other overhead) of the Department in connection with the regulation and supervision (including examination) of any person or entity licensed, registered, incorporated or otherwise formed pursuant to the BL are to be charged to, and paid by, the regulated institutions subject to the supervision of in the Banking Division of the Department (the "Banking Division"). Under both statutes, the Superintendent is authorized to assess regulated institutions in the Banking Division in such proportions as the Superintendent shall deem just and reasonable.

Litigation commenced in June, 2011 challenged the methodology used by the Banking Department to assess mortgage bankers. On May 3, 2012, the Appellate Division invalidated this methodology for the 2010 State Fiscal Year, finding that the former Banking Department had not followed the requirements of the State Administrative Procedures Act.

In response to this ruling, the Department has determined to adopt this new rule setting forth the assessment methodology applicable to all entities regulated by the Banking Division for fiscal years beginning with fiscal year 2011.

The emergency adoption of this regulation is necessary to implement the requirements of Section 17 of the Banking Law and Section 206 of the Financial Services Law in light of the determination of the Court and the ongoing need to fund the operations of the Department without interruption.

**Subject:** Assessment of entities regulated by the Banking Division of the Department of Financial Services.

**Purpose:** To set forth the basis for allocating all costs and expenses attributable to the operation of the Banking Division of the Department of Financial Services.

**Text of emergency rule: Part 501****BANKING DIVISION ASSESSMENTS**

(Statutory authority: Banking Law § 17; Financial Services Law § 206) § 501.1 Background.

Pursuant to the Financial Services Law ("FSL"), the New York State Banking Department ("Banking Department") and the New York State Insurance Department were consolidated on October 3, 2011 into the Department of Financial Services ("Department").

Prior to the consolidation, assessments of institutions subject to the Banking Law ("BL") were governed by Section 17 of the BL. Effective October 3, 2011, assessments are governed by Section 206 of the FSL, provided that Section 17 of the BL continues to apply to assessments for the fiscal year commencing on April 1, 2011.

Both Section 17 of the BL and Section 206 of the FSL provide that all expenses (including, but not limited to, compensation, lease costs and other overhead costs) of the Department attributable to institutions subject to the BL are to be charged to, and paid by, such regulated institutions. These institutions ("Regulated Entities") are now regulated by the Banking Division of the Department. Under both Section 17 of the BL and Section 206 of the FSL, the Superintendent is authorized to assess Regulated Entities for its total costs in such proportions as the Superintendent shall deem just and reasonable.

The Banking Department has historically funded itself entirely from industry assessments of Regulated Entities. These assessments have covered all direct and indirect expenses of the Banking Department, which are activities that relate to the conduct of banking business and the regulatory concerns of the Department, including all salary expenses, fringe benefits, rental and other office expenses and all miscellaneous and overhead costs such as human resource operations, legal and technology costs.

This regulation sets forth the basis for allocating such expenses among Regulated Entities and the process for making such assessments.

**§ 501.2 Definitions.**

The following definitions apply in this Part:

(a) "Total Operating Cost" means for the fiscal year beginning on April 1, 2011, the total direct and indirect costs of operating the Banking Division. For fiscal years beginning on April 1, 2012, "Total Operating Cost" means (1) the sum of the total operating expenses of the Department that are solely attributable to regulated persons under the Banking Law and (2) the proportion deemed just and reasonable by the Superintendent of the other operating expenses of the Department which under Section 206(a) of the Financial Services Law may be assessed against persons regulated under the Banking Law and other persons regulated by the Department.

(b) "Industry Group" means the grouping to which a business entity regulated by the Banking Division is assigned. There are three Industry Groups in the Banking Division:

(1) The Depository Institutions Group, which consists of all banking organizations and foreign banking corporations licensed by the Department to maintain a branch, agency or representative office in this state;

(2) The Mortgage-Related Entities Group, which consists of all mortgage brokers, mortgage bankers and mortgage loan servicers; and

(3) The Licensed Financial Services Providers Group, which consists of all check cashers, budget planners, licensed lenders, sales finance companies, premium finance companies and money transmitters.

(c) "Industry Group Operating Cost" means the amount of the Total Operating Cost to be assessed to a particular Industry Group. The amount is derived from the percentage of the total expenses for salaries and fringe benefits for the examining, specialist and related personnel represented by such costs for the particular Industry Group.

(d) "Industry Group Supervisory Component" means the total of the Supervisory Components for all institutions in that Industry Group.

(e) "Supervisory Component" for an individual institution means the product of the average number of hours attributed to supervisory oversight by examiners and specialists of all institutions of a similar size and type, as determined by the Superintendent, in the applicable Industry Group, or the applicable sub-group, and the average hourly cost of the examiners and specialists assigned to the applicable Industry Group or sub-group.

(f) "Industry Group Regulatory Component" means the Industry Group Operating Cost for that group minus the Industry Group Supervisory Component and certain miscellaneous fees such as application fees.

(g) "Industry Financial Basis" means the measurement tool used to distribute the Industry Group Regulatory Component among individual institutions in an Industry Group.

The Industry Financial Basis used for each Industry Group is as follows:

(1) For the Depository Institutions Group: total assets of all institutions in the group;

(2) For the Mortgage-Related Entities Group: total gross revenues from New York State operations, including servicing and secondary market revenues, for all institutions in the group; and

(3) For the Licensed Financial Services Providers Group: (i.) for budget planners, the number of New York customers; (ii.) for licensed lenders, the dollar amount of New York assets; (iii.) for check cashers, the dollar amount of checks cashed in New York; (iv.) for money transmitters, the dollar value of all New York transactions; (v.) for premium finance companies, the dollar value of loans originated in New York; and (vi.) for sales finance companies, the dollar value of credit extensions in New York.

(h) "Financial Basis" for an individual institution is that institution's portion of the measurement tool used in Section 501.2(g) to develop the Industry Financial Basis. (For example, in the case of the Depository Institutions Group, an entity's Financial Basis would be its total assets.)

(i) "Industry Group Regulatory Rate" means the result of dividing the Industry Group Regulatory Component by the Industry Financial Basis.

(j) "Regulatory Component" for an individual institution is the product of the Financial Basis for the individual institution multiplied by the Industry Group Regulatory Rate for that institution.

**§ 501.3 Billing and Assessment Process.**

The New York State fiscal year begins April 1 and ends March 31 of the following calendar year. Each institution subject to assessment pursuant to this Part is billed five times for a fiscal year: four quarterly assessments (each approximately 25% of the anticipated annual amount) based on the Banking Division's estimated annual budget at the time of the billing, and a final assessment (or "true-up"), based on the Banking Division's actual expenses for the fiscal year. Any institution that is a Regulated Entity for any part of a quarter shall be assessed for the full quarter.

**§ 501.4 Computation of Assessment.**

The total annual assessment for an institution shall be the sum of its Supervisory Component and its Regulatory Component.

**§ 501.5 Penalties/Enforcement Actions.**

All Regulated Entities shall be subject to all applicable penalties, including late fees and interest, provided for by the BL, the FSL, the State Finance law or other applicable laws. Enforcement actions for nonpayment could include suspension, revocation, termination or other actions.

**§ 501.6 Effective Date.**

This Part shall be effective immediately. It shall apply to all State Fiscal Years beginning with the Fiscal Year starting on April 1, 2011.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the State Register at some future date. The emergency rule will expire October 22, 2013.

**Text of rule and any required statements and analyses may be obtained from:** Gene C. Brooks, First Assistant Counsel, Department of Financial Services, One State Street, New York, NY 10004, (212) 709-1641, email: gene.brooks@dfs.ny.gov

**Regulatory Impact Statement****1. Statutory authority.**

Pursuant to the Financial Services Law ("FSL"), the New York State Banking Department (the "Banking Department") and the New York State Insurance Department were consolidated, effective October 3, 2011, into the Department of Financial Services (the "Department").

Prior to the consolidation, assessments of institutions subject to the Banking Law ("BL") were governed by Section 17 of the BL; effective on October 3, 2011, assessments are governed by Section 206 of the Financial Services Law, provided that Section 17 continues to apply to assessments for the fiscal year which commenced April 1, 2011.

Both Section 17 of the BL and Section 206 of the FSL provide that all expenses (compensation, lease costs and other overhead) of the Department in connection with the regulation and supervision of any person or entity licensed, registered, incorporated or otherwise formed pursuant to the BL are to be charged to, and paid by, the regulated institutions subject to the supervision of the Banking Division of the Department (the "Banking Division"). Under both statutes, the Superintendent is authorized to assess regulated institutions in the Banking Division in such proportions as the Superintendent shall deem just and reasonable.

In response to a court ruling, *In the Matter of Homestead Funding Corporation v. State of New York Banking Department et al.*, 944 N.Y.S.2d 649 (2012) ("Homestead"), that held that the Department should adopt changes to its assessment methodology for mortgage bankers through a formal assessment rule pursuant to the requirements of the State Administrative Procedures Act ("SAPA"), the Department has determined to adopt this new regulation setting forth the assessment methodology applicable to all entities regulated by the Banking Division for fiscal years beginning with fiscal year 2011.

## 2. Legislative objectives.

The BL and the FSL make the industries regulated by the former Banking Department (and now by the Banking Division of the new Department) responsible for all the costs and expenses of their regulation by the State. The assessments have covered all direct and indirect expenses of the Banking Department, which are activities that relate to the conduct of banking business and the regulatory concerns of the Department, including all salary expenses, fringe benefits, rental and other office expenses and all miscellaneous and overhead costs such as human resource operations, legal and technology costs.

This reflects a long-standing State policy that the regulated industries are the appropriate parties to pay for their supervision in light of the financial benefits it provides to them to engage in banking and other regulated businesses in New York. The statute specifically provides that these costs are to be allocated among such institutions in the proportions deemed just and reasonable by the Superintendent.

While this type of allocation had been the practice of the former Banking Department for many decades, Homestead found that a change to the methodology for mortgage bankers to include secondary market and servicing income should be accomplished through formal regulations subject to the SAPA process. Given the nature of the Banking Division's assessment methodology - - the calculation and payment of the assessment is ongoing throughout the year and any period of uncertainty as to the applicable rule would be extremely disruptive - - the Department has determined that it is necessary to adopt the rule on an emergency basis so as to avoid any possibility of disrupting the funding of its operations.

## 3. Needs and benefits.

The Banking Division regulates more than 250 state chartered banks and licensed foreign bank branches and agencies in New York with total assets of over \$2 trillion. In addition, it regulates a variety of other entities engaged in delivering financial services to the residents of New York State. These entities include: licensed check cashers; licensed money transmitters; sales finance companies; licensed lenders; premium finance companies; budget planners; mortgage bankers and brokers; mortgage loan servicers; and mortgage loan originators.

Collectively, the regulated entities represent a spectrum, from some of the largest financial institutions in the country to the smallest, neighborhood-based financial services providers. Their services are vital to the economic health of New York, and their supervision is critical to ensuring that these services are provided in a fair, economical and safe manner.

This supervision requires that the Banking Division maintain a core of trained examiners, plus facilities and systems. As noted above, these costs are by statute to be paid by all regulated entities in the proportions deemed just and reasonable by the Superintendent. The new regulation is intended to formally set forth the methodology utilized by the Banking Division for allocating these costs.

## 4. Costs.

The new regulation does not increase the total costs assessed to the regulated industries or alter the allocation of regulatory costs between the various industries regulated by the Banking Division. Indeed, the only change from the allocation methodology used by the Banking Department in the previous state fiscal years is that the regulatory costs assessed to the mortgage banking industry will be divided among the entities in that group on a basis which includes income derived from secondary market and servicing activities. The Department believes that this is a more appropriate basis for allocating the costs associated with supervising mortgage banking entities.

## 5. Local government mandates.

None.

## 6. Paperwork.

The regulation does not change the process utilized by the Banking Division to determine and collect assessments.

## 7. Duplication.

The regulation does not duplicate, overlap or conflict with any other regulations.

## 8. Alternatives.

The purpose of the regulation is to formally set forth the process employed by the Department to carry out the statutory mandate to assess and collect the operating costs of the Banking Division from regulated entities. In light of Homestead, the Department believes that promulgating this formal regulation is necessary in order to allow it to continue to assess all of its regulated institutions in the manner deemed most appropriate by the Superintendent. Failing to formalize the Banking Division's allocation methodology would potentially leave the assessment process open to further judicial challenges.

## 9. Federal standards.

Not applicable.

## 10. Compliance schedule.

The emergency regulations are effective immediately. Regulated

institutions will be expected to comply with the regulation for the fiscal year beginning on April 1, 2011 and thereafter.

## Regulatory Flexibility Analysis

### 1. Effect of the Rule:

The regulation does not have any impact on local governments.

The regulation simply codifies the methodology used by the Banking Division of the Department of Financial Services (the "Department") to assess all entities regulated by it, including those which are small businesses. The regulation does not increase the total costs assessed to the regulated industries or alter the allocation of regulatory costs between the various industries regulated by the Banking Division.

Indeed, the only change from the allocation methodology used by the Banking Department in the previous state fiscal years is that the regulatory costs assessed to the mortgage banking industry will be divided among the entities in that group on a basis which includes income derived from secondary market and servicing activities. The Department believes that this is a more appropriate basis for allocating the costs associated with supervising mortgage banking entities. It is expected that the effect of this change will be that larger members of the mortgage banking industry will pay an increased proportion of the total cost of regulating that industry, while the relative assessments paid by smaller industry members will be reduced.

### 2. Compliance Requirements:

The regulation does not change existing compliance requirements. Both Section 17 of the Banking Law and Section 206 of the Financial Services Law provide that all expenses (compensation, lease costs and other overhead) of the Department in connection with the regulation and supervision of any person or entity licensed, registered, incorporated or otherwise formed pursuant to the Banking Law are to be charged to, and paid by, the regulated institutions subject to the supervision of the Banking Division. Under both statutes, the Superintendent is authorized to assess regulated institutions in the Banking Division in such proportions as the Superintendent shall deem just and reasonable.

### 3. Professional Services:

None.

### 4. Compliance Costs:

All regulated institutions are currently subject to assessment by the Banking Division. The regulation simply formalizes the Banking Division's assessment methodology. It makes only one change from the allocation methodology used by the Banking Department in the previous state fiscal years. That change affects only one of the industry groups regulated by the Banking Division. Regulatory costs assessed to the mortgage banking industry are now divided among the entities in that group on a basis which includes income derived from secondary market and servicing activities. Even within the one industry group affected by the change, additional compliance costs, if any, are expected to be minimal.

### 5. Economic and Technological Feasibility:

All regulated institutions are currently subject to the Banking Division's assessment requirements. The formalization of the Banking Division's assessment methodology in a regulation will not impose any additional economic or technological burden on regulated entities which are small businesses.

### 6. Minimizing Adverse Impacts:

Even within the mortgage banking industry, which is the one industry group affected by the change in assessment methodology, the change will not affect the total amount of the assessment. Indeed, it is anticipated that this change may slightly reduce the proportion of mortgage banking industry assessments that is paid by entities that are small businesses.

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

This regulation does not impact local governments.

This regulation simply codifies the methodology which the Banking Division uses for determining the just and reasonable proportion of the Banking Division's costs to be charged to and paid by each regulated institution, including regulated institutions which are small businesses. The overall methodology was adopted in 2005 after extensive discussion with regulated entities and industry associations representing groups of regulated institutions, including those that are small businesses.

Thereafter, the Banking Department applied assessments against all entities subject to its regulation. In addition, for fiscal 2010, the Banking Department changed its overall methodology slightly with respect to assessments against the mortgage banking industry to include income derived from secondary market and servicing activities. Litigation was commenced challenging this latter change, and in a recent decision, *In the Matter of Homestead Funding Corporation v. State of New York Banking Department et al.*, 944 N.Y.S. 2d 649 (2012), the court determined that the Department should adopt a change to its assessment methodology for mortgage bankers through a formal assessment rule promulgated pursuant to the requirements of the State Administrative Procedures Act. The challenged change in methodology had the effect of increasing the proportion

of assessments against the mortgage banking industry paid by its larger members, while reducing the assessments paid by smaller participants, including those which are small businesses.

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

**Types and Estimated Numbers.** There are entities regulated by the New York State Department of Financial Services (formerly the Banking Department) located in all areas of the State, including rural areas. However, this rule simply codifies the methodology currently used by the Department to assess all entities regulated by it. The regulation does not alter that methodology, and thus it does not change the cost of assessments on regulated entities, including regulated entities located in rural areas.

**Compliance Requirements.** The regulation would not change the current compliance requirements associated with the assessment process.

**Costs.** While the regulation formalizes the assessment process, it does not change the amounts assessed to regulated entities, including those located in rural areas.

**Minimizing Adverse Impacts.** The regulation does not increase the total amount assessed to regulated entities by the Department. It simply codifies the methodology which the Superintendent has chosen for determining the just and reasonable proportion of the Department's costs to be charged to and paid by each regulated institution.

**Rural Area Participation.** This rule simply codifies the methodology which the Department currently uses for determining the just and reasonable proportion of the Department's costs to be charged to and paid by each regulated institution, including regulated institutions located in rural areas. The overall methodology was adopted in 2005 after extensive discussion with regulated entities and industry associations representing groups of regulated institutions, including those located in rural areas. It followed the loss of several major banking institutions that had paid significant portions of the former Banking Department's assessments.

Thereafter, the Department applied assessments against all entities subject to its regulation. In addition, for fiscal 2010, the Department changed this overall methodology slightly with respect to assessments against the mortgage banking industry to include income derived from secondary market income and servicing income. This latter change was challenged by a mortgage banker, and in early May, the Appellate Division determined that the latter change should have been made in conformity with the State Administrative Procedures Act. The challenged part of the methodology had the effect of increasing the proportion of assessments against the mortgage banking industry paid by its larger members, while reducing the assessments paid by smaller participants.

#### **Job Impact Statement**

The regulation is not expected to have an adverse effect on employment.

All institutions regulated by the Banking Division (the "Banking Division") of the Department of Financial Services are currently subject to assessment by the Department. The regulation simply formalizes the assessment methodology used by the Banking Division. It makes only one change from the allocation methodology used by the former Banking Department in the previous state fiscal years.

That change affects only one of the industry groups regulated by the Banking Division. It somewhat alters the way in which the Banking Division's costs of regulating mortgage banking industry are allocated among entities within that industry. In any case, the total amount assessed against regulated entities within that industry will remain the same.

## **EMERGENCY RULE MAKING**

### **Provider Requirements for Insurance Reimbursement of Applied Behavior Analysis**

**I.D. No.** DFS-33-13-00013-E

**Filing No.** 784

**Filing Date:** 2013-07-25

**Effective Date:** 2013-07-25

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

**Action taken:** Addition of Part 440 (Regulation 201) to Title 11 NYCRR.

**Statutory authority:** Financial Services Law, sections 202 and 302; Insurance Law, sections 301, 1109, 1124, 3216, 3221, 4303 and 4709; and Public Health Law, section 4406

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

**Specific reasons underlying the finding of necessity:** Chapters 595 and 596 of the Laws of 2011 require all policies and contracts subject to sections 3216(i)(25), 3221(l)(17) and 4303(ee) of the Insurance Law that are

issued, renewed, modified, altered or amended on or after November 1, 2012, to provide coverage for autism spectrum disorder ("ASD"), including behavioral health treatment in the form of applied behavior analysis ("ABA").

Chapters 595 and 596 of the Laws of 2011 also require that the Superintendent of Financial Services (the "Superintendent"), in consultation with the Commissioners of Health and Education, promulgate regulations that establish standards of professionalism, supervision and relevant experience for individuals who provide or supervise behavioral health treatment in the form of ABA.

In response to the statutory directive, the Superintendent seeks to promulgate new 11 NYCRR 440 (Insurance Regulation 201). The Superintendent, in consultation with the Commissioners of Health and Education, has determined that 11 NYCRR 440 will require that behavior analysts and assistant behavior analysts who work under the supervision of behavior analysts, meet the necessary minimum standards of education, training and relevant experience to ensure that individuals with ASD receive ABA services from qualified providers.

This rule also is necessary to ensure that insurers and health maintenance organizations ("HMOs") establish adequate provider networks and provider credentialing requirements that comply with this rule so that those entities may effectively provide insurance coverage for critical ABA therapy to those individuals diagnosed with ASDs, and for whom out-of-pocket costs for those services are prohibitively expensive.

In light of the foregoing, it is critical that this new 11 NYCRR 440 be adopted as promptly as possible, and that the rule be promulgated on an emergency basis for the furtherance of the public health and general welfare.

**Subject:** Provider Requirements for Insurance Reimbursement of Applied Behavior Analysis.

**Purpose:** Establish standards of professionalism, supervision, and relevant experience for providers of Applied Behavior Analysis.

**Text of emergency rule:** Section 440.0 Purpose.

*The purpose of this Part is to establish standards of professionalism, supervision, and relevant experience for individuals who provide or supervise the provision of behavioral health treatment in the form of applied behavior analysis, for insurance coverage pursuant to Insurance Law sections 3216(i)(25), 3221(l)(17) and 4303(ee).*

*Section 440.1 Definitions.*

*For purposes of this Part:*

(a) *Applied behavior analysis or ABA means the design, implementation, and evaluation of environmental modifications, using behavioral stimuli and consequences, to produce socially significant improvement in human behavior, including the use of direct observation, measurement, and functional analysis of the relationship between environment and behavior.*

(b) *ABA aide means an individual who meets at least one of the following requirements:*

(1) *a high school diploma or its equivalent; and*

(i) *two years of full-time direct, supervised work experience providing services to children with disabilities; or*

(ii) *current matriculation in a degree program that is an approved professional preparation program for licensure in psychology, early childhood development, early childhood education, speech language pathology, special or elementary education, or in a degree program necessary for a license, registration, or certification in a profession designated as qualified personnel in 10 NYCRR 69-4.1(ak);*

(2) *an associate's degree or higher level degree in a profession listed in Education Law Title VIII or in teaching;*

(3) *certification as a teaching assistant; or*

(4) *the minimum qualifications set forth in 10 NYCRR 69-4.25(e).*

(c) *Assistant behavior analyst means:*

(1) *an individual who is certified as an assistant behavior analyst pursuant to a behavior analyst certification board to provide behavioral health treatment under the supervision of a behavior analyst; or*

(2) *an ABA aide who meets the education, experience and supervision requirements for assistant behavior analysts as set forth in this Part.*

(d) *Applied behavior analysis provider or ABA provider means:*

(1) *an assistant behavior analyst who directly provides ABA pursuant to an ABA treatment plan to an individual diagnosed with autism spectrum disorder;*

(2) *a behavior analyst who directly provides or supervises an assistant behavior analyst in the provision of ABA; or*

(3) *a licensed provider.*

(e) *Autism spectrum disorder or ASD shall have the meaning ascribed by Insurance Law section 3216(i)(25)(C)(i).*

(f) *Behavior analyst means an individual who is certified as a behavior analyst pursuant to a behavior analyst certification board.*

(g) *Behavior analyst certification board means:*

(1) the Behavior Analyst Certification Board, Inc., a nonprofit corporation established to meet professional credentialing needs identified by behavior analysts, governments, and consumers of behavior analysis services; or

(2) any other entity, acceptable to the superintendent, in consultation with the Commissioners of Health and Education, that has a certification or approval process for behavior analysts.

(h) Behavioral health treatment means, when prescribed or ordered for an individual diagnosed with ASD by a licensed physician or licensed psychologist, counseling and treatment programs when provided by a licensed provider, and ABA when provided or supervised by a behavior analyst, that are necessary to develop, maintain, or restore, to the maximum extent practicable, the functioning of an individual. A treatment program includes an ABA treatment plan developed by a licensed provider and delivered by an ABA provider.

(i) Licensed provider means an individual licensed or certified to practice psychiatry, psychology, clinical social work, or another related profession pursuant to Education Law Title VIII.

**Section 440.2 Supervision of assistant behavior analysts.**

(a) An assistant behavior analyst must be supervised by a behavior analyst.

(b) A behavior analyst who supervises and oversees the provision of ABA by assistant behavior analysts shall meet the following minimum education, training and experience requirements:

(1) documented completion of a minimum of 20 hours of continuing education or 12 credits of matriculated or non-matriculated relevant coursework in behavioral interventions, including at a minimum the following content areas:

- (i) basic principles, processes, and concepts of behavior analysis;
- (ii) clinical application of ABA, including behavior assessment, selecting intervention outcomes and strategies, behavior change procedures and systems support, data collection and analyses to measure and monitor progress, including measurement of behavior and displaying and interpreting data; and
- (iii) ethical issues related to the delivery of behavior interventions using ABA techniques; and

(2) a minimum of two years of documented full-time professional supervised work experience providing behavior interventions using ABA to individuals with ASD for whom such services have been proven effective in peer-reviewed, scientific research. The experience must include at a minimum:

- (i) performing behavior assessments;
- (ii) developing and evaluating individualized ABA services;
- (iii) employing an array of scientifically validated, behavior analytic procedures, including discrete trial intervention, modeling, incidental teaching, and other naturalistic teaching methods, activity-embedded instruction, task analysis, and chaining;
- (iv) using ABA methods in one-to-one intervention, small and large group intervention, and in transitions across those situations;
- (v) using behavior change procedures and systems supports;
- (vi) measuring behavior and displaying and interpreting behavior data;
- (vii) conducting functional assessments (including functional analyses) of challenging behavior and selecting the specific assessment methods that are best suited to the behavior and the context; and
- (viii) assessing, monitoring, documenting, evaluating, and modifying ABA techniques as necessary to promote the progress of the individual receiving ABA.

(c) A behavior analyst who supervises and oversees the provision of ABA by assistant behavior analysts shall be responsible for:

- (1) developing individual ABA plans in collaboration with, as appropriate, the parents or caregivers of the individual receiving ABA, as well as assistant behavior analysts or licensed providers;
- (2) directing the implementation of the individual ABA plans and the ongoing monitoring, systematic measurement, data collection, and documentation of the progress of the individual receiving ABA;
- (3) modifying the individual ABA plans as necessary to promote progress toward goals, generalization of learning, and where applicable, transitioning of the individual receiving ABA across service delivery environments and settings;
- (4) providing assistance, training, and support as needed by the parents or caregivers of the individual receiving ABA, as applicable, to assist them in follow-through specified in the individual's ABA plan and to enhance development, behavior, and functioning;
- (5) supervising assistant behavior analysts, including:
  - (i) a minimum of six hours per month in the first three months of employment of an assistant behavior analyst, and a minimum of four hours per month thereafter, of direct on-site observation of each assistant behavior analyst assigned to the individual receiving ABA; and
  - (ii) a minimum of two hours per month of indirect supervision of

an assistant behavior analyst assigned to an individual receiving ABA, in a group or individual format, including:

- (a) weekly review and signed approval of the record of the individual receiving ABA, progress notes and data, correspondence, and evaluation of written reports;
- (b) participation in telephone conferences with the assistant behavior analyst and, as appropriate, the parent or caregiver of the individual receiving ABA;
- (c) ensuring proper documentation of the intervention provided and the response of the individual receiving ABA;
- (d) ensuring that the assistant behavior analyst follows the modifications in the plan of the individual receiving ABA; and
- (e) other supervision and support that the assistant behavior analyst needs to successfully implement the ABA plan of the individual receiving ABA; and
- (6) convening a minimum of two team meetings per month with the assistant behavior analyst, as well as other providers, as appropriate, who are delivering services to the individual receiving ABA to review the progress, identify problems or concerns, and modify intervention strategies as necessary to enhance the development, behavior, and functioning of the individual receiving ABA.

**Section 440.3 Qualifications for assistant behavior analysts.**

An assistant behavior analyst, in addition to the other requirements set forth in this Part, shall meet the following minimum qualifications:

- (a) Prior to the provision of any services to any individual without direct, on-site supervision, completion of a child abuse and neglect identification and reporting workshop and a minimum of 20 hours of training or in-service in behavior interventions using ABA techniques within the past five years, including at a minimum:
  - (1) basic principles of behavior analysis;
  - (2) the application of these principles in behavior intervention, including collection of data as needed for monitoring progress;
  - (3) ethical issues related to the delivery of applied behavior interventions; and
  - (4) overview of autism and pervasive developmental disorder; and
- (b) Completion of a minimum of ten hours of additional training or in-service annually in topics pertaining to ABA and ASD.

**Section 440.4 Duties of assistant behavior analysts.**

Under the supervision and direction of a behavior analyst in accordance with this Part, an assistant behavior analyst shall:

- (a) assist in the recording and collection of data needed to monitor progress;
- (b) participate in required team meetings; and
- (c) complete any other activities as directed by his or her supervisor and as necessary to assist in the implementation of an individual ABA plan.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire October 22, 2013.

**Text of rule and any required statements and analyses may be obtained from:** Camielle Barclay, NYS Department of Financial Services, 25 Beaver Street, New York, NY 10004, (212) 480-5299, email: camielle.barclay@dfs.ny.gov

**Regulatory Impact Statement**

1. Statutory authority: Financial Services Law sections 202 and 302, Insurance Law sections 301, 1109, 1124, 3216, 3221, 4303, and 4709, and Public Health Law section 4406.

Section 301 of the Insurance Law and sections 202 and 302 of the Financial Services Law authorize the Superintendent of Financial Services (the "Superintendent") to prescribe regulations interpreting the provisions of the Insurance Law and to effectuate any power granted to the Superintendent under the Insurance Law.

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

Insurance Law section 1124, which applies to student health plans offered by institutions of higher learning, requires that such plans be subject to all consumer protection laws applicable to Article 43 corporations, including minimum requirements of Insurance Law Article 43 and regulations thereunder regarding benefits, contracts, and rates.

Insurance Law section 3216 establishes requirements for individual accident and health insurance policies and sets forth the benefits that must be covered under such policies. Specifically, subsection (i)(25) requires the Superintendent to promulgate regulations setting forth the standards of professionalism, supervision and relevant experience of individuals who provide behavioral health treatment in the form of applied behavior analysis ("ABA"), under the supervision of a certified behavior analyst for insurance coverage under such policies.

Insurance Law section 3221 establishes requirements and standard provisions for group or blanket accident and health insurance policies and sets forth the benefits that must be covered under such policies. Specifically, subsection (l)(17) requires the Superintendent to promulgate regulations setting forth the standards of professionalism, supervision and relevant experience of individuals who provide behavioral health treatment in the form of ABA under the supervision of a certified behavior analyst for insurance coverage under such policies.

Insurance Law section 4303 governs health insurance subscriber contracts written by not-for-profit corporations and sets forth the benefits that must be covered under such contracts. Specifically, subsection (ee) requires the Superintendent to promulgate regulations setting forth the standards of professionalism, supervision and relevant experience of individuals who provide behavioral health treatment in the form of ABA under the supervision of a certified behavior analyst for insurance coverage under such contracts.

Insurance Law section 4709(b), which applies to municipal cooperative health benefit plans, subjects such plans to the same scope and type of coverage as article 43 corporations.

Public Health Law section 4406 provides that the contract between an HMO and an enrollee is subject to regulation by the Superintendent as if it were a health insurance subscriber contract, and that it shall include all mandated benefits required by Article 43 of the Insurance Law.

2. Legislative objectives: In November 2011, Chapters 595 and 596 of the Laws of 2011 amended Insurance Law sections 3216, 3221 and 4303 to expand health insurance coverage for the screening, diagnosis and treatment of autism spectrum disorder (“ASD”). The amendments also directed the Superintendent, in consultation with the Commissioners of Health and Education, to promulgate regulations that set forth the standards of professionalism, supervision and relevant experience of individuals who provide behavioral health treatment in the form of ABA, under the supervision of a certified behavior analyst for insurance coverage pursuant to Insurance Law sections 3216(i)(25), 3221(l)(17), and 4303(ee). Chapters 595 and 596 took effect on November 1, 2012.

3. Needs and benefits: Prior to the enactment of Chapters 595 and 596, state law did not provide health insurers and HMOs sufficient clarity or an affirmative obligation to cover costs related to treatments for ASD. As a result, individuals diagnosed with an ASD who required treatment in addition to an individualized family services plan, individualized education program, or individualized service plan, had to pay out-of-pocket for expensive services. The law, as amended, ensures that insurance coverage is extended to individuals diagnosed with ASD for treatment such as ABA, thus alleviating the financial burdens placed on the parents and caregivers of those individuals. This rule is being promulgated pursuant to the new statutory amendments to establish the education, training and supervision requirements of ABA providers in order for them to be eligible for health insurance reimbursement under the statute, and also to ensure that qualified ABA providers will be rendering services to individuals with ASD.

4. Costs: This rule imposes no compliance costs upon state or local governments, except that, to the extent that local governments participate in municipal cooperative health benefit plans, the rule will impact them, but the costs of providing the coverage are mandated by the statute.

Some private ABA providers may incur additional costs to fulfill the educational and training requirements of the rule in order to become eligible for reimbursement from health insurance coverage for providing ABA. However, many individuals currently providing ABA are not expected to incur such costs and will be able to continue providing ABA as they always have. In addition, any such costs are likely to be offset by the additional revenue obtained from being newly eligible for health insurance reimbursement. Nonetheless, the Department of Financial Services (“Department”) is unable to estimate the specific cost of such compliance because the cost depends on the number of ABA providers who intend to provide treatment to individuals with ASD for reimbursement through health insurance, and ABA providers are not regulated by the Department.

Insurers and HMOs also may incur compliance costs from having to develop an ABA provider eligibility database, and will have to expand their networks if they do not include an adequate number of ABA providers. Those costs may be passed on to consumers in the form of higher premiums, but the long-term benefits of having properly credentialed ABA providers to treat individuals with ASD greatly outweigh the costs. Furthermore, the costs for insurers and HMOs are a consequence of the legislation, not this regulation.

5. Local government mandates: This rule imposes no new mandates on any county, city, town, village, school district, fire district or other special district. The rule merely establishes the criteria by which insurers may reimburse ABA providers.

6. Paperwork: Insurers and HMOs submitted to the Department new health insurance policy forms and rates to add the new coverage for the screening, diagnosis and treatment of ASD. The requirement to make such submissions was imposed by the statutory mandate, not this rule.

7. Duplication: There are no federal or other New York State requirements that duplicate, or conflict with this regulation.

8. Alternatives: The Department, in consultation with the Department of Health and the State Education Department, considered various ways to establish the necessary standards of this regulation. The Department previously promulgated on an emergency basis two different versions of this rule. The first emergency regulation, promulgated on October 31, 2012, required an ABA provider both to be certified by a behavior analysis certification board (“board”) and to hold a certain type of license issued pursuant to New York Education Law Title VIII, or to be supervised by a person with both such a license and board certification. A number of stakeholders, however, expressed concern that the prior rule would permit very few providers to be eligible for health insurance reimbursement for providing ABA – perhaps less than 100 statewide.

In response to those concerns, the Department made significant changes to the rule when it was again promulgated on an emergency basis on January 28, 2013. This emergency rule eliminated the dual license/board certification requirement and also permitted health insurance reimbursement for ABA provided by licensed providers whose scope of practice includes ABA, certified providers, and ABA aides under the supervision of certified behavior analysts. However, stakeholders expressed concerns that the rule would continue to limit the number of providers eligible to directly provide or supervise ABA, to the detriment of individuals diagnosed with ASD. In addition, because the rule specified that the provider had to be licensed under the New York Education Law, some insurers apparently denied claims for out-of-state providers where services were provided in other states.

To address the concerns of interested parties, the Department has made significant changes to the current rule. The new rule now permits health insurance reimbursement for ABA provided by licensed providers, behavior analysts, and assistant behavior analysts under the supervision of behavior analysts. Behavior analysts must be board certified but are not required to be New York licensed providers. As a result, this new rule should significantly expand the pool of providers eligible to provide and supervise ABA while still ensuring that only properly credentialed ABA providers treat individuals with ASD and that those who require supervision obtain it from highly qualified ABA providers. Also, the new rule will permit health insurance reimbursement to out-of-state providers who are board certified.

9. Federal standards: There are no federal minimum standards or regulations regarding professionalism, supervision and relevant experience for individuals who provide ABA under the supervision of a certified behavior analyst as defined under Insurance Law sections 3216(i)(25), 3221(l)(17) and 4303(ee).

10. Compliance schedule: Because the law took effect on November 1, 2012, this rule takes effect upon filing with the Secretary of State.

#### **Regulatory Flexibility Analysis**

1. Effect of the rule: This rule will impact insurers and health maintenance organizations (“HMOs”) in New York State, but none fall within the definition of “small business” set forth in section 102(8) of the State Administrative Procedure Act, because none are either independently owned or have less than one hundred employees.

However, this rule may affect providers of applied behavior analysis (“ABA”) who treat autism spectrum disorder (“ASD”), many of which are small businesses, because some of those ABA providers may be required under the rule to obtain additional education, training and experience in order to become eligible for health insurance reimbursement for rendering ABA. However, the rule should have a positive impact on small business because of the additional revenue to be generated from health insurance reimbursement for ABA services. The Department of Financial Services (the “Department”) is unable to quantify the precise number of small businesses affected by this rule because ABA providers are not regulated by the Department. The Department has established no reporting requirements with respect to these small businesses, nor does the Department maintain records of ABA providers in this state.

2. Compliance requirements: This rule does not impose any reporting, recordkeeping, or other compliance requirements on small businesses, sole proprietors or local governments. The rule only establishes standards of professionalism, training and experience for ABA providers so that they can be eligible for insurance reimbursement for providing ABA.

3. Professional services: This rule does not require the use of professional services.

4. Compliance costs: This rule will not impose any compliance costs on local governments but may impose additional costs on small businesses that provide ABA services and want to obtain health insurance reimbursement for those services. In order to do so, some small business ABA providers who do not have the requisite education, training, or experience would have to incur costs of education, training and experience for their employees to become eligible for health insurance reimbursement for providing ABA. However, any such costs that may be incurred are likely

to be more than offset by increased revenue as a result of health insurance reimbursement for these services. Nonetheless, the Department is unable to estimate the cost of such compliance because the cost depends on whether the providers already meet such requisites. Moreover, ABA providers are not regulated by the Department.

5. Economic and technological feasibility: Compliance with the rule is economically and technologically feasible for providers.

6. Minimizing adverse impact: Although some ABA providers that are small businesses may incur additional costs to fulfill the requirements of this rule, many will not, and those costs likely will be offset by the additional revenue that will be generated from health insurance reimbursement for providing ABA services.

7. Small business and local government participation: On October 31, 2012, the Department first promulgated this rule on an emergency basis pursuant to a mandate in Chapters 595 and 596 of the Laws of 2011 amending Insurance Law sections 3216, 3221 and 4303, and again on January 28, 2013 and April 26, 2013. The Department received a number of comments from interested parties regarding the rule, particularly with respect to the regulation's requirement that ABA providers and supervisors of ABA providers had to be licensed under the New York Education Law, which would significantly limit the number of eligible ABA providers and supervisors of ABA providers.

In response to those concerns, the Department made significant changes to the current rule. The new rule permits health insurance reimbursement for ABA services provided by licensed providers, behavior analysts and assistant behavior analysts under the supervision of behavior analysts. Behavior analysts will only be required to be certified by a behavior analysis certification board. As such, this new rule is expected to expand the pool of providers eligible to provide ABA services and to supervise ABA providers while still ensuring that only properly credentialed ABA providers treat individuals with ASD and that those who require supervision obtain it from highly qualified ABA providers.

The Department intends subsequently to file a notice of proposed rulemaking and all interested parties will have a formal opportunity to comment on the rule once it is published in the State Register.

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

1. Types and estimated numbers of rural areas: Applied behavior analysis ("ABA") providers, health insurers, and health maintenance organizations ("HMOs") affected by this rule operate throughout this state, including rural areas as defined under State Administrative Procedure Act section 102(10).

2. Reporting, recordkeeping and other compliance requirements, and professional services: This rule will not impose any reporting, recordkeeping, or other compliance requirements on ABA providers located in rural areas. The rule only establishes standards of professionalism, training and experience required to be eligible for insurance reimbursement for providing ABA.

3. Costs: This rule may impose additional costs on some ABA providers located in rural areas who may need additional education, training and experience and certification pursuant to the rule in order to become eligible for health insurance reimbursement for providing ABA services. However, any such costs are likely to be more than offset by increased revenue generated from health insurance reimbursement for the services of ABA providers. Moreover, the education, training and experience requirements need to be uniform within the state, and providing ABA services within rural areas does not negate the need for the providers to satisfy these minimum consumer protection requirements.

Insurers and HMOs submitted to the Department of Financial Services (the "Department") new health insurance policy forms and rates to add the new coverage for the screening, diagnosis and treatment of ASD. The requirement to add such coverage was imposed by the enactment of Chapters 595 and 596 of the Laws of 2011 amending Insurance Law sections 3216, 3221 and 4303. As a result, insurers and HMOs may incur compliance costs from having to develop an ABA provider eligibility database, and may have to expand their networks if they do not include an adequate number of ABA providers. Those costs may be passed on to consumers in the form of higher premiums, but these additional costs are consequences of the statute, not the regulation, and the long-term benefits of having properly credentialed ABA providers to treat individuals with ASD, as well as the prohibitively expensive out-of-pocket costs for ABA services, greatly outweigh any increase in premiums.

4. Minimizing adverse impact: Although some ABA providers in rural areas may incur additional costs to fulfill the requirements of this rule, those costs likely will be offset from the additional revenue that will be generated from health insurance reimbursement for their services. This rule also will enable many behavior analysts and assistant behavior analysts to immediately start providing ABA services covered by health insurance.

5. Rural area participation: On October 31, 2012, the Department first promulgated this rule pursuant to a mandate in Chapters 595 and 596 of

the Laws of 2011 amending Insurance Law sections 3216, 3221 and 4303 on an emergency basis, and again on January 28, 2013 and April 26, 2013. The Department received a number of comments from interested parties regarding the rule, particularly with respect to the licensing requirement for ABA providers and supervisors of ABA providers, which would significantly limit the number of eligible ABA providers and supervisors of ABA providers.

In response to those concerns, the Department made significant changes to the current rule. The new rule will permit health insurance reimbursement for ABA services provided by licensed providers, behavior analysts, and assistant behavior analysts under the supervision of behavior analysts. Behavior analysts will only be required to be certified by a behavior analysis certification board. As such, this new rule is expected to expand the pool of providers eligible to provide ABA services and to supervise ABA providers while still ensuring that only properly credentialed ABA providers treat individuals with ASD and that those who require supervision obtain it from highly qualified ABA providers.

The Department intends to subsequently file a notice of proposed rulemaking and all interested parties will have a formal opportunity to comment on the rule once it is published in the State Register.

#### **Job Impact Statement**

1. Nature of impact: In November 2011, Chapters 595 and 596 of the Laws of 2011 amended Insurance Law sections 3216, 3221 and 4303 to expand health insurance coverage for the screening, diagnosis and treatment of autism spectrum disorder ("ASD"). The amendments also directed the Superintendent of Financial Services, in consultation with the Commissioners of Health and Education, to promulgate regulations that set forth the standards of professionalism, supervision and relevant experience of individuals who provide behavioral health treatment in the form of applied behavior analysis ("ABA"). Chapters 595 and 596 took effect on November 1, 2012.

This rule should have no adverse impact on jobs and employment opportunities because it merely implements the statutory charge to establish standards of professionalism, supervision and relevant experience of individuals who provide behavioral health treatment in the form of ABA. These standards are designed to ensure that individuals with ASD receive treatment from qualified ABA providers. In fact, this rule will provide more job and employment opportunities because it does not require ABA providers to be licensed pursuant to the New York Education Law in order to receive insurance reimbursement for ABA services.

### **NOTICE OF ADOPTION**

#### **Suitability in Annuity Transactions**

**I.D. No.** DFS-12-13-00003-A

**Filing No.** 785

**Filing Date:** 2013-07-26

**Effective Date:** 2013-08-14

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

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

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

**Subject:** Suitability in Annuity Transactions.

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

**Text or summary was published** in the March 20, 2013 issue of the Register, I.D. No. DFS-12-13-00003-EP.

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

**Text of rule and any required statements and analyses may be obtained from:** Michael Maffei, New York State Department of Financial Services, 1 State Street, New York, NY 10004, (212) 480-5027, email: michael.maffei@dfs.ny.gov

#### **Initial Review of Rule**

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2016, which is no later than the 3rd year after the year in which this rule is being adopted.

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

The agency received no public comment.

## Department of Health

### EMERGENCY RULE MAKING

#### Episodic Pricing for Certified Home Health Agencies (CHHAs)

**I.D. No.** HLT-33-13-00001-E

**Filing No.** 781

**Filing Date:** 2013-07-24

**Effective Date:** 2013-07-24

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

**Action taken:** Amendment of section 86-1.44 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 3614(13)

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

**Specific reasons underlying the finding of necessity:** It is necessary to issue the proposed regulations on an emergency basis in order to ensure an appropriate level of reimbursement to those Certified Home Health Agencies (CHHAs) that provide services to a special needs population of medically complex children, adolescents and young disabled adults and to those CHHAs that serve primarily patients who are eligible for OPWDD services.

Section 111 of Part H of Chapter 59 of the Laws of 2011 provides the Commissioner of Health with authority to issue regulations such as these emergency regulations.

Further, there is compelling interest in enacting these regulations immediately in order to secure federal approval of the associated Medicaid State Plan Amendment.

**Subject:** Episodic Pricing for Certified Home Health Agencies (CHHAs).

**Purpose:** To exempt services to a special needs population from the episodic payment system for CHHAs.

**Text of emergency rule:** Subdivisions (a) and (c) and the opening paragraph of subdivision (b) of section 86-1.44 of title 10 of NYCRR are amended to read as follows:

(a) Effective for services provided on and after [April 1] May 2, 2012, Medicaid payments for certified home health care agencies ("CHHA"), except for such services provided to children under 18 years of age and except for services provided to a special needs population of medically complex and fragile children, adolescents and young disabled adults by a CHHA operating under a pilot program approved by the Department, shall be based on payment amounts calculated for 60-day episodes of care.

(b) An initial statewide episodic base price, to be effective [April 1] May 2, 2012, will be calculated based on paid Medicaid claims, as determined by the Department, for services provided by all certified home health agencies in New York State during the base period of January 1, 2009 through December 31, 2009.

(c) The base price paid for 60-day episodes of care shall be adjusted by an individual patient case mix index as determined pursuant to subdivision (f) of this section; and also by a regional wage index factor as determined pursuant to subdivision (h) of this section. *Such case mix adjustments shall include an adjustment factor for CHHAs providing care primarily to a special needs patient population coming under the jurisdiction of the Office of People With Developmental Disabilities (OPWDD) and consisting of no fewer than two hundred such patients.*

Section 86-1.44 of title 10 of NYCRR is amended by adding a new subdivision (k) to read as follows:

(k) *Closures, mergers, acquisitions, consolidations, and restructurings.*

(1) *The commissioner may grant approval of a temporary adjustment to rates calculated pursuant to this section for eligible certified home health agencies.*

(2) *Eligible certified home health agency providers shall include:*

(i) *providers undergoing closure;*  
(ii) *providers impacted by the closure of other health care providers;*

(iii) *providers subject to mergers, acquisitions, consolidations or restructuring; or*

(iv) *providers impacted by the merger, acquisition, consolidation or restructuring of other health care facilities.*

(3) *Providers seeking rate adjustments under this subdivision shall demonstrate through submission of a written proposal to the commissioner that the additional resources provided by a temporary rate adjustment will achieve one or more of the following:*

(i) *protect or enhance access to care;*  
(ii) *protect or enhance quality of care;*  
(iii) *improve the cost effectiveness of the delivery of health care services; or*

(iv) *otherwise protect or enhance the health care delivery system, as determined by the commissioner.*

(4)(i) *Such written proposal shall be submitted to the commissioner at least sixty days prior to the requested effective date of the temporary rate adjustment and shall include a proposed budget to achieve the goals of the proposal. Any temporary rate adjustment issued pursuant to this subdivision shall be in effect for a specified period of time as determined by the commissioner, of up to three years. At the end of the specified timeframe, the provider shall be reimbursed in accordance with the otherwise applicable rate-setting methodology as set forth in applicable statutes and applicable provisions of this Subpart. The commissioner may establish, as a condition of receiving such a temporary rate adjustment, benchmarks and goals to be achieved in conformity with the provider's written proposal as approved by the commissioner and may also require that the provider submit such periodic reports concerning the achievement of such benchmarks and goals as the commissioner deems necessary. Failure to achieve satisfactory progress, as determined by the commissioner, in accomplishing such benchmarks and goals shall be a basis for ending the provider's temporary rate adjustment prior to the end of the specified timeframe.*

(ii) *The commissioner may require that applications submitted pursuant to this section be submitted in response to and in accordance with a Request For Applications or a Request For Proposals issued by the commissioner.*

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire October 21, 2013.

**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:

The authority for implementation of an episodic payment system for Certified Home Health Agency services pursuant to regulations is set forth in section 3614(13) of the Public Health Law and in section 111(t) of part H of chapter 59 of the laws of 2011, which authorizes the Commissioner to promulgate regulations, including emergency regulations, with regard to Medicaid reimbursement rates for certified home health agencies. Section 3614(13) also exempts the application of the episodic payment system to Medicaid reimbursement for "children under eighteen years of age and other discrete groups as may be determined by the commissioner pursuant to regulations".

Legislative Objectives:

The Legislature chose to address the issue of over-utilization of Certified Home Health Agency services as a result of the recommendations submitted by the Medicaid Redesign Team and accepted by the Governor. Pursuant to statute, an episodic payment system based on 60-day episodes of care, with payments tied to patient acuity, was chosen as one of the vehicles to address this issue. The legislation also exempted Medicaid payments for children from the new payment system and, further, gave the Commissioner of Health authority to exempt other discrete groups through regulation.

In addition, Section 86-1.44 of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulation of the State of New York, will be amended to add subdivision (k), which provides the Commissioner authority to grant temporary rate adjustments to eligible Article 36 certified home health agency providers subject to or affected by the closure, merger, acquisition, consolidation, or restructuring of a health care provider in their service delivery area. In addition, the proposed regulation sets forth the conditions under which a provider will be considered eligible, the requirements for requesting a temporary rate adjustment, and the conditions that must be met in order to receive a temporary rate adjustment. The temporary rate adjustment shall be in effect for a specified period of time, as approved by the Commissioner, of up to three years. This regulation is necessary in order to maintain beneficiaries' access to services by providing needed relief to providers that meet the criteria.

Proposed subdivision (k) requires providers seeking a temporary rate adjustment to submit a written proposal demonstrating that the additional resources provided by a temporary rate adjustment will achieve one or more of the following: (i) protect or enhance access to care; (ii) protect or enhance quality of care; (iii) improve the cost effectiveness of the delivery of health care services; or (iv) otherwise protect or enhance the health care delivery system, as determined by the Commissioner. The proposed

amendment permits the Commissioner to establish benchmarks and goals, in conformity with a provider's written proposal as approved by the Commissioner, and to require the provider to submit periodic reports concerning its progress toward achievement of such. Failure to achieve satisfactory progress in accomplishing such benchmarks and goals, as determined by the Commissioner, shall be a basis for ending the provider's temporary rate adjustment prior to the end of the specified timeframe.

#### Needs and Benefits:

The proposed amendments to subdivisions (a), (b), and (c) will exempt services provided to a special needs population of medically complex children, adolescents and young disabled adults by a CHHA operating under a pilot program approved by the Department from the episodic payment system and will also provide for an adjustment of the case mix index for CHHAs serving primarily patients who are eligible for OPWDD services when such CHHAs have over 200 such patients. These amendments reflect a Health Department determination that the more stringent cost containment mechanism of episodic pricing, already deemed by the legislature to be an inappropriate reimbursement mechanism for CHHA services for children, is also not appropriate for special needs populations consisting of young adults as well as children and adolescents being cared for pursuant to an approved pilot program. These amendments will thus help assure that agencies primarily serving certain special needs populations will receive a level of reimbursement from the Medicaid system to maintain both adequate access and quality of care for members of these populations.

With regard to the new subdivision (k), in the center of a changing health care delivery system, the closure, merger, acquisition, consolidation or restructuring of a health care provider within a community often happens without adequate planning of resources for the impact on health care providers in the service delivery area. In addition, maintaining access to needed services while also maintaining or improving quality becomes challenging for the impacted providers. The additional reimbursement provided by this adjustment will support the impacted Article 36 certified home health agency providers in achieving these goals, thus improving quality while reducing health care costs.

#### Costs:

The regulated parties (providers) are not expected to incur any additional costs as a result of the proposed rule change. There are no additional costs to local governments for the implementation of and continuing compliance with this amendment. It is anticipated there will be a slight decrease to the total state fiscal savings which were budgeted for the Episodic Payment System.

#### Local Government Mandates:

The proposed amendment 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:

There is no additional paperwork required of providers as a result of this amendment.

#### Duplication:

These regulations do not duplicate existing state or federal regulations.

#### Alternatives:

No significant alternatives are available that will protect the special needs populations identified in this amendment. With regard to the new subdivision (k), no significant alternatives are available. Any potential certified home health agency provider project that would otherwise qualify for funding pursuant to the revised regulation would, in the absence of this amendment, either not proceed or would require the use of existing provider resources.

#### Federal Standards:

This amendment does not exceed any minimum standards of the federal government for the same or similar subject areas.

#### Compliance Schedule:

There are no significant actions which are required by the affected providers to comply with the amendments to subdivisions (a), (b) and (c). With regard to the new subdivision (k), the proposed regulation provides the Commissioner of Health the authority to grant approval of temporary adjustments to rates calculated for Article 36 certified home health care providers that are subject to or affected by the closure, merger, acquisition, consolidation, or restructuring of a health care provider, for a specified period of time, as determined by the Commissioner, of up to three years.

#### Regulatory Flexibility Analysis

No regulatory flexibility analysis is required pursuant to section 202-(b)(3)(a) of the State Administrative Procedure Act. The proposed amendment does not impose an adverse economic impact on small businesses or local governments, and it does not impose reporting, record keeping or other compliance requirements on small businesses or local governments.

#### Rural Area Flexibility Analysis

No rural area flexibility analysis is required pursuant to section 202-bb(4)(a) of the State Administrative Procedure Act. The proposed amend-

ment does not impose an adverse impact on facilities in rural areas, and it does not impose reporting, record keeping or other compliance requirements on facilities in rural areas.

#### Job Impact Statement

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

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Physician Assistants and Specialist Assistants

I.D. No. HLT-33-13-00014-P

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

**Proposed Action:** This is a consensus rule making to amend section 94.2 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 3701

**Subject:** Physician Assistants and Specialist Assistants.

**Purpose:** Change restriction of the number of physician assistants under the supervision of a physician in a private practice from 2 to 4.

**Text of proposed rule:** Pursuant to the authority vested in the Commissioner of Health by section 3701 of the public health law, and in accordance with Subdivision 3 of section 6542 of the education law, paragraph (c) of section 94.2 of Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended, to be effective immediately, to read as follows:

"(c) No physician may employ or supervise more than [two] *four* registered physician[']s assistants and two specialist[']s assistants in his or her private practice."

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

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

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

**This rule was not under consideration at the time this agency submitted its Regulatory Agenda for publication in the Register.**

#### Consensus Rule Making Determination

##### Statutory Authority:

The authority to promulgate this regulation can be found in Section 3701 of the Public Health Law (PHL). Section 3701 of the PHL grants the Commissioner of Health the authority to promulgate regulations defining and restricting the duties which may be assigned to physician assistants by their supervising physician and the degree of supervision required.

##### Basis:

The proposed amendment will bring Section 94.2 of Title 10 into accord with Part T of Chapter 57 of the Laws of 2013, which increased the number of physician assistants that a physician in private practice may employ or supervise from two to four. Chapter 57 of the Laws of 2013 amended Education Law § 6542(3) by striking the word "two" and inserting the word "four". This amendment became effective on March 29, 2013. The current regulation, stating no physician in private practice may employ or supervise more than two physician assistants, is found at 10 NYCRR § 94.2(c), and must be amended to allow such physicians to employ or supervise up to four physician assistants.

The State Administrative Procedure Act (SAPA) defines a consensus rule as "a rule proposed by an agency for adoption on an expedited basis pursuant to the expectation that no person is likely to object to its adoption because it merely ... implements or conforms to non-discretionary statutory provisions ..." SAPA § 102(11). A consensus rule is appropriate in this instance because the amendment simply conforms 10 NYCRR § 94.2(c) to the statutory provisions of Education Law § 6542(3) as amended by Chapter 57 of the Laws of 2013. For this reason it is unlikely that any person will object to this amendment.

#### Job Impact Statement

No Job Impact Statement is required pursuant to section 201a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature of the proposed amendment, that it will not have a substantial adverse impact on jobs and employment opportunities. This rule simply raises the limit, from 2 to 4, that applies to physicians in private practice in the supervision of physician assistants. This rule may in fact have a positive impact on jobs

by virtue of allowing physicians to hire additional physician assistants if they so choose.

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

#### Tanning Facilities

**I.D. No.** HLT-33-13-00024-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 Subpart 72-1 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, sections 3551 and 3554

**Subject:** Tanning Facilities.

**Purpose:** To further clarify the authority of local jurisdictions to enact and enforce local regulations governing tanning facilities.

**Text of proposed rule:** Subdivision (a), (b) and (c) of Section 72-1.2 are added as follows:

72-1.2 Application.

(a) The requirements of this Subpart shall apply to all tanning facilities except where ultraviolet radiation devices are used by a qualified health care professional for treatment of medical conditions.

(b) A county or other local jurisdiction may apply to the department for approval of a program for the regulation of tanning facilities within its jurisdiction. When such approval is given, the department of health, or equivalent agency of such county or other local jurisdiction, may enact and enforce local regulations governing such program.

(c) Any local regulations issued pursuant to subdivision (b) of this section must be at least as protective as any related requirements in this Subpart, and may include, but are not limited to, provisions relating to the following:

(1) the conspicuous posting of the tanning facility's license and appropriate warning signs;

(2) the required provision of informational materials by tanning facilities, which may include, but need not be limited to, an advisory to customers of conditions, such as the use of photosensitizing drugs, under which the use of ultraviolet radiation is contraindicated;

(3) standards for cleanliness, hygiene and safety;

(4) the requirement that each tanning facility provide safety goggles and any other safety-related devices to customers without additional charge therefor;

(5) the reporting of injury or illness related to the use of ultraviolet radiation devices;

(6) requiring tanning facilities to maintain specified records;

(7) requiring patrons to provide identification and sign a statement of acknowledgment prior to undergoing ultraviolet radiation exposure at a tanning facility.

The requirements of sections 72-1.1 and 72-1.3 et seq. of this Subpart shall not apply within a local jurisdiction that has established and been approved for a program pursuant to subdivision (b) of this section when such program is in effect.

Paragraph (2) of Section 72-1.8(a) is amended as follows:

(2) No person under [fourteen (14)] *seventeen (17)* years of age shall be permitted to use an ultraviolet radiation device. Persons [fourteen (14)] *seventeen (17)* years of age to eighteen (18) years of age must provide a consent form as described in Section 72-1.8 (d) of the Subpart.

Section 72-1.8 (d) is amended as follows:

(d) Consent form.

The operator shall not permit persons [fourteen (14)] *seventeen (17)* years of age to eighteen (18) years of age to use ultraviolet radiation devices until such persons provide the tanning facility operator or an employee responsible for the operation of the ultraviolet radiation device of such facility (per § 3555(2) of PHL) with the written consent form, prescribed by the Commissioner, indicating the following conditions have been met:

Paragraphs (2) and (3) of Section 72-1.8 (d) are amended as follows:

(2) By signing the consent form, the parent or legal guardian and persons [fourteen (14)] *seventeen (17)* years of age to eighteen (18) years of age acknowledges that they have read the warnings required in Section 72-1.9(a) of these rules and have received the information specified in Section 72-1.8(b) of these rules.

(3) By signing the consent form, the parent or legal guardian acknowledges that the person(s) [fourteen (14)] *seventeen (17)* years of age to eighteen (18) years of age has agreed to wear protective eyewear.

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

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

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

#### Consensus Rule Making Determination

Statutory Authority:

The Commissioner of Health is authorized by Sections 3551 and 3554 of the Public Health Law (PHL) to promulgate rules and regulations as are necessary to carry out the tanning facility provisions of the PHL.

Basis:

The proposed amendments to Subpart 72-1 (Tanning Facilities) will modify the minimum age that minors are allowed to use commercial ultraviolet (UV) tanning devices to conform with 2012 legislation which amended Section 3555 of the Public Health Law. Chapter 105 of the laws of 2012. The amendments also provide technical revisions to clarify the authority of local jurisdictions to enact and enforce local regulations governing tanning facilities.

The amendment is submitted as a consensus rule because no objections to the changes are anticipated as the amendment merely makes the regulation consistent with the Public Health Law, as amended by Chapter 105 of the laws of 2012, by prohibiting use of UV tanning devices by children less than 17 years of age and requiring those between 17-18 years of age to obtain written parental consent. The law previously prohibited children less than 14 years of age from using UV tanning devices and required those between 14-18 years of age to obtain written parental consent.

There also should be no objection to the technical revisions clarifying the authority of local jurisdictions to enact and enforce local regulation governing tanning facilities.

#### Job Impact Statement

No job impact statement is required pursuant to section 201-a (2)(a) of the State Administrative Procedures Act. It is apparent, from the nature of the proposed amendment, that it will not have a substantial adverse impact on jobs and employment opportunities.

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## Division of Housing and Community Renewal

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### PROPOSED RULE MAKING HEARING(S) SCHEDULED

#### Low-Income Housing Credit Qualified Allocation Plan

**I.D. No.** HCR-33-13-00020-P

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

**Proposed Action:** Amendment of Part 2040 of Title 9 NYCRR.

**Statutory authority:** Executive Order No. 135, dated February 27, 1990, as continued by Executive Order No. 11, dated March 2, 2011; U.S. Internal Revenue Code, section 42(m); and Public Housing Law, section 19

**Subject:** Low-Income Housing Credit Qualified Allocation Plan.

**Purpose:** To amend definitions, threshold criteria, and application scoring utilized in the allocation of low-income housing credits.

**Public hearing(s) will be held at:** 2:00 p.m., October 3, 2013 at 38-40 State St., 1st Fl., Albany, NY; 2:00 p.m., Oct. 3, 2013 at 25 Beaver St., Rm. 642, New York, NY; 2:00 p.m., Oct. 3, 2013 at 620 Erie Blvd. W, Ste. 312, Syracuse, NY; and 2:00 p.m., Oct. 3, 2013 at 535 Washington St., Ste. 105, Buffalo, 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.nyshcr.org):** 9 NYCRR Part 2040 is amended as follows:

1. Replace reference to New York State Division of Housing and Community Renewal noted as "division" with upper case "Division" throughout regulation, ensuring agency name clarity.

2. Amend the definition of "Adjusted project cost" to clarify it, deleting unnecessary references.

3. Amend the definition of “Code” to include reference to the Internal Revenue Service regulations, rulings and publications which clarify Section 42 of the Internal Revenue Code.

4. Delete the definition of “Compliance period” since it is Code-defined.

5. Add a new definition of “Cost certification” for consistency with NYS Housing Finance Agency (“HFA”) QAP.

6. Delete the definition of “Extended use period” since it is Code-defined.

7. Amend the definition of “Feasibility review” to correspond with underwriting requirements and stress cost reasonableness.

8. Amend the definition of “Identity of interest” to elaborate upon the specific parties to the transaction which would be considered under the definition.

9. Amend the definition of “Preservation project” to clarify existing housing must be government regulated.

10. Delete the definition of “Qualified low-income housing project” since it is Code-defined.

11. Add a new defined term “State Designated Building” for projects eligible for a Division-designated increase in tax credits per the Code.

12. Amend the definition of “Supportable debt” for consistency with current policy.

13. Amend the definition of “Supportive housing” to include a provision that projects meeting this Definition, and corresponding funding set-aside, must obtain financing from the government agency assisting client population.

14. Amend the definition of “Visitability” to reflect current threshold eligibility standards for accessibility.

15. Revise language at 2040.3(b), “Documentation,” for consistency with current application processing, eliminating references to incomplete application review.

16. Add language at 2040.3(c), “Processing fees,” allowing nonprofit joint ventures to request fee deferral and requiring a new \$1,000 fee for discretionary binding agreement review and letter issuance.

17. Revise language at 2040.3(d), “Credit allocation process,” to include the project review factors of site suitability, and meeting State and regional economic development council goals, consistent with current policy.

18. Revise threshold eligibility language at 2040.3(e)(8) requiring the Division provide notification of development team non-compliance.

19. Revise language at 2040.3(e)(9) to coordinate waiver notification requirements.

20. Modify threshold eligibility language at 2040.3(e)(10) to clarify current documentation submission requirements for evaluating project sites/buildings.

21. Revise language at 2040.3(e)(15) to mandate cost reasonableness for the acquisition of occupied buildings and ensuring consistency with other sections pertaining to project selection.

22. Revise the language at 2040.3(e)(17) to provide the Division with flexibility in setting minimum regulatory term for projects each funding round.

23. Revise the threshold language at 2040.3(e)(18) pertaining to green and energy efficient sustainable building practices to ensure flexibility in setting minimum standards annually and to require applicant certification to meeting such requirements.

24. Add a new credit/background review threshold requirement at 2040.3(e)(19) for the Division to review whether applicant credit worthiness and financial wherewithal are satisfactory.

25. Add new language at 2040.3(e)(20) to mandate that project developers and their contractors not contract with entities on federal or state debarment lists.

26. Add a new threshold provision at 2040.3(e)(21) to indicate projects must not significantly exceed costs of other projects unless otherwise determined to be in furtherance of State housing goals.

27. Delete the last sentence at 2040.3(f) stating scoring criteria are listed in descending point order to maintain current ordering of most scoring items in light of other changes in point allotment and new provisions revisions.

28. Amend “community impact/revitalization” scoring provision at 2040.3(f)(1) by: deleting previous sub-section (ii) and, modifying former sub-section (iii), now (ii), to clarify that the project type must be complementary to a local neighborhood-specific revitalization plan and corresponding local efforts to address revitalization and blight; adding a new sub-section (iii) with 5 points to advance specific local housing objectives of regional economic development councils; and, moving points to amended section 2040.3(f)(9) as more suitable to the evaluation of project readiness.

29. Amend the “Green building” scoring provision at 2040.3(f)(4) by reducing the scoring points in light of the inclusion of more green building requirements in threshold eligibility and the need to allocate points for new scoring categories, as well as by indicating specific scoring parameters will be noted in the request for proposals to ensure flexibility and consistency with current industry standards.

30. Delete the “long term affordability” scoring provision to correspond to proposed changes to threshold eligibility at 2040.3(e)(17) as described in paragraph 22.

31. Amend the “fully accessible and adapted, move-in ready units” criteria now at 2040.3(f)(5)(i) and (ii), clarifying roll-in shower provisions, accessible unit distribution and requiring a written agreement with service organization to assist in marketing units to the target population benefiting from accessible units.

32. Renumber and modify the “affordability” scoring provision now at 2040.3(f)(6) to score projects on the basis of both income targets served and the affordability of such units to tenants at the specified income levels.

33. Delete the “energy efficiency” scoring item at former 2040.3(f)(9) to correspond with the relocation of key elements of this provision into threshold eligibility as explained in paragraph 23.

34. Amend the “Project readiness” scoring criteria now at 2040.3(f)(9) by increasing the scoring point value from 5 to 10 points for shovel ready projects likely to promptly close on construction financing by virtue of the status of financing commitments, environmental approvals or clearances and local implementation measures in support of the project (per paragraph 28).

35. Amend the “Participation of non-profit organizations” scoring item now at 2040.3(f)(11) to enable projects with more than one non-profit applicant/developer to benefit from these points and requiring non-profits participating in project to have demonstrable housing experience to qualify under this section.

36. Add a new 5 point scoring category, “Cost effectiveness,” at 2040.3(f)(14) to foster cost containment by providing points for projects with total costs lower than other projects.

37. Add a new 3 point category, “Housing opportunity projects” at 2040.3(f)(15) to support a State preference for projects located in communities well-served by public transportation, low crime rates and high performing schools.

38. Add a new 2 point provision, “Minority and Women Owned Business Enterprise participation” at 2040.3(f)(16) to encourage projects to utilize and contract with certified New York State minority and women-owned businesses.

39. Delete the former scoring provision, “Project amenities,” at 2040.3(f)(16) to correspond with the move of many of the former scoring provisions to threshold eligibility, also allowing the allotment of scoring points to new categories.

40. Revise the language at 2040.3(g)(1)(ii) to clarify that the preferences elaborated in this section are Code-mandated.

41. Revise the language for “Cost standards” at 2040.3(g)(2)(i) to promote clarity and project cost containment by reducing allowable fees for builder’s profit and builder’s overhead, utilizing affordable housing industry standards.

42. In conjunction with the amended definition noted in paragraph 8., revise the “Identity of interest” language at 2040.3(g)(2)(iii) to clarify the circumstances under which allowable project costs might be reduced by the Division, as well as to strengthen disclosure requirements.

43. Revise the “Syndication standards” language at 2040.3(g)(3), setting the project ownership interest percentage for the project owner/taxpayer at 99.9%, which potentially maximizes the leveraging of private equity financing for the project and is consistent with affordable housing industry and tax credit standards.

44. Revise the wording of the “General” provision at 2040.3(g)(5) by updating State goals to promote coordinated investments with government agencies and by providing clarity in stating the circumstances under which an allocation may be made irrespective of point ranking.

45. Amend the language regarding “Eligible projects” at 2040.4(a) to clarify that the tax-exempt bond projects described in this section continue to be HFA-administered.

46. Delete the provision at 2040.4(f) since it is incorporated in 2040.4(a) and it is unnecessary.

47. Amend the “Request for qualified contract” at 2040.5(c) to clarify that projects seeking to opt out of extended use agreement via qualified contract at the end of the initial 15 year credit compliance period may only do so if they are eligible under their extended use agreement and to state that projects making such a request will be required to submit a documentation checklist and cover all costs incurred by the Division which are associated with evaluation of the request.

48. Add a new sub-section at 2040.5(d) to require that all projects maintain and update records regarding unit vacancies to foster disaster relief preparedness.

49. Revise the language for “Changes in ownership” at 2040.6(b) to clarify that project owners must obtain the Division’s written confirmation of no objection to any proposed change in project ownership.

50. Revised to correct the title of the Division’s monitoring officer at 2040.7(b).

51. Amend the language for “Monitoring fee” at 2040.7(c) to indicate

that the annual monitoring fee charged by the Division will vary based on project type and size, consistent with a similar provision in HFA's QAP.

52. Add a new provision, "Required staff training," at 2040.7(d) to require that the project owner's management staff complete compliance certification programs and to include this requirement in owner's management plan, ensuring that the staff responsible for maintaining project compliance throughout the term of the project's operation are appropriately trained.

53. Amend the language for "Recordkeeping" at 2040.7(e)(6) and (7) to clarify that the owner must retain all pertinent project records including income certifications, recertifications, and other Code-required documentation.

54. Add a new sub-section at 2040.8(b)(ii)(b)(4) allowing the Division the discretion to continue requiring annual tenant income certifications, or to reinstate them if previously waived, to ensure units remain Code-compliant.

55. Delete and/or replace all the provisions of the SLIHC Regulation commencing at 2040.14(d), "Project scoring and rating criteria," to mirror LIHC revisions in paragraphs 27. through 39. to correspond and coordinate, to the extent possible, the scoring for both Programs and to revise 2040.14(f), General, as described in paragraph 44. for the same purpose.

**Text of proposed rule and any required statements and analyses may be obtained from:** Arnon Adler, New York State Division of Housing and Community Renewal, 38-40 State Street, Albany, New York 12207, (518) 486-5044, email: aadler@nysdchr.org

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

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

**This rule was not under consideration at the time this agency submitted its Regulatory Agenda for publication in the Register.**

#### Regulatory Impact Statement

##### 1. Statutory Authority:

Executive Order Number 11(March 2, 2011) authorizes the Division of Housing and Community Renewal's ("DHCR") Commissioner to administer New York State's annual allotment of federal low-income housing tax credits ("low-income housing credit", "LIHC" or "Credit"). U.S. Internal Revenue Code ("IRC") Section 42(m) requires that Credit be allocated pursuant to a "qualified allocation plan" ("QAP"), which DHCR promulgates as a rule.

Public Housing Law Article 2-A (the "Act") created the New York State Low-Income Housing Tax Credit Program ("SLIHC"). The Act authorizes DHCR to allocate NYS tax credits to those investing in eligible housing, promulgate rules necessary to administer a SLIHC program, and provides that IRC Section 42 shall apply to the SLIHC program. 9 NYCRR Sections 2040.1 - 2040.13 provide the framework for LIHC program administration, and 9 NYCRR Section 2040.14 the framework for SLIHC program administration.

##### 2. Legislative Objectives:

Both the LIHC and SLIHC programs were enacted to encourage private investment in housing affordable to low-income persons. The LIHC program authorizes states to allocate Credit to owners of low-income housing meeting IRC Section 42 requirements. The LIHC program serves households earning up to 60 percent of area median income, while SLIHC serves households earning up to 90 percent.

##### 3. Needs and Benefits:

The purpose of the proposed amendments is to clarify program enrollment and implementation requirements, as well as the contractual obligations of participating owners. In addition, the proposed amendments remove definitions of terms that are already defined in the sections of the Internal Revenue Code which enable New York State to administer the LIHC program, and eliminate sections that have proven to not have a significant impact in the administration of the LIHC program.

The proposed amendments revise certain sections so that they can have a greater impact for achieving the goals of the LIHC program. In particular, revisions have been made to green building and energy efficiency requirements and to the section delineating how LIHC project owners are to determine which affordable units they may make available to households within specified income bands. Also, the proposed amendments reconfigure selection and compliance criteria to promote local participation in the LIHC program and to further environmentally conscious construction while incentivizing reductions in development costs.

Furthermore, terms and sections that will make the regulations consistent with the New York State Housing Finance Agency's (HFA) Qualified Allocation Plan (QAP) have been added. For example, the proposed amendments add new LIHC project eligibility and competitive ranking criteria addressing important State goals, such as project cost efficiencies, projects situated in accessible, safe neighborhoods with strong schools and increased Minority/Women Owned Business Enterprise participation. The proposed amendments also provide that accessible units be equitably

distributed to families of different sizes and now require owners to maintain unit vacancy data.

All of the foregoing modifications contained within the proposed amendments are needed to better reflect the agency's current application review and award process. The amendments are needed to provide the agency flexibility in assessing which projects qualify to participate in the LIHC program and to bring the LIHC program requirements up-to-date with current trends in the housing industry and current State housing goals.

And, as noted above, the proposed amendments make the agency's regulations consistent with the HFA QAP while implementing new cost containment strategies in response to National Council of State Housing Agencies (NCSHA) recommendations. The proposed amendments enable the agency to prioritize high readiness projects better identify experienced project sponsors and other entities participating in the development of the project while making previously lengthy criteria more flexible to address changing industry standards and assisting the agency to responding to natural disasters and other emergencies. Moreover, the proposed amendments improve the tenant referral process for accessible units.

#### 4. Costs:

##### (1) Costs to State Government:

There will be no costs to state government because of the proposed amendments to the Existing Rule. LIHC and SLIHC will continue to be implemented with existing staff resources.

##### (2) Costs to local government:

None.

##### (3) Cost to private regulated parties:

The Proposed Rule may result in increased costs due to potential for new fee for binding agreement issuance or decreased profit as result of cost containment measures; however, specific amount of such costs have not been determined. Any increase in costs resulting from additional mandatory "energy efficiency" or "green building" requirements will be offset by the Credit allocation, and cost savings achieved over the term of projects' operation.

##### 5. Local Government Mandates:

None.

##### 6. Paperwork:

The rule requires the filing of an on-line application and supporting documentation to request Credit financing.

##### 7. Duplication:

None.

##### 8. Alternatives:

The alternative to the Proposed Rule is to retain the Existing Rule which does not address necessary changes and clarifications of definitions, funding process, threshold eligibility, scoring criteria and underwriting to meet new federal requirements, State goals and ensuring program efficiency. Specifically:

(1) The alternative to replacing "Division" is retaining lower case "division," a term with multiple meanings.

(2) The alternative to revising "adjusted project cost" (2040.2(a)) is an unclear definition.

(3) The alternative to expanding "Code" (2040.2(b)) is an insufficient definition.

(4) The alternative to deleting "Compliance period" (formerly 2040.2(d)) is an unnecessary definition.

(5) The alternative to adding "Cost certification" (2040.2(d)) is unclear wording inconsistent HFA's QAP.

(6) The alternative to deleting "Extended use period" (formerly 2040.2(h)) is an unnecessary definition.

(7) The alternative to modifying "Feasibility review" (2040.2(h)) is an outdated definition.

(8) The alternative to revising "Identity of interest" (2040.2(l)) is an unclear definition.

(9) The alternative to modifying "Preservation project" (2040.2(q)) is an insufficient definition.

(10) The alternative to deleting "Qualified low-income housing project" (former 2040.2(t)) is a redundant definition.

(11) The alternative to adding "State designated building" (2040.2(s)) is Code non-compliance.

(12) The alternative to revising "Supportable debt" (2040.2(t)) is an ambiguous definition.

(13) The alternative to amending "Supportive housing" (2040.2(u)(6)) is failing to ensure project financing.

(14) The alternative to modifying "Visitability" (2040.2(v)) is a definition lacking specificity.

(15) The alternative to revising "Documentation" (2040.3(b)) is inconsistency with current policy.

(16) The alternative to adding provisions to "Processing fees" (2040.3(c)) is penalizing non-profit organizations and failing to secure revenue.

(17) The alternative to expanding "Credit allocation process"

(2040.3(d)) is failing to note aspects of DHCR's authority to finance projects meeting state housing goals.

(18) The alternative to amending 2040.3(e)(8) is a standard not sufficiently verifying applicant competency.

(19) The alternative to modifying 2040.3(e)(9) is retaining unclear references and inconsistencies between QAP sections.

(20) The alternative to expanding 2040.3(e)(10) is retaining a provision not listing all documentation requirements to determine cost and viability.

(21) The alternative to modifying 2040.3(e)(15) is retaining incorrect citations and failing to reflect current agency policies

(22) The alternative to amending 2040.3(e)(17) is eliminating agency discretion to mandate longer project regulatory periods annually to serve tenants.

(23) The alternative to revising 2040.3(e)(18) is failing to incorporate flexibility in mandating energy efficiency and green building standards.

(24) The alternative to amending 2040.3(e)(19) is retaining an inconsistency with HFA's QAP and failing to assess applicant financial viability.

(25) The alternative to amending 2040.3(e)(20) is allowing debarred contractors to participate in projects.

(26) The alternative to amending 2040.3(e)(21) is failing to institute a cost containment measure.

(27) The alternative to modifying 2040.3(f) is retaining incorrect guidance.

(28) The alternative to amending "community revitalization plan" (2040.3(f)(1)) is a scoring provision inconsistent with practice, lacking clarity and failing to assess local planning and revitalization efforts.

(29) The alternative to revisions under "green building" criteria (2040.3(f)(4)) is retaining current scoring for non-standard and mandatory features, reducing flexibility to adapt to industry changes, and not allowing the reallocation of points to new scoring criteria.

(30) The alternative to deleting "long term affordability" (2040.3(f)(5)) is retaining scoring inconsistent with new eligibility standards and not reallocating sufficient points for new provisions.

(31) The alternative to amending "fully accessible units" (2040.3(f)(5)) is retaining scoring not specifying current accessibility requirements or addressing marketing to disabled tenants.

(32) The alternative to modifying "affordability" (2040.3(f)(6)) is not scoring for income targets, necessary to serve households at proposed incomes.

(33) The alternative to deleting "energy efficiency" (former 2040.3(f)(9)) is retaining scoring inconsistent with mandatory threshold.

(34) The alternative to amending "project readiness" (2040.3(f)(9)) is scoring that does not effectively determine readiness.

(35) The alternative to modifying "participation of non-profit organizations" (2040.3(f)(11)) is unclear scoring criteria.

(36) The alternative to adding "cost effectiveness" (section 2040.3(f)(14)) is not providing scoring for projects with lower costs than others.

(37) The alternative to creating "housing opportunity projects" (2040.3(f)(15)) is failing to encourage development in accessible, safe and educationally strong communities.

(38) The alternative to adding "Minority and Women Owned Business Enterprise participation" (2040.3(f)(16)) is failing to encourage this important statewide goal.

(39) The alternative to deleting "project amenities" (2040.3(f)(16)) is inconsistency with threshold and retaining scoring for now standard amenities.

(40) The alternative to modifying 2040.3(g)(1)(ii) is lack of clarity regarding federally mandated preferences.

(41) The alternative to revising "cost standards" (2040.3(g)(2)(i)) is allowing construction-related fees above industry standards; also inconsistent with HFA's QAP.

(42) The alternative to clarifying "identity of interest" (2040.3(g)(2)(iii)) is retaining insufficient guidance for reductions in allowable costs and failing to strengthen identity of interest disclosure.

(43) The alternative to modifying "syndication standards" (2040.3(g)(3)) is not strengthening project ownership provisions to ensure consistency with industry standards.

(44) The alternative to revising "General" (2040.3(g)(5)) is retaining insufficient guidance for applicants and public regarding State allocation decisions.

(45) The alternative to amending "eligible projects" (2040.4(a)) and deleting 2040.4(f) is retaining outdated guidance.

(46) The alternative to modifying 2040.5(b) is failing to reflect current policies and regulatory provisions.

(47) The alternative to amending "request for qualified contract" (2040.5(c)) is retaining wording inconsistent with current IRS Regulations.

(48) The alternative to amending 2040.5(d) is retaining provisions regarding record maintenance potentially hampering agency disaster relief efforts.

(49) The alternative to modifying "changes in ownership" (2040.6(b)) is retaining an incorrect provision.

(50) The alternative to correcting monitoring officer's title (section 2040.7(b)) is retaining an incorrect reference.

(51) The alternative to amending "monitoring fee" (2040.7(c)) is retaining an inconsistency in fees between DHCR and HFA.

(52) The alternative to adding "required staff training" (section 2040.7(d)) is retaining an inconsistency between DHCR and HFA and failing to address project management staff training.

(53) The alternative to modifying "recordkeeping" (2040.7(e)(6) and (7)) is retaining an inconsistent provision concerning programmatic requirements.

(54) The alternative to amending 2040.8(b)(2)(ii)(b)(4) is retaining wording inconsistent with HFA's QAP and failing to allow necessary discretion to ensure units are rented in a Code-compliant manner.

(55) The alternative to amending 2040.14(c), "funding rounds," and 2040.14(d), "project scoring and rating criteria," is retaining SLIHC funding round and scoring criteria which do not track changes to the LIHC Program, nor IRC-required amendments.

#### 9. Federal Standards:

This Rule does not exceed the minimum standards of the federal government for the LIHC program or SLIHC program.

#### 10. Compliance Schedule:

Not applicable. The rule changes will affect only those who apply to DHCR for allocations of Credit after the Rule amendments are effective.

#### Regulatory Flexibility Analysis

The Division of Housing and Community Renewal has found that the proposed amendments to the rule at 9 NYCRR Part 2040 (the "Proposed Rule") will have no negative impact on small businesses. While the proposed Rule includes a new eligibility requirement for general cost limitations and a scoring incentive for project cost effectiveness, these provisions would not likely have a significant impact on small businesses involved with these projects. In addition, the proposed Rule does not include any diminution of the quality or materials of the affordable housing to be built which could result in a decrease of opportunities or a negative impact on small businesses. Further, the proposed Rule's continued inclusion and upgrading of certain requirements and incentives regarding energy conservation and sustainable, green building development and the minimization of adverse environmental impacts may result in an increase in jobs and opportunities for small businesses, which are quite active in these burgeoning fields. The proposed Rule also provides a potential benefit to small businesses by including an additional scoring incentive for projects utilizing Minority and Women-Owned Business Enterprises.

DHCR sought and utilized the advice of persons who represent small businesses in order to ensure that the Proposed Rule would have no negative impact on small businesses. Prior to drafting the Proposed Rule, DHCR held two roundtable discussions in the Upstate and Downstate regions of the State. The invitees included for-profit and not-for-profit housing developers, attorneys, Credit syndicators and representatives of government agencies with an interest in the Credit program. No participant expressed an opinion indicating that any of the roundtable's discussion topics would adversely affect small businesses. Based upon the roundtables, its prior experience in the allocation of Credit to projects which utilize small business services, and the nature of the amendments, DHCR does not anticipate that the Proposed Rule will have any adverse impact on small businesses or local government.

#### Rural Area Flexibility Analysis

The Division of Housing and Community Renewal (DHCR) has found that the proposed amendments to the Rule at 9 NYCRR Part 2040 will not impose any adverse economic impact on rural areas or reporting, record-keeping, or other compliance requirements on public or private entities in rural areas. The changes to the existing Rule which would be made by the proposed amendments impose no further requirements in rural areas, will not impose additional capital or compliance costs on person/entities which are located in rural areas, and will have no other adverse impacts on rural areas.

Prior to drafting the Proposed Rule, DHCR held two roundtable discussions in the Upstate and Downstate regions of the State with members of the affordable housing industry who have been active in the Credit program. The invitees included for-profit and not-for-profit housing developers, attorneys, Credit syndicators and representatives of government agencies. No invitee expressed an opinion indicating that the roundtable discussion items would adversely affect rural areas. DHCR's experience with the Low-Income Housing Credit Program and the nature of the amendments are such that no such impact should be anticipated.

#### Job Impact Statement

The Division of Housing and Community Renewal (DHCR) has found that the proposed amendments to the Rule at 9 NYCRR Part 2040 will have no adverse impact on jobs and employment opportunities. DHCR's

experience with the Low-Income Housing Credit Program and the nature of the amendments are such that no adverse impact should be anticipated. While the proposed Rule includes a new eligibility requirement for general cost limitations and a scoring incentive for project cost effectiveness, these provisions would not likely impact the number of construction or other project-related job positions created as a result of this financing. In addition, the proposed Rule does not include any diminution of the quality or materials of the affordable housing to be built which could result in a decrease of employment opportunities. Further, the proposed Rule's continued inclusion and upgrading of certain requirements and incentives regarding energy conservation and sustainable, green building development and the minimization of adverse environmental impacts may result in an increase in jobs in related industries. The proposed Rule also provides a potential benefit of creating jobs by including an additional scoring incentive for projects utilizing Minority and Women-Owned Business Enterprises.

## New York State Joint Commission on Public Ethics

### NOTICE OF ADOPTION

#### Source of Funding Reporting

**I.D. No.** JPE-37-12-00010-A

**Filing No.** 791

**Filing Date:** 2013-07-30

**Effective Date:** 2013-08-14

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

**Action taken:** Addition of Part 938 to Title 19 NYCRR.

**Statutory authority:** Executive Law, section 94(9)(c); Legislative Law, art. 1-A, sections 1-h(c)(4) and 1-j(c)(4)

**Subject:** Source of funding reporting.

**Purpose:** To implement reporting that will inform the public of efforts to influence government decision making by lobbying entities.

**Text or summary was published** in the September 12, 2012 issue of the Register, I.D. No. JPE-37-12-00010-P.

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

**Revised rule making(s) were previously published in the State Register** on January 9, 2013 and June 5, 2013.

**Text of rule and any required statements and analyses may be obtained from:** Shari Calnero, Senior Counsel, Joint Commission on Public Ethics, 540 Broadway, Albany, NY 12207, (518) 408-3976, email: regs@jcope.ny.gov

#### Initial Review of Rule

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2016, which is no later than the 3rd year after the year in which this rule is being adopted.

#### Assessment of Public Comment

The agency received no public comment.

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

#### Gift Regulations

**I.D. No.** JPE-33-13-00008-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 933 to Title 19 NYCRR.

**Statutory authority:** Executive Law, section 94(9)(c) and (17)(a); and Public Officers Law, sections 73(5) and 74

**Subject:** Gift regulations.

**Purpose:** To regulate and clarify the gift prohibition for State officers and employees and Legislative members and employees.

**Substance of proposed rule (Full text is posted at the following State website: [www.jcope.ny.gov](http://www.jcope.ny.gov)):** Executive Law section 94(17)(a) directs the Joint Commission on Public Ethics ("JCOPE") to promulgate rules

concerning limitations on the receipt of gifts, and section 94(9)(c) authorizes JCOPE to adopt, amend, and rescind rules and regulations to govern JCOPE procedures. Public Officers Law section 73(5) establishes the restrictions on soliciting, accepting or receiving gifts (the Public Officers Law utilizes the definition of a gift, and exclusions from the definition, that are contained in Legislative Law Article 1-A, section 1-c(j)) that apply to certain individuals affiliated with the State, including Statewide elected officials, State officers, employees, members of the Legislature, and Legislative employees.

Currently, individuals covered by the gift statutes who look to JCOPE for guidance on how to apply those statutes must synthesize information from a number of different sources, including the statutory language and multiple advisory opinions from predecessor agencies. By setting forth the circumstances in which solicitation, acceptance or receipt of a gift is appropriate, these rules provide a comprehensive set of requirements for covered persons. The regulations provide clear guidance to questions concerning who is covered by the gift statutes, what qualifies as a gift or as an exception, and what requirements apply to these individuals.

**Text of proposed rule and any required statements and analyses may be obtained from:** Louis Manuta, Associate Counsel, Joint Commission on Public Ethics, 540 Broadway, Albany, NY 12207, (518) 408-3976, email: regs@jcope.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: Executive Law section 94(17)(a) directs the Joint Commission on Public Ethics ("JCOPE") to promulgate rules concerning limitations on the receipt of gifts, and section 94(9)(c) authorizes JCOPE to adopt, amend, and rescind rules and regulations to govern JCOPE procedures. Public Officers Law section 73(5) establishes the restrictions on soliciting or receiving gifts that apply to certain individuals affiliated with the State, including Statewide elected officials, State officers, employees, members of the Legislature, and Legislative employees. (Public Officers Law section 73(5) utilizes the definition of "gift" in Legislative Law Article 1-A, section 1-c(j).) The Code of Ethics in Public Officers Law section 74 establishes standards intended to prevent the use of an individuals' official position or authority for personal benefit.

2. Legislative objectives: Currently, individuals covered by the gift statutes who look to JCOPE for guidance on how to apply those statutes must synthesize information from a number of different sources, including the statutory language and several advisory opinions from predecessor agencies. By setting forth the circumstances in which solicitation, acceptance or receipt of a gift is appropriate, these rules provide a comprehensive set of requirements for covered persons.

3. Needs and benefits: The proposed rulemaking is necessary to regulate and clarify the requirements for State officers and employees and Legislative members and employees covered by the gift prohibition set forth in Public Officers Law section 73(5). The regulations provide clear guidance to questions about who is covered by the gift prohibition, what qualifies as a gift, and what requirements apply to these individuals.

Part 933.1 provides the purpose and effect of the regulations. The Part clarifies that the regulations supersede prior Advisory Opinions issued by predecessor agencies to the extent such Advisory Opinions are inconsistent with the regulations.

Part 933.2 defines key terms in the regulations. It defines a "gift" as an item or service (or anything else of value) with a fair market value of more than ten dollars. This Part also defines an "interested source," which is a person or entity who has certain specified relationships with State persons or entities. This definition is central to a determination in Part 933.3 as to when a gift is presumptively permissible or impermissible. Finally, this Part defines precisely to whom the regulations apply (referred to as "covered persons" in the regulations).

Part 933.3 specifies when a gift can be solicited, received, or accepted by a covered person. If a gift is from an interested source, it is presumptively impermissible to solicit, receive, or accept the gift, unless certain criteria are met. Specifically, the presumption is overcome (making the gift permissible) only when: (1) it would not be reasonable to infer that the gift was intended to influence the individual subject to the gift regulations; and (2) the gift could not reasonably be expected to influence the person in the performance of his or her official duties; and (3) it would not be reasonable to infer that the gift was intended as a reward for any official action on the person's part.

If the gift is not from an interested source, it is presumptively permissible to solicit, receive or accept the gift. This presumption is overcome (making the gift impermissible) when: (1) it could reasonably be inferred that the Gift was offered or given with the intent to influence the covered person, or (2) it could reasonably be expected to influence the covered person in the performance of his or her official duties, or (3) it could rea-

sonably be inferred that the Gift was offered or given with the intent to reward the covered person for any official action on his or her part.

These rules are designed to provide covered persons with an established structure within which to determine whether it is appropriate to accept, receive, or solicit a gift.

This Part also discusses the propriety of receiving multiple gifts from the same person within a 12-month period. Part 933.3 states that even if each gift might be permissible on its own, the fact that multiple gifts are offered may create a reasonable basis to infer that the gifts are, in fact, impermissible. This Part also explains that a covered person cannot direct an impermissible gift to a third party, including a charitable organization.

Part 933.4 sets forth and clarifies the statutory exclusions from the definition of gift. Both the definition and the exclusions are contained in Legislative Law Article 1-A, section 1-c(j) and are incorporated by reference into Public Officers Law section 73(5). This Part also clarifies that covered persons must consider the requirements of the Code of Ethics in Public Officers Law section 74 before soliciting, receiving, or accepting any item or service, including the items enumerated as exclusions to the definition of "gift."

Part 933.5 clarifies that covered persons must consider the requirements of Public Officers Law section 74 before soliciting, receiving, or accepting any item or service, that is not a gift because its fair market value is less than ten dollars.

Part 933.6 identifies the statutory provision, Executive Law section 94, that authorizes JCOPE to investigate possible violations of Public Officers Law sections 73 and 74 and their corresponding regulations and to take appropriate action as authorized in these statutes.

Part 933.7 explains that state agencies are free to adopt or implement rules, regulations, or procedures that are more restrictive than those in the gift regulations.

4. Costs:

a. costs to regulated parties for implementation and compliance: Minimal.

b. costs to the agency, state and local government: Minimal costs to state and local governments. Minimal administrative costs to the agency during the implementation phase.

c. cost information is based on the fact that there will be minimal costs to regulated parties and state and local government for training staff on changes to the requirements. The cost to the agency is based on an estimated slight increase in staff resources to implement the regulations.

5. Local government mandate: The proposed regulation imposes, at most, minimal new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district or other special district, as they must make themselves aware of any requirements from the regulation that would apply to gifts they would give to individuals covered by the gift regulations.

6. Paperwork: This regulation may require the preparation of additional forms or paperwork. Such additional paperwork is expected to be minimal.

7. Duplication: This regulation does not duplicate any existing federal, state or local regulations.

8. Alternatives: JCOPE could promulgate a formal advisory opinion or other guidance, but the formal rulemaking process provides more clarity to affected parties.

9. Federal standards: These regulations do not exceed any federal minimum standard with regard to a similar subject area.

10. Compliance schedule: Compliance will take effect upon adoption.

#### Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not submitted with this Notice of Proposed Rulemaking because the proposed rulemaking will not impose any adverse economic impact on small businesses or local governments, nor will it require or impose any reporting, record-keeping or other affirmative acts on the part of these entities for compliance purposes. The New York State Joint Commission on Public Ethics notes that while the gift regulations may, indirectly, affect what items and services certain small businesses and local governments can offer or give to certain individuals employed by or otherwise affiliated with the state, this does not impose extensive record-keeping requirements or other adverse economic impacts on these entities.

#### Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not submitted with this Notice of Proposed Rule Making since the proposed rule making will not impose any adverse economic impact on rural areas, nor will compliance require or impose any reporting, record-keeping or other affirmative acts on the part of rural areas. The Joint Commission on Public Ethics makes these findings based on the fact that the gift regulations affect what items or services certain state employees and officers, among others affiliated with the state, can solicit, accept or receive. Rural areas are not affected in any way.

#### Job Impact Statement

A Job Impact Statement is not submitted with this Notice of Proposed Rule Making because the proposed rulemaking will have no impact on jobs or employment opportunities. The Joint Commission on Public Ethics makes this finding based on the fact that the gift regulations apply only to what items or services certain state employees and officers, among others affiliated with the state, can solicit, accept or receive. This regulation does not apply nor relate to economic development or employment opportunities.

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Honoraria Regulations

I.D. No. JPE-33-13-00009-P

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

**Proposed Action:** Repeal of Part 930 and addition of new Part 930 to Title 19 NYCRR.

**Statutory authority:** Executive Law, section 94(9)(c) and (17)(a); and Public Officers Law, sections 73(5) and 74

**Subject:** Honoraria regulations.

**Purpose:** To provide guidance and procedures regarding the acceptance of honoraria.

**Text of proposed rule:** Title 19 NYCRR Part 930 is repealed and a new Part 930 is added to read as follows:

**CHAPTER XX. JOINT COMMISSION ON PUBLIC ETHICS**

**TITLE 19 NYCRR PART 930: HONORARIA**

**930.1 Purpose and Effect of Regulations.**

(a) The purpose of these regulations is to establish the procedures and conditions for approval and acceptance of Honoraria by specified New York State officials and employees.

(b) The effect of these regulations is to supersede prior regulations and any Advisory Opinions or other guidance issued by predecessor agencies to the Joint Commission on Public Ethics to the extent such Advisory Opinions and guidance are inconsistent with this Part.

**930.2 Definitions.**

(a) Approving Authority for a State Officer or Employee shall mean the head of a State agency or appointing authority, or his or her appropriate designee. In the case of a Statewide Elected Official, the head of a Civil Department or the head of a State Agency, it shall mean the New York State Joint Commission on Public Ethics.

(b) Civil Department shall mean any of the departments listed herein: Agriculture and Markets, Civil Service, Comptroller, Corrections and Community Services, Economic Development, Education, Environmental Conservation, Executive, Financial Services, Health, Labor, Law, Motor Vehicles, Office of Children and Family Services, Office of Mental Health, Office for People with Developmental Disabilities, Office of Temporary and Disability Assistance, Public Service, State, Taxation and Finance, and Transportation.

(c) Commission shall mean the New York State Joint Commission on Public Ethics.

(d) Covered Person shall mean:

(1) Head of a Civil Department as defined in subdivision (b) of this section;

(2) State Officer or Employee as defined in subdivision (j) of this section;

(3) Statewide Elected Official as defined in subdivision (k) of this section.

(e) Honorarium shall mean:

(1) Any payment, which may take the form of a fee or any other compensation, made to a Covered Person in consideration for a service performed that is not part of his or her official duties. Such service includes, but is not limited to, delivering a speech, writing, or publishing an article, or participating in any public or private conference, convention, meeting, or similar event. Honorarium shall also include expenses incurred for travel, lodging, and meals related to the service performed.

(2) Honorarium shall not mean a payment provided to a Covered Person who provides services for or acts on behalf of an employee organization certified or recognized under Article 14 of the Civil Service Law to represent such Covered Person.

(f) Honorarium Approval shall mean a record created by the Approving Authority in accordance with section 930.4(c) of this Part.

(g) Interested Source shall mean any person or entity who on his or her own behalf, or on behalf of an entity, that satisfies any one of the following:

(1) is regulated by, negotiates with, appears before in other than a Ministerial Matter, seeks to contract with or has contracts with, or does other business with: (i) the Covered Person, in his or her official capacity; (ii) the State Agency with which the Covered Person is employed or affiliated; or (iii) any other State Agency when the Covered Person's agency is to receive the benefits of the contract; or

(2) is required to be listed on a statement of registration pursuant to § 1-e(a)(1) of article 1-A of the Legislative Law and lobbies or attempts to influence actions, decisions, or policies of the State Agency with which the Covered Person is employed or affiliated; or

(3) is the spouse or unemancipated child of any individual satisfying the requirements of section 930.2(g)(2); or

(4) is involved in any action or proceeding, in which administrative and judicial remedies thereto have not been exhausted, and which is adverse to either: (i) the Covered Person in his or her official capacity; or (ii) the State Agency with which the Covered Person is employed or affiliated; or

(5) has received or applied for funds at any time during the previous 12 months up to and including the date of the proposed or actual receipt of the item or service from either: (i) the Covered Person in his or her official capacity; or (ii) the State Agency with which the Covered Person is employed or affiliated.

(h) Ministerial Matter shall mean an administrative act carried out in a prescribed manner not allowing for substantial personal discretion.

(i) State Agency shall mean any Civil Department; State department; or division, board, commission, or bureau of any State department or Civil Department; any public benefit corporation, public authority, or commission at least one of whose members is appointed by the Governor. State Agency shall also include the State University of New York or the City University of New York, including all their constituent units except (1) community colleges of the State University of New York and (2) the independent institutions operating statutory or contract colleges on behalf of the State.

(j) State Officer(s) or Employee(s) shall mean:

(1) Statewide Elected Officials;

(2) Heads of Civil Departments and State departments and their respective deputies and assistants other than members of the board of regents of the university of the State of New York who receive no compensation or are compensated on a per diem basis;

(3) Officers and employees of statewide elected officials;

(4) Officers and employees of State departments, boards, bureaus, divisions, commissions, councils, or other State Agencies other than officers of such boards, commissions or councils who receive no compensation or are compensated on a per diem basis;

(5) Employees of public authorities (other than multi-128; state authorities), public benefit corporations, and commissions at least one of whose members of such public authorities, public benefit corporations, and commissions is appointed by the governor; and

(6) Members or directors of public authorities (other than multi-state authorities), public benefit corporations, and commissions identified in section 930.2(j)(5) who receive compensation other than on a per diem basis.

(k) Statewide Elected Official shall mean the Governor, Lieutenant Governor, Comptroller, or Attorney General.

**930.3 Certain Covered Persons Prohibited from Receiving Payment for Speeches.**

Notwithstanding any other provision of this Part and pursuant to Public Officers Law § 73(5-a)(b), no Statewide Elected Official or any head of a Civil Department shall, directly or indirectly, solicit, accept, or receive any payment made in consideration for any speech given at a public or private conference, convention, meeting, social event, meal, or like gathering.

**930.4 Approval Procedures.**

(a) An Honorarium must be approved by the Covered Person's Approving Authority in accordance with this Part.

(b) Within a reasonable period of time prior to the performance of the service for which an Honorarium is offered, or to the receipt of the Honorarium, a Covered Person shall submit to his or her Approving Authority a written request for approval to accept the Honorarium.

(c) The Approving Authority shall review and approve a request to accept an Honorarium in accordance with the procedures and conditions set forth in sections 930.4 and 930.5 of this Part. The Honoraria Approval shall contain the information set forth in (1) through (5) of this subdivision:

(1) The name of the Covered Person accepting the Honorarium;

(2) Identify the offeror and nature of the offeror's business;

(3) A detailed description of the service for which the Honorarium is offered, including the date and location where the service will be performed;

(4) The amount of the Honorarium and, where applicable, and itemization of amounts paid for the service, attendance, registration, travel, lodging, and meals; and

(5) A statement that the Approving Authority has approved the Honorarium in accordance with the conditions set forth in section 930.5 of this Part.

(d) The Approving Authority shall retain all completed and signed Honorarium Approvals for a period of three years from the receipt date of the Honorarium and shall be made available to the Commission upon its request.

(e) The Approving Authority shall provide the Covered Person with a copy of the Honorarium Approval.

**930.5 Conditions for Approval.**

(a) An Approving Authority may approve a request to accept an Honorarium provided the following conditions are met:

(1) State personnel, equipment, and time are not used in preparing the service for which an Honorarium is offered;

(2) No State funds (including funds from any New York State public authority or any public benefit corporation) are used to pay the Covered Person's attendance, registration, travel, lodging, or meal expenses related to the service for which an Honorarium is offered;

(3) If the service is to be performed during the Covered Person's official work day, he or she must charge accrued leave (other than sick leave) to perform such service;

(4) If the Honorarium is offered by or on behalf of an Interested Source, all of the following criteria must be met:

(i) It is not reasonable, under the circumstances, to infer that the Honorarium was intended to influence the Covered Person in the performance of his or her official duties.

(ii) The Honorarium could not, under the circumstances, reasonably be expected to influence the Covered Person in the performance of his or her official duties.

(iii) The Honorarium is not, under the circumstances, intended as a reward for any official action on his or her part.

(5) The Approving Authority determines that the offeror is not being used to conceal that the Honorarium is actually offered or paid by an Interested Source; and

(6) Performing the service for which the Honorarium is offered and accepting the Honorarium do not violate Public Officers Law § 74.

**930.6 Minimum Requirements.**

Nothing contained in this Part shall prohibit any State Agency from adopting or implementing its own rules, regulation or procedures governing Honoraria that are more restrictive than the requirements of this Part.

**930.7 Exemption.**

A member of the faculty (including an adjunct member of the faculty) at the State University of New York and the City University of New York, including all their constituent units except community college of the State University of New York and the independent institutions operating statutory or contract colleges on behalf of the State, and a State Officer or Employee serving in the title of Research Scientist, Cancer Research Scientist, Research Physician, Research Psychiatrist or Psychiatrist, is exempt from all the provisions and requirements in this Part, with the exception of sections 930.7 and 930.8, provided the service performed by such member of the faculty is within the subject matter of his or her official academic discipline.

**930.8 Enforcement.**

The Commission is authorized pursuant to Executive Law § 94 to investigate possible violations of Public Officers Law § 73 and § 74 and their corresponding regulations and take appropriate action as authorized in these statutes.

**930.9 Reporting.**

Any Covered Person who is required to file a financial disclosure statement pursuant to § 73-a of the Public Officers Law, including those persons qualifying for an exemption under section 930.7, shall report any Honorarium in excess of \$1,000 (or all Honoraria the aggregate total of which exceed \$1,000 received from a single offeror) in his or her financial disclosure statement for the applicable year.

**Text of proposed rule and any required statements and analyses may be obtained from:** Louis Manuta, Associate Counsel, Joint Commission on Public Ethics, 540 Broadway, Albany, NY 12207, (518) 408-3976, email: regs@jcope.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: Executive Law section 94(9)(c) generally directs the Joint Commission on Public Ethics ("JCOPE") to adopt, amend, and rescind rules and regulations to govern JCOPE's various procedures. Executive Law section 94(17)(a) directs JCOPE to promulgate rules concerning limitations on the receipt of gifts and honoraria by persons subject to its jurisdiction. Public Officers Law section 73(5) prohibits subject persons from soliciting, accepting, or receiving a gift. The Code of Ethics in Pub-

lic Officers Law section 74 establishes standards intended to prevent the use of an individuals' official position or authority for personal benefit.

2. Legislative objectives: To provide guidance and procedures regarding the acceptance of honoraria by certain State officers and employees.

3. Needs and benefits: JCOPE's predecessor agencies created regulations regarding honoraria and payment for officially related travel expenses in Part 930. The proposed rulemaking will clarify these rules by separating the regulations governing honoraria (set forth in Part 930) from the regulations governing payment for officially related travel expenses (proposed herein in Part 931). The regulations set forth in Part 931 govern payments for official activities of specified New York State officials and employees (referred to as "covered person(s)").

Part 930.1 provides the purpose and effect of the regulations.

Part 930.2 defines key terms in the regulations. It defines an "honorarium" as a fee or any other compensation made to a covered person in consideration for a service performed that is not part of his or her official duties. Such services include, but are not limited to, delivering a speech, writing or publishing an article, or participating in any public or private conference, convention, meeting, or similar event. This Part also defines an "interested source," which is a person or entity who has certain defined relationships with State persons or entities. This definition is central to a determination made, pursuant to Part 930.5, by the individual's approving authority as to whether an honorarium can be approved. In the case of most covered persons, the approving authority is the individual's agency. In the case of statewide elected officials and heads of agencies and certain departments, the approving authority is JCOPE.

Part 930.3 specifies that, in accordance with Public Officers Law section 73(5-a)(b), a Statewide elected official or a head of a civil department may not, directly or indirectly, solicit, accept, or receive any payment made in consideration for any speech given at a public or private conference, convention, meeting, social event, meal, or like gathering.

Part 930.4 sets forth the procedures a covered person and his approving authority are to follow when deterring whether an honorarium may be accepted. The approving authority must retain all completed and signed honorarium approvals for a period of three years from the receipt date of the honorarium and must provide a copy of the honorarium approval to the requesting individual.

Part 930.5 establishes the conditions for the approving authority to approve acceptance of the honorarium by the covered individual, including an analysis for situations where the honorarium is from an interested source. In addition, the approving authority must consider whether performing the service for which the honorarium is offered and accepting the honorarium violate the Code of Ethics in Public Officers Law section 74.

Part 930.6 explains that State agencies are free to adopt or implement rules, regulations, or procedures that are more restrictive than those in the honoraria regulations.

Part 930.7 creates an exemption from the honorarium processes in Parts 930.1 through 930.8 for: (1) a member of the faculty (including an adjunct member of the faculty) at the State University of New York and the City University of New York, including all constituent units (except community colleges of the State University of New York and the independent institutions operating statutory or contract colleges on behalf of the State), and (2) a State officer or employee serving in specified research and scientific titles, provided the service performed by the member of the faculty is within the subject matter of his or her official academic discipline.

Part 930.8 identifies the statutory provision, Executive Law section 94, that authorizes JCOPE to investigate possible violations of Public Officers Law sections 73 and 74 and their corresponding regulations and to take appropriate action as authorized in these statutes.

Part 930.9 states that any individual who is required to file a financial disclosure statement pursuant to section 73-a of the Public Officers Law, including those persons qualifying for an exemption under Part 930.7, must report any honorarium in excess of \$1,000 (or all honoraria the aggregate total of which exceed \$1,000 received from a single offeror) in his or her financial disclosure statement for the applicable year.

4. Costs:

a. costs to regulated parties for implementation and compliance: Minimal.

b. costs to the agency, state and local government: Minimal costs to state and local governments. Minimal administrative costs to the agency during the implementation phase.

c. cost information is based on the fact that there will be minimal costs to regulated parties and state and local government for training staff on changes to the requirements. The cost to the agency is based on the estimated slight increase in staff resources to implement the regulations.

5. Local government mandate: The proposed regulation imposes, at most, minimal new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district or other special district, as they must make themselves aware of any requirements from

the regulation that would apply to honorarium they would give to individuals covered by the honorarium regulations.

6. Paperwork: This regulation may require the preparation of additional forms or paperwork. Such additional paperwork is expected to be minimal.

7. Duplication: This regulation does not duplicate any existing federal, state, or local regulations.

8. Alternatives: JCOPE could promulgate a formal advisory opinion or other guidance. However, amending the existing honoraria regulations and moving the reimbursement for travel expenses language to new Part 931 through the formal rulemaking process provide more clarity to affected parties.

9. Federal standards: These regulations do not exceed any federal minimum standard with regard to a similar subject area.

10. Compliance schedule: Compliance will take effect upon adoption.

#### **Regulatory Flexibility Analysis**

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not submitted with this Notice of Proposed Rulemaking because the proposed rulemaking will not impose any adverse economic impact on small businesses or local governments, nor will it require or impose any reporting, record-keeping or other affirmative acts on the part of these entities for compliance purposes. The New York State Joint Commission on Public Ethics notes that while the honoraria regulations may affect what payments Covered Persons (as defined in the regulations) can accept as honoraria, this does not impose record-keeping requirements or other adverse economic impacts on small businesses and local governments.

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

A Rural Area Flexibility Analysis is not submitted with this Notice of Proposed Rule Making since the proposed rule making will not impose any adverse economic impact on rural areas, nor will compliance require or impose any reporting, record-keeping or other affirmative acts on the part of rural areas. The Joint Commission on Public Ethics makes these findings based on the fact that the honoraria regulations affect what payments Covered Persons (as defined in the regulations) can accept as honoraria. Rural areas are not affected in any way.

#### **Job Impact Statement**

A Job Impact Statement is not submitted with this Notice of Proposed Rule Making because the proposed rulemaking will have no impact on jobs or employment opportunities. The Joint Commission on Public Ethics makes this finding based on the fact that the honoraria regulations apply only to what payments Covered Persons (as defined in the regulations) can accept as honoraria. This regulation does not apply nor relate to economic development or employment opportunities.

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

### **Gift Regulations for Lobbyists and Their Clients**

**I.D. No.** JPE-33-13-00010-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 934 to Title 19 NYCRR.

**Statutory authority:** Legislative Law, art. 1-A, sections 1-c(j) and 1-m; and Executive Law, section 94(9)(c) and (17)(a)

**Subject:** Gift regulations for lobbyists and their clients.

**Purpose:** To regulate and clarify the prohibition on the offering and giving of gifts to public officials by lobbyists and their clients.

**Substance of proposed rule (Full text is posted at the following State website: [www.jcope.ny.gov](http://www.jcope.ny.gov)):** Executive Law section 94(17)(a) directs the Joint Commission on Public Ethics ("JCOPE") to promulgate rules concerning limitations on the receipt of gifts, and section 94(9)(c) authorizes JCOPE to adopt, amend, and rescind rules and regulations to govern JCOPE procedures. Legislative Law Article 1-A, section 1-m prohibits individuals or entities who are required to be listed on a statement of registration (in other words, lobbyists or clients of lobbyists) or the spouses and unemancipated children of such individuals from offering or giving gifts to public officials or their spouses or unemancipated children, except in certain limited circumstances. The definition of a gift and exclusions from the definition are contained in Legislative Law Article 1-A, section 1-c(j).

By setting forth the circumstances in which lobbyists and clients of lobbyists or their family members can offer or give gifts to public officials or their families, these rules provide a comprehensive set of requirements. These regulations provide clear guidance to questions concerning who is covered by these requirements, what qualifies as a gift and what as an exclusion, and what requirements apply to these individuals.

**Text of proposed rule and any required statements and analyses may be obtained from:** Louis Manuta, Associate Counsel, Joint Commission on Public Ethics, 540 Broadway, Albany, NY 12207, (518) 408-3976, email: regs@jcope.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: Executive Law Section 94(17)(a) directs the Joint Commission on Public Ethics ("JCOPE") to promulgate rules concerning limitations on the receipt of gifts, and section 94(9)(c) authorizes JCOPE to adopt, amend, and rescind rules and regulations to govern JCOPE procedures. Legislative Law Article 1-A, section 1-c(j) defines a "gift" and sets forth exclusions from the definition of gift. Legislative Law Article 1-A, section 1-m prohibits, except in certain limited circumstances, individuals or entities who are required to be listed on a statement of registration or certain of their family members (collectively, "lobbyist(s) and client(s) of lobbyist(s)") from offering or giving gifts to public officials or certain of their family members (collectively, "public official(s)").

2. Legislative objectives: To regulate and clarify the prohibition on the offering and giving of gifts to public officials by lobbyists and their clients.

3. Needs and benefits: The proposed rulemaking is necessary to regulate and clarify the prohibition on the offering and giving of gifts to public officials by lobbyists and their clients. The regulations provide clear guidance concerning who is prohibited from offering and giving a gift to a public official, what qualifies as a gift, and who is a public official.

Part 934.1 provides the purpose and effect of the regulations. The Part clarifies that the regulations supersede prior Advisory Opinions issued by predecessor agencies to the extent such Advisory Opinions are inconsistent with the regulations.

Part 934.2 defines key terms in the regulations. It defines a "gift" as an item or service (or anything else of value) with a fair market value of more than ten dollars. This Part also defines an "interested source," which is a person or entity who has certain specified relationships with State persons or entities. This definition is central to a determination in Part 933.3 as to when a gift is presumptively permissible or impermissible. Finally, this Part defines precisely to whom the regulations apply.

Part 934.3 specifies when a gift can be offered or given by a lobbyist or client of a lobbyist to a public official. Such a gift is presumptively impermissible unless certain criteria are met. Specifically, the presumption is overcome (making the gift permissible) only when: (1) it would not be reasonable to infer that the gift was intended to influence the public official; and (2) the gift could not reasonably be expected to influence the public official in the performance of his or her official duties; and (3) it would not be reasonable to infer that the gift was intended as a reward for any official action on the public official's part.

These rules are designed to provide lobbyists and clients of lobbyists with an established structure within which to determine whether the giving or offering of gift to public officials is appropriate.

This Part also sets forth the statutory exception that a lobbyist or client of a lobbyist is permitted to give a gift to officers, members, or directors of boards, commissions, councils, public authorities, or public benefit corporations who receive no compensation or are compensated on a per diem basis as long as the lobbyist or client of a lobbyist does not appear, and does not have any matters pending before, the entity on which the recipient sits.

Finally, this Part discusses the propriety of a lobbyist or client of a lobbyist giving or offering multiple gifts to the same person within a 12-month period. Part 934.3 states that even if each gift might be permissible on its own, the fact that multiple gifts are offered or given may create a reasonable basis to infer that the gifts are, in fact, impermissible. This Part also explains that an impermissible gift does not become permissible if it is directed to a third party, including a charitable organization. This clarifies that lobbyists and clients of lobbyists cannot avoid the proscriptions of the gift regulations by not giving gifts directly to a public official.

Part 934.4 sets forth and clarifies the statutory exclusions from the definition of gifts, which are contained in Legislative Law Article 1-A, section 1-c(j).

Part 934.5 identifies the statutory provision, Executive Law section 94, that authorized JCOPE to investigate possible violations of section 1-m of article 1-A of the Legislative Law and its corresponding regulations and to take appropriate action as authorized in these statutes.

#### 4. Costs:

a. costs to regulated parties for implementation and compliance: Minimal.

b. costs to the agency, state and local government: Minimal costs to state and local governments. Minimal administrative costs to the agency during the implementation phase.

c. cost information is based on the fact that there will be minimal costs to regulated parties and state and local government for training staff on changes to the requirements. The cost to the agency is based on the estimated slight increase in staff resources to implement the regulations.

5. Local government mandate: The proposed regulation imposes, at most, minimal new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district or other special district, as they must make themselves aware of any requirements from the regulation that would apply to gifts they would give to public officials.

6. Paperwork: This regulation may require the preparation of additional forms or paperwork. Such additional paperwork is expected to be minimal.

7. Duplication: This regulation does not duplicate any existing federal, state or local regulations.

8. Alternatives: JCOPE could promulgate a formal advisory opinion or other guidance, but the formal rulemaking process provides more clarity to affected parties.

9. Federal standards: These regulations do not exceed any federal minimum standard with regard to a similar subject area.

10. Compliance schedule: Compliance will take effect upon adoption.

#### **Regulatory Flexibility Analysis**

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not submitted with this Notice of Proposed Rulemaking because the proposed rulemaking will not impose any adverse economic impact on small businesses or local governments, nor will it require or impose any reporting, record-keeping or other affirmative acts on the part of these entities for compliance purposes. The New York State Joint Commission on Public Ethics notes that while the gift regulations may affect what items and services certain small businesses and local governments can offer or give to public officials, this does not impose extensive record-keeping requirements or other adverse economic impacts on these entities.

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

A Rural Area Flexibility Analysis is not submitted with this Notice of Proposed Rule Making since the proposed rule making will not impose any adverse economic impact on rural areas, nor will compliance require or impose any reporting, record-keeping or other affirmative acts on the part of rural areas. The Joint Commission on Public Ethics makes these findings based on the fact that the gift regulations affect what items or services lobbyists and clients of lobbyists can offer or give to public officials. Rural areas are not affected in any way.

#### **Job Impact Statement**

A Job Impact Statement is not submitted with this Notice of Proposed Rule Making because the proposed rulemaking will have no impact on jobs or employment opportunities. The Joint Commission on Public Ethics makes these findings based on the fact that the gift regulations affect what items or services lobbyists and clients of lobbyists can offer or give to public officials. This regulation does not apply nor relate to economic development or employment opportunities.

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

### **Official Activity Expense Payment and Service Payment Regulations**

**I.D. No.** JPE-33-13-00011-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 931 to Title 19 NYCRR.

**Statutory authority:** Executive Law, section 94(9)(c) and (17)(a); and Public Officers Law, sections 73(5) and 74

**Subject:** Official activity expense payment and service payment regulations.

**Purpose:** To provide guidance and procedures regarding the acceptance of officially related travel payments and service payments.

**Text of proposed rule:** Title 19 NYCRR Part 931 is added to read as follows:

*OFFICIAL COMPILATION OF CODES, RULES AND REGULATIONS OF THE STATE OF NEW YORK  
TITLE 19. DEPARTMENT OF STATE  
CHAPTER XX. JOINT COMMISSION ON PUBLIC ETHICS  
PART 931: OFFICIAL ACTIVITY EXPENSE PAYMENTS AND SERVICE PAYMENTS TO THE STATE: LIMITATIONS AND APPROVAL*

*931.1 Purpose and Effect of Regulations.*

*(a) The purpose of these regulations is to establish the procedures and*

conditions for approval and acceptance of payments related to the attendance, registration, travel, lodging, and food for specified New York State officials and employees when such persons are engaged in activities, or are providing services, that are part of their official duties.

(b) The effect of these regulations is to supersede prior regulations and any Advisory Opinions or other guidance issued by predecessor agencies to the Joint Commission on Public Ethics to the extent such Advisory Opinions and guidance are inconsistent with this Part.

#### 931.2 Definitions.

(a) Approving Authority for a State Officer or Employee shall mean the head of a State Agency or appointing authority or his or her appropriate designee. In the case of a Statewide Elected Official and the head of a State Agency, it shall mean the New York State Joint Commission on Public Ethics.

(b) Commission shall mean the New York State Joint Commission on Public Ethics.

(c) Covered Person shall mean:

(1) A State Officer or Employee as defined in subdivision (l) of this section;

(2) A Statewide Elected Officials as defined in subdivision (m) of this section.

(d) Interested Source. The term Interested Source shall mean any person or entity, on his or her own behalf or on behalf of an entity, that:

(1) is regulated by, negotiates with, appears before in other than a Ministerial Matter, seeks to contract with or has contracts with, or does other business with: (i) the Covered Person, in his or her official capacity; (ii) the State Agency with which the Covered Person is employed or affiliated; or (iii) any other State Agency when the Covered Person's agency is to receive the benefits of the contract; or

(2) is required to be listed on a statement of registration pursuant to § 1-e(a)(1) of article 1-A of the Legislative Law and lobbies or attempts to influence actions, decisions, or policies of the State Agency with which the Covered Person is employed or affiliated; or

(3) is the spouse or unemancipated child of any individual satisfying the requirements of section 931.2(d)(2); or

(4) is involved in any action or proceeding, in which administrative and judicial remedies thereto have not been exhausted, and which is adverse to either: (i) the Covered Person in his or her official capacity; or (ii) the State Agency with which the Covered Person is employed or affiliated; or

(5) has received or applied for funds at any time during the previous 12 months up to and including the date of the proposed or actual receipt of the item or service from either: (i) the Covered Person in his or her official capacity; or (ii) the State Agency with which the Covered Person is employed or affiliated.

(e) Ministerial Matter shall mean an administrative act carried out in a prescribed manner not allowing for substantial personal discretion.

(f) Official Activity shall mean a Covered Person's attendance or Service at a meeting, conference, seminar, convention, or professional program that is part of his or her official duties and benefits the Covered Person's State Agency.

(g) Official Activity Expense Payment shall mean a payment or reimbursement for the cost of attendance, registration, travel, food, or lodging related to a Covered Person's Official Activity as defined in subdivision (f) of this section. Official Activity Expense Payment does not include (1) any payment or reimbursement for such costs when they have been bargained for by a State Agency, or (2) a Service Payment.

(h) Official Activity Approval shall mean a completed and signed record created by the Approving Authority in accordance with section 931.3(c) of this Part.

(i) Service shall mean any action or service performed by a Covered Person. Such action may include, but is not limited to, delivering a speech, writing, or publishing an article, or making a presentation.

(j) Service Payment shall mean any payment of money made in consideration for a Service provided.

(k) State Agency shall mean any civil department; State department; or division, board, commission, or bureau of any State department or civil department; any public benefit corporation, public authority, or commission at least one of whose members is appointed by the Governor. State Agency shall also include the State University of New York or the City University of New York, including all their constituent units except (1) community colleges of the State University of New York and (2) the independent institutions operating statutory or contract colleges on behalf of the State.

(l) State Officer(s) or Employee(s) shall mean:

(1) Statewide Elected Officials;

(2) Heads of civil departments and State departments and their respective deputies and assistants other than members of the board of regents of the university of the State of New York who receive no compensation or are compensated on a per diem basis;

(3) Officers and employees of statewide elected officials;

(4) Officers and employees of state departments, boards, bureaus, divisions, commissions, councils, or other State Agencies other than officers of such boards, commissions or councils who receive no compensation or are compensated on a per diem basis;

(5) Employees of public authorities (other than multi-state authorities), public benefit corporations, and commissions at least one of whose members of such public authorities, public benefit corporations, and commissions is appointed by the governor; and

(6) Members or directors of public authorities (other than multi-state authorities), public benefit corporations, and commissions identified in section 931.2(l)(5) who receive compensation other than on a per diem basis.

(m) Statewide Elected Officials shall mean the Governor, Lieutenant Governor, Comptroller, or Attorney General.

#### 931.3 Approval Procedures.

(a) An Official Activity Expense Payment or a Service Payment must be approved by the Covered Person's Approving Authority in accordance with this Part.

(b) Within a reasonable period of time prior to engaging in the Official Activity, a Covered Person shall submit to his or her Approving Authority a written request to approve an Official Activity Expense Payment or Service Payment.

(c) The Approving Authority shall review a request for an Official Activity Expense Payment or Service Payment in accordance with the procedures and conditions set forth in section 931.3 and 931.4 of this Part. If approved, the Official Activity Approval shall contain the information set forth in (1) through (5) of this subdivision:

(1) The name of the Covered Person to whom, or on behalf of whom, the Official Activity Expense Payment or Service Payment is offered;

(2) Identity of the offeror and nature of the offeror's business;

(3) A detailed description of the Official Activity or Service, including date and location;

(4) The amount of the Official Activity Expense Payment and, where applicable, an itemization of costs for the attendance, registration, travel, lodging, and meals, and the amount of a Service Payment, if any; and

(5) A statement that the Approving Authority has approved the Official Activity Expense Payment and Service Payment, if any, in accordance with the conditions set forth in section 931.4 of this Part.

(d) The Approving Authority shall retain all completed and signed Official Activity Approvals for a period of three years from the date of the Official Activity for which an Official Activity Expense Payment or Service Payment, if any, is offered and shall be made available to the Commission upon its request.

(e) The Approving Authority shall provide the Covered Person with a copy of the Official Activity Approval.

#### 931.4 Conditions for Approval.

(a) An Approving Authority may approve a request for an Official Activity Expense Payment or Service Payment provided the following conditions are met:

(1) The Official Activity Expense Payment or Service Payment covers only the period of time that the Covered Person is reasonably required to be present for such Official Activity.

(2) If the Official Activity Expense Payment or Service Payment is offered by or on behalf of an Interested Source, all of the following criteria must be met:

(i) It is not reasonable, under the circumstances, to infer that the Official Activity Expense Payment or Service Payment was intended to influence the Covered Person in the performance of his or her official duties.

(ii) The Official Activity Expense Payment or Service Payment could not, under the circumstances, reasonably be expected to influence the Covered Person in the performance of his or her official duties.

(iii) The Official Activity Expense Payment or Service Payment is not, under the circumstances, intended as a reward for any official action on his or her part.

(3) The Official Activity Expense Payment, if not made by the offeror, could be lawfully paid by the State Agency in accordance with its travel policy.

(4) The Official Activity Expense Payment is made on behalf of the Covered Person at a rate not greater than the rate at which the State Agency would pay or reimburse the Covered Person under its travel policy.

(5) The Approving Authority determines that the offeror is not being used to conceal that the Official Activity Expense Payment or Service Payment is actually offered or paid by an Interested Source.

(6) The Official Activity and the corresponding Official Activity Expense Payment or Service Payment is consistent with Public Officers § 74.

(b) If a Covered Person's Official Activity includes a Service and an offer for a Service Payment, in connection with such Official Activity, the

*Approving Authority shall approve the Service Payment provided such Official Activity comports with the conditions set forth in section 931.4 of this Part. The Approving Authority shall direct that such Service Payment shall be made directly to the general fund of the State or to such fund as is appropriate for a public authority, public benefit corporation, or commission not funded through State general fund appropriation.*

#### 931.5 Minimum Requirements.

*Nothing contained in this Part shall prohibit any State Agency from adopting or implementing its own rules, regulations, or procedures governing Official Activity Expense Payments for Official Activities that are more restrictive than the requirements of this Part.*

#### 931.6 Enforcement.

*The Commission is authorized pursuant to Executive Law § 94 to investigate possible violations of Public Officers Law § 73 and § 74 and their corresponding regulations and take appropriate action as authorized in these statutes.*

#### 931.7 Reporting.

*Any Covered Person who is required to file a financial disclosure statement pursuant to § 73-a of the Public Officers Law shall report any Official Activity Expense Payment in excess of \$1,000 (or all Official Activity Expense Payments the aggregate total of which exceed \$1,000 received from a single offeror) in his or her statement of financial disclosure for the applicable year.*

**Text of proposed rule and any required statements and analyses may be obtained from:** Louis Manuta, Associate Counsel, Joint Commission on Public Ethics, 540 Broadway, Albany, NY 12207, (518) 408-3976, email: regs@jcope.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: Executive Law section 94(9)(c) generally directs the Joint Commission on Public Ethics (“JCOPE”) to adopt, amend, and rescind rules and regulations to govern JCOPE’s various procedures. Executive Law section 94(17)(a) directs JCOPE to promulgate rules concerning limitations on the receipt of gifts and honoraria by persons subject to its jurisdiction. Public Officers Law section 73(5) prohibits subject persons from soliciting, accepting, or receiving a gift. The Code of Ethics in Public Officers Law section 74 establishes standards intended to prevent the use of an individual’s official position or authority for personal benefit.

2. Legislative objectives: To provide guidance and procedures regarding the acceptance of officially related travel payments and service payments by certain State officers and employees.

3. Needs and benefits: JCOPE’s predecessor agencies created regulations regarding honoraria and payment for officially related travel expenses in Part 930. The proposed rulemaking will clarify these rules by separating the regulations governing honoraria (set forth in Part 930) from the regulations governing payment for officially related travel expenses (proposed herein in Part 931). The regulations set forth in Part 931 govern payments for official activities of specified New York State officials and employees (referred to as “covered person(s)”).

The change in terminology from “travel expenses” to “official activity expense payments and service payments” was made to reflect more accurately the breadth of the regulatory language concerning payments made in connection with a person’s official duties. The new Part 931 establishes the procedures and conditions for approval and acceptance of payments related to the attendance, registration, travel, lodging, and food for specified New York State officials and employees when such persons are engaged in activities or are providing services that are part of their official duties.

Part 931.1 provides the purpose and effect of the regulations.

Part 931.2 defines key terms in the regulations. It defines “official activity” as a covered person’s attendance or service at a meeting, conference, seminar, convention, or professional program that is part of his or her official duties and benefits the covered person’s State agency. The regulations define “service” as any action or service performed by a covered person, including, but is not limited to, delivering a speech, writing, or publishing an article, or making a presentation. This Part also defines an “interested source” as a person or entity who has certain defined relationships with State persons or entities. This definition is central to a determination made, pursuant to Part 931.4, by the individual’s approving authority as to whether an official activity expense payment or service payment can be approved. In the case of most covered persons, the approving authority is the individual’s agency. In the case of statewide elected officials and heads of agencies and certain departments, the approving authority is JCOPE.

Part 931.3 sets forth the procedures a covered person and his approving authority are to follow when determining whether an official activity expense payment or service payment may be accepted. The approving

authority must retain all completed and signed official activity approvals for a period of three years from the date of the official activity and must provide a copy of the official activity expense payment or service payment approval to the requesting individual.

Part 931.4 establishes the conditions for the approving authority to approve acceptance of an official activity expense payment by the covered individual and acceptance of a service payment, including an analysis for situations where the payment is from an interested source. In addition, the approving authority must consider whether performing the official activity and accepting the official activity expense or service payment violates the Code of Ethics in Public Officers Law section 74. This Part also clarifies that an approved service payment is to be directed to the general fund of the State or to such fund as appropriate for a public authority, public benefit corporation, or commission not funded through a State general fund appropriation.

Part 931.5 explains that State agencies are free to adopt or implement rules, regulations, or procedures that are more restrictive than those in the official activity regulations.

Part 931.6 identifies the statutory provision, Executive Law section 94, that authorized JCOPE to investigate possible violations of Public Officers Law sections 73 and 74 and their corresponding regulations and to take appropriate action as authorized in these statutes.

Part 931.7 states that any individual who is required to file a financial disclosure statement pursuant to section 73-a of the Public Officers Law must report any official activity expense payment in excess of \$1,000 (or all official activity expense payments the aggregate total of which exceed \$1,000 received from a single offeror) in his or her financial disclosure statement for the applicable year.

#### 4. Costs:

a. costs to regulated parties for implementation and compliance: Minimal.

b. costs to the agency, state and local government: Minimal costs to state and local governments. Minimal administrative costs to the agency during the implementation phase.

c. cost information is based on the fact that there will be minimal costs to regulated parties and state and local government for training staff on changes to the requirements. The cost to the agency is based on the estimated slight increase in staff resources to implement the regulations.

5. Local government mandate: The proposed regulation imposes, at most, minimal new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district or other special district, as they must make themselves aware of any requirements from the regulation that would apply to official activity expense payments or service payments they would give to individuals covered by the official activity regulations.

6. Paperwork: This regulation may require the preparation of additional forms or paperwork. Such additional paperwork is expected to be minimal.

7. Duplication: This regulation does not duplicate any existing federal, state, or local regulations.

8. Alternatives: JCOPE could promulgate a formal advisory opinion or other guidance. However, amending the existing honoraria regulations in Part 930, moving the reimbursement for travel expenses language of those regulations to a new Part 931, and modifying these regulations to be official activity expense payment and service payment regulations through the formal rulemaking process provide more clarity to affected parties.

9. Federal standards: These regulations do not exceed any federal minimum standard with regard to a similar subject area.

10. Compliance schedule: Compliance will take effect upon adoption.

#### Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not submitted with this Notice of Proposed Rulemaking because the proposed rulemaking will not impose any adverse economic impact on small businesses or local governments, nor will it require or impose any reporting, record-keeping or other affirmative acts on the part of these entities for compliance purposes. The New York State Joint Commission on Public Ethics notes that while the official activity regulations may affect what payments Covered Persons (as defined in the regulations) can accept as an official activity expense payment or service payment, this does not impose record-keeping requirements or other adverse economic impacts on small businesses and local governments.

#### Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not submitted with this Notice of Proposed Rule Making since the proposed rule making will not impose any adverse economic impact on rural areas, nor will compliance require or impose any reporting, record-keeping or other affirmative acts on the part of rural areas. The Joint Commission on Public Ethics makes these findings based on the fact that the official activity regulations affect what payments Covered Persons (as defined in the regulations) can accept as an

official activity expense payment or service payment. Rural areas are not affected in any way.

#### **Job Impact Statement**

A Job Impact Statement is not submitted with this Notice of Proposed Rule Making because the proposed rulemaking will have no impact on jobs or employment opportunities. The Joint Commission on Public Ethics makes this finding based on the fact that the official activity regulations apply only to what payments Covered Persons (as defined in the regulations) can accept as an official activity expense payment or service payment. This regulation does not apply nor relate to economic development or employment opportunities.

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## Office of Mental Health

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### NOTICE OF ADOPTION

#### **Operation of Residential Treatment Facilities for Children and Youth**

**I.D. No.** OMH-23-13-00001-A

**Filing No.** 788

**Filing Date:** 2013-07-29

**Effective Date:** 2013-08-14

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

**Action taken:** Amendment of section 584.5 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.09(b), 31.04(a)(2) and 31.26(b)

**Subject:** Operation of Residential Treatment Facilities for Children and Youth.

**Purpose:** To provide for the temporary increase in capacity of certain facilities for an additional three years.

**Text or summary was published** in the June 5, 2013 issue of the Register, I.D. No. OMH-23-13-00001-P.

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

**Text of rule and any required statements and analyses may be obtained from:** 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.

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## Public Service Commission

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### ERRATUM

A Notice of Proposed Rule Making, I.D. No. PSC-26-13-00011-P (13-T-0235SP1), pertaining to Waiver of 16 NYCRR Sections 86.3(a)(2), (b)(2) and 88.4(b)(4), published in the June 26, 2013 issue of the *State Register* contained an incorrect proposed action. Following is the corrected proposed action.

**Proposed action:** Waiver of certain provisions of 16 NYCRR regarding the application of New York State Electric and Gas Corporation and Niagara Mohawk Power Corporation d/b/a National Grid pursuant to PSC Article VII for a Certificate of Environmental Compatibility and Public Need.

### NOTICE OF ADOPTION

#### **Approval of Petition of UDC Gateway, LLC to Submeter Electricity at 1560 Fulton Street, Brooklyn**

**I.D. No.** PSC-12-13-00008-A

**Filing Date:** 2013-07-25

**Effective Date:** 2013-07-25

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

**Action taken:** On 7/18/13, the PSC adopted an order approving the petition of UDC Gateway, LLC to submeter electricity at 1560 Fulton Street, Brooklyn, 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:** Approval of petition of UDC Gateway, LLC to submeter electricity at 1560 Fulton Street, Brooklyn.

**Purpose:** To approve the petition of UDC Gateway, LLC to submeter electricity at 1560 Fulton Street, Brooklyn.

**Substance of final rule:** The Commission, on July 18, 2013 adopted an order approving the petition of UDC Gateway, LLC to submeter electricity at 1560 Fulton Street, Brooklyn located in the territory of Consolidated Edison Company of New York, Inc., 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:** Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: deborah.swatling@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.

(13-E-0066SA1)

### NOTICE OF ADOPTION

#### **Approving a Waiver of 16 NYCRR Sections 894.1 Through 894.4**

**I.D. No.** PSC-19-13-00010-A

**Filing Date:** 2013-07-24

**Effective Date:** 2013-07-24

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

**Action taken:** On 7/18/13, the PSC adopted an order approving the petition of the Town of Warren to waive 16 NYCRR, sections 894.1 through 894.4 pertaining to the franchising process for the Town of Warren.

**Statutory authority:** Public Service Law, section 216(1)

**Subject:** Approving a waiver of 16 NYCRR sections 894.1 through 894.4.

**Purpose:** To approve a waiver of 16 NYCRR sections 894.1 through 894.4.

**Substance of final rule:** The Commission, on July 18, 2013, adopted an order approving a petition of Town of Warren to waive sections 894.1, 894.2, 894.3 and 894.4 regarding franchising proceedings for the Town of Warren, Herkimer County, 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:** Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: deborah.swatling@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.

(13-V-0165SA1)

### NOTICE OF ADOPTION

#### **Extending the End Date of NYSEG and RG&E's Home Energy Reports Demonstration Program**

**I.D. No.** PSC-20-13-00009-A

**Filing Date:** 2013-07-24

**Effective Date:** 2013-07-24

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

**Action taken:** On 7/18/13, the PSC adopted an order approving the peti-

tion of New York State Electric & Gas Corporation (NYSEG) and Rochester Gas and Electric Corporation (RG&E) extending the date of the Home Energy Reports Demonstration program.

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

**Subject:** Extending the end date of NYSEG and RG&E's Home Energy Reports Demonstration program.

**Purpose:** To extend the end date of NYSEG and RG&E's Home Energy Reports Demonstration program.

**Substance of final rule:** The Commission, on July 18, 2013, adopted an order approving a petition of New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation to extend the end date of the companies Home Energy Reports Demonstration 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:** Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: [deborah.swatling@dps.ny.gov](mailto:deborah.swatling@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.

(07-M-0548SA76)

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

#### Update Pole Attachment Rates

**I.D. No.** PSC-33-13-00025-P

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

**Proposed Action:** The Commission is considering whether to grant, modify or deny a tariff filing by New York State Electric & Gas Corporation to make various revisions to the rates, charges, rules and regulations contained in Schedule for P.S.C. No. 119 — Electricity.

**Statutory authority:** Public Service Law, sections 65 and 66(12)

**Subject:** Update pole attachment rates.

**Purpose:** Tariff filing proposing revisions to update pole attachment rates applicable to cable television system operators.

**Substance of proposed rule:** The Public Service Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by New York State Electric & Gas Corporation to update the pole attachment rental rates applicable to cable television (CATV) system operators to reflect 2012 actual data. The amendments have an effective date of November 1, 2013. The Commission may apply its decision here to other utilities.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact:** Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: [Deborah.Swatling@dps.ny.gov](mailto:Deborah.Swatling@dps.ny.gov)

**Data, views or arguments may be submitted to:** Jeffrey C. Cohen, Acting Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 408-1978, 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.

(13-E-0321SP1)

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

#### Provides Economic Development Assistance to Qualified Business

**I.D. No.** PSC-33-13-00026-P

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

**Proposed Action:** The Public Service Commission is considering to approve or reject, in whole or in part, a proposed revision to Economic Development Programs filed by Central Hudson Gas and Electric Corporation (CHG&E).

**Statutory authority:** Public Service Law, sections 4, 5, 66 and 70

**Subject:** Provides economic development assistance to qualified business.

**Purpose:** Determination of the appropriate revisions to CHG&E's Economic Development Programs.

**Substance of proposed rule:** The Public Service Commission is considering whether to adopt, modify or reject a petition filed by Central Hudson Gas and Electric Corporation (Central Hudson) requesting approval of modifications made to their Economic Development Programs. The modifications were developed to create new economic development opportunities in Central Hudson's territory. Modifications include revising some economic programs and creating a new economic program. The Commission may adopt, reject or modify the petition and address any related matters.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact:** Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: [Deborah.Swatling@dps.ny.gov](mailto:Deborah.Swatling@dps.ny.gov)

**Data, views or arguments may be submitted to:** Jeffrey C. Cohen, Acting Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 408-1978, email: [secretary@dps.ny.gov](mailto:secretary@dps.ny.gov)

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

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

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

(12-M-0192SP2)

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

#### Waive Underground Facility Requirements for New Construction in Residential Subdivisions to Allow for Overhead Electric Lines

**I.D. No.** PSC-33-13-00027-P

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

**Proposed Action:** The Public Service Commission is considering a petition for a waiver of Orange and Rockland Utility's tariff provisions requiring undergrounding of electric lines in the Chapin Lumberland subdivision in the Town of Lumberland, Sullivan County.

**Statutory authority:** Public Service Law, sections 51, 65(1) and 66(1)

**Subject:** Waive underground facility requirements for new construction in residential subdivisions to allow for overhead electric lines.

**Purpose:** Determine whether Chapin Lumberland, LLC subdivision will be allowed overhead electric distribution and service lines.

**Substance of proposed rule:** The Public Service Commission is considering whether to approve, modify or reject a petition filed by Chapin Lumberland, LLC requesting a waiver, for Chapin Lumberland, of Orange and Rockland Utilities, Inc.'s tariff provision requiring undergrounding of electric service. The petition states that rocky conditions in the subdivision will have a prohibitive cost to underground the electric facilities and a waiver would allow for the installation of overhead facilities. The petition notes that New York State Electric and Gas Corporation (NYSEG) had installed overhead electric facilities in the adjacent portion of the Chapin subdivision, located in the Town of Bethel that NYSEG completed and currently serves. The Commission may accept, reject, or modify the waiver request.

**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:** Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: [Deborah.Swatling@dps.ny.gov](mailto:Deborah.Swatling@dps.ny.gov)

**Data, views or arguments may be submitted to:** Jeffrey C. Cohen, Acting Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 408-1978, 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.

(13-E-0315SP1)

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

**Revise Applicability Provisions and Make Clarifying Changes to Certain Riders and Service Classification (SC) No. 4**

**I.D. No.** PSC-33-13-00028-P

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

**Proposed Action:** The Commission is considering whether to grant, modify or deny a tariff filing by Niagara Mohawk Power Corporation d/b/a National Grid to make various revisions to the rates, charges, rules and regulations contained in P.S.C. No. 220 — Electricity.

**Statutory authority:** Public Service Law, sections 65 and 66(12)

**Subject:** Revise applicability provisions and make clarifying changes to certain riders and Service Classification (SC) No. 4.

**Purpose:** To revise applicability provisions and make clarifying changes to certain riders and SC No. 4.

**Substance of proposed rule:** The Public Service Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by Niagara Mohawk Power Corporation d/b/a National Grid to revise the applicability provisions of Rule No. 34.3 — Empire Zone Rider (EZR) and Rule No. 34.7 — Excelsior Jobs Program (EJP) to include Service Classification (SC) No. 4 (Untransformed Service to Certain Customers Taking Power from Projects of the New York Power Authority) to the list of customers who qualify to receive EZR and EJP service and to make clarifying revisions to EZR, EJP, and SC- 4. The amendments have an effective date of November 1, 2013. The Commission may apply its decision here to other utilities.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact:** Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: Deborah.Swatling@dps.ny.gov

**Data, views or arguments may be submitted to:** Jeffrey C. Cohen, Acting Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 408-1978, email: secretary@dps.ny.gov

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

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

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

(13-E-0337SP1)

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

**Deferral of Incremental Costs Associated with the Restoration of Steam Service Following Superstorm Sandy**

**I.D. No.** PSC-33-13-00029-P

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

**Proposed Action:** The Commission is considering a petition filed by Consolidated Edison Company of New York, Inc. (Con Edison) to defer incremental costs associated with the restoration of steam service following Superstorm Sandy.

**Statutory authority:** Public Service Law, sections 5 and 80(7)

**Subject:** Deferral of incremental costs associated with the restoration of steam service following Superstorm Sandy.

**Purpose:** To consider a petition by Con Edison to defer certain incremental steam system restoration costs relating to Superstorm Sandy.

**Substance of proposed rule:** The Commission is considering a petition filed by Consolidated Edison Company of New York, Inc. (Con Edison) to defer incremental costs associated with the restoration of steam service following Superstorm Sandy. Consolidated Edison Company of New York, Inc. has requested authorization to defer, with carrying charges, \$14.2 million in incremental costs related to the restoration of the steam system in New York City in the aftermath of Superstorm Sandy, until rates are reset in the Company's steam rate proceeding (Case 13-S-0032) to reflect the recovery of these costs. The \$14.2 million is comprised of an estimated \$13.7 million in operation and maintenance expenses and \$0.5 million of carrying charges associated with capital expenditures. The Company proposes to defer such costs and the associated deferred income taxes as a regulatory asset in Account 182.4. The Commission may approve, reject, or modify Con Edison's petition, in whole or in part.

**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:** Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: Deborah.Swatling@dps.ny.gov

**Data, views or arguments may be submitted to:** Jeffrey C. Cohen, Acting Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 408-1978, email: secretary@dps.ny.gov

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

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

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

(13-S-0195SP1)

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

**Issuance of Securities**

**I.D. No.** PSC-33-13-00030-P

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

**Proposed Action:** The Commission is considering whether to approve, reject or modify, in whole or in part, a petition filed by Orange and Rockland Utilities, Inc. requesting permission to issue and sell securities.

**Statutory authority:** Public Service Law, section 69

**Subject:** Issuance of securities.

**Purpose:** To permit the Company to issue and sell securities.

**Substance of proposed rule:**

On July 12, 2013, Orange and Rockland Utilities, Inc (Company) submitted a petition (Petition) requesting Commission approval to issue and sell securities. The proposed agency action would permit the Company (i) to issue and sell not to exceed \$305 million aggregate principal amount of unsecured debt obligations of the Company having a maturity of more than one year for purposes of reimbursement of the Company's treasury for moneys expended for capital purposes (ii) to enter into or continue one or more revolving credit agreements and to issue and sell not to exceed \$250 million aggregate principal amount at any time outstanding of unsecured debt obligations having a maturity of more than one year pursuant to the Revolver(s), such issuance and sale to be for purposes of reimbursement of the Company's treasury for moneys expended for capital purposes and (iii) to issue and sell an aggregate amount of unsecured debt obligations having a maturity of more than one year (the "Refunding Debt" (a) not to exceed \$125 million aggregate principal amount of outstanding debt securities of the Company to be refunded with the Refunding Debt ("Old Debt") and (b) the costs of such refunding (including any premium), the net proceeds from the sale of which are to be applied solely and exclusively to refund Old Debt. The Commission may decide to approve, reject or modify the Petition, in whole or in part. The Commission may also address related matters.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact:** Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: Deborah.Swatling@dps.ny.gov

**Data, views or arguments may be submitted to:** Jeffrey C. Cohen, Acting Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 408-1978, email: secretary@dps.ny.gov

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

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

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

(13-M-0304SP1)

## State University of New York

### NOTICE OF EXPIRATION

The following notice has expired and cannot be reconsidered unless the State University of New York publishes a new notice of proposed rule making in the *NYS Register*.

**State Basic Financial Assistance for Operating Expenses of Community Colleges Under the Program of the State & City Universities**

I.D. No.	Proposed	Expiration Date
SUN-30-12-00014-EP	July 25, 2012	July 25, 2013

## Office of Victim Services

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

#### Necessary Updates to Office Regulations

**I.D. No.** OVS-33-13-00021-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 525.3(d), 525.4, 525.12(g), (h), (i), 525.15(b), (c), 525.17(a) and 525.23(c) and (g) of Title 9 NYCRR.

**Statutory authority:** Executive Law, section 623; L. 2012, chs. 39 and 233; L. 2013, ch. 119

**Subject:** Necessary updates to Office regulations.

**Purpose:** To enact necessary updates pursuant to law, recent chapters of the Laws of 2012 and 2013 and a change of address.

**Text of proposed rule:** Paragraph (1) of subdivision (d) of section 525.3 is amended to read as follows:

(1) Notwithstanding the provisions of subdivision (d) above, for all new claims received after the adoption of this rule (*effective date Aug. 15, 2007*), the office may authorize the reimbursement of expenses associated with the provision of home-care services rendered by a non-licensed caregiver who is a family member when:

(i) the victim is under 18 years of age;

(ii) the claimant submits a physician's statement clearly stating that in the physician's opinion the victim will benefit from such home care by a non-licensed caregiver; and

(iii) the authorization is for no more than a three month period.

Family members who perform such services shall be reimbursed at a rate no greater than the current state minimum wage for up to 40 hours per week.

Section 525.4 is amended to read as follows:

525.4 Filing of claims. In addition to the provisions contained in section 625 of the Executive Law:

(a) Claim applications shall be filed with the office in person, by mail, or electronically via facsimile, electronic mail or any other manner the office may make available for the filing of claims pursuant to subdivision one of section 305 of the New York State Technology Law. (1) If mailed, such application shall be directed to:

Office of Victim Services  
[One Columbia Circle, Suite 200

Albany, New York 12203]

*Alfred E. Smith State Office Building  
80 South Swan Street, 2nd Floor  
Albany, NY 12210-8002*

(2) Emergency award claim applications may be sent via facsimile, to a number the office may make available.

(b) If a person is eligible to file a claim for loss of earnings as a parent or guardian during the period of hospitalization of a child victim under the age of eighteen for injuries sustained as a direct result of a crime, all other requests for the reimbursement of related, out-of-pocket expenses must be submitted together under the name of one, eligible parent or guardian. Should more than one parent or guardian be responsible for the child victim, the office shall determine all other requests for reimbursement of such expenses under the first, eligible claim accepted by the office. All claims received for loss of earnings as a parent or guardian during the period of hospitalization of the same child victim under the age of eighteen for injuries sustained as a direct result of a crime shall be cross-referenced to ensure no duplicate awards are made.

(c) *If a person is eligible to file a claim for crime scene clean-up as a surviving spouse, child or stepchild of a victim of a crime who died as a direct result of such crime and where such crime occurred in the residence shared by such family member or members and the victim, out-of-pocket expenses must be submitted together under the name of one family member who is eligible pursuant to paragraph (k) of subdivision (1) of section 624 of the Executive Law. Should more than one eligible family member file a claim requesting reimbursement for crime scene clean-up, the office shall determine all other requests for reimbursement of such expenses under the first, eligible claim accepted by the office. If the child or stepchild of a victim is a minor, the claimant filing on behalf of the child or stepchild must also be responsible for the residence shared by such family member and the victim. All claims received for crime scene clean-up as a surviving spouse, child or stepchild of a victim of a crime who died as a direct result of such crime and where such crime occurred in the residence shared by such family member or members and the victim shall be cross-referenced to ensure no duplicate awards are made.*

(d) If a claim application is received complete, it shall be accepted and delivered to the Director for assignment pursuant to subdivision (a) of section 525.5 of this Part.

[(d)] (e) If a claim application is received incomplete, the office shall: (1) if submitted pursuant to subdivision (a) of section 525.20 of this Part, return the claim application to the Victim Assistance Program to complete the application, (2) if submitted directly by the claimant without any Victim Assistance Program indicated on the application, assign a staff person to obtain the necessary information from the claimant or other parties to complete the application, or (3) return it to the claimant to obtain the necessary information to complete the application.

Paragraph (7) of subdivision (g) of section 525.12 is amended to read as follows:

(7) An award for crime-related counseling expenses may be made to: (i) certain family members, pursuant to paragraph b of subdivision 1 of section 624 of the Executive Law, including spouses, grandparents, parents, stepparents, *guardians, brothers, sisters, stepbrothers, stepsisters, children or stepchildren of homicide victims, if otherwise eligible and as a result of the death of such victim, (ii) certain family members, pursuant to paragraph h of subdivision 1 of section 624 of the Executive Law, including parents, stepparents, grandparents, guardians, brothers, sisters, stepbrothers or stepsisters of child victims, if otherwise eligible and as a result of the victimization of such child victims, and (iii) child victims, pursuant to subdivision 17 of section 631 of the Executive Law, if otherwise eligible and as a result of having witnessed a crime.*

Subparagraph (i) of paragraph (4) of subdivision (h) of section 525.12 is amended to read as follows:

(i) To establish eligibility, a licensed provider shall submit a completed Claim Form as defined in section 525.12(h)(1)(iv) and attach an itemized bill indicating the relevant forensic examination related current procedural terminology (CPT) codes associated with each service provided to the office at the address below:

Office of Victim Services  
[One Columbia Circle, Suite 200  
Albany, NY 12203]  
*Alfred E. Smith State Office Building  
80 South Swan Street, 2nd Floor  
Albany, NY 12210-8002*

Subparagraph (iv) of paragraph (5) of subdivision (h) of section 525.12 is amended to read as follows:

(iv) Pharmaceuticals directly related to the forensic examination including STD, pregnancy, initial HIV prophylaxis up to a [three] *seven* day supply and hepatitis prophylaxis.

Paragraph (1) of subdivision (i) of section 525.12 is amended to read as follows:

(1) *The office may award loss of earnings or support in accordance with this Part, subdivision 3 of section 631 of the Executive Law and subject to any applicable maximum award limitations pursuant to Article 22 of the Executive Law, for such amounts that can be verified to the satisfaction of the office. (i) Any award for loss of earnings shall include time which an employee: (i) was absent from work and not paid for the date or time off; (ii) was absent from work and utilized accumulated paid leave available to him or her by the employer; or (iii) had taken leave of employment without pay. (ii) Except as provided in subparagraph (iii) of this paragraph, any award for loss of earnings or support shall be limited to the victim's income which has been reported to an appropriate taxing authority. (iii) If during an investigation of a claim the office determines that such income is not subject to taxation, the office shall request alternative information to verify such income.*

Paragraph (1) of subdivision (b) of section 525.15 is amended to read as follows:

(1) If mailed, such notification shall be directed to:

Office of Victim Services  
[One Columbia Circle, Suite 200  
Albany, New York 12203]  
*Alfred E. Smith State Office Building*  
80 South Swan Street, 2nd Floor  
Albany, NY 12210-8002

Subdivision (c) of section 525.15 is amended to read as follows:

(c) A claimant may request a copy of part or all of their record by letter, indicating the claim number and containing an original signature of the claimant. Such request shall be directed to:

Legal Unit  
Office of Victim Services  
[One Columbia Circle, Suite 200  
Albany, New York 12203]  
*Alfred E. Smith State Office Building*  
80 South Swan Street, 2nd Floor  
Albany, NY 12210-8002

Subdivision (a) of section 525.17 is amended to read as follows:

(a) A request for a further reduction of the amount of the State's lien pursuant to subdivision 2 of section 634 of the Executive Law, shall be submitted by the claimant or the claimant's attorney in writing to the office at the following address:

Legal Unit  
Office of Victim Services  
[One Columbia Circle, Suite 200  
Albany, New York 12206]  
*Alfred E. Smith State Office Building*  
80 South Swan Street, 2nd Floor  
Albany, NY 12210-8002

Subdivision (c) of section 525.23 is amended to read as follows:

(c) Location. Records shall be available for public inspection and copying at:

New York State Office of Victim Services  
[One Columbia Circle, Suite 200  
Albany, New York 12203]  
*Alfred E. Smith State Office Building*  
80 South Swan Street, 2nd Floor  
Albany, NY 12210-8002

Paragraph (3) of subdivision (g) of section 525.23 is amended to read as follows:

(3) The Director or his or her designee shall determine appeals regarding denial of access to records under the Freedom of Information Law. Such appeal shall be directed to:

Director  
New York State Office of Victim Services  
[One Columbia Circle, Suite 200  
Albany, New York 12203]  
*Alfred E. Smith State Office Building*  
80 South Swan Street, 2nd Floor  
Albany, NY 12210-8002

**Text of proposed rule and any required statements and analyses may be obtained from:** John Watson, General Counsel, Office of Victim Services, AE Smith Office Bldg., 80 S. Swan Street, 2nd Floor, Albany, NY 12210, (518) 457-8066, email: john.watson@ovs.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: New York State Executive Law, section 623 grants the Office of Victim Services (OVS or Office) the authority to adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions and purposes of Article 22 of the Executive Law.

The recent relocation of the OVS's Albany office necessitates several address changes in its regulations. Substantively, Chapter 233 of the Laws of 2012 amended New York State Executive Law, section 624(1)(b) adding guardian, brother, sister, stepbrother and stepsister to those family members of a homicide victim eligible for counseling reimbursement from the Office. Chapter 39 of the Laws of 2012 amended New York State Public Health Law, section 2805-i(1)(c) and Executive Law, section 631(13) relating to a seven-day starter pack of HIV post-exposure prophylaxis given to victims of sexual assaults. Chapter 119 of the Laws of 2013 amended New York State Executive Law, sections 624(a) and 631 adding a surviving spouse, child or stepchild of a victim of a crime who dies as a result of a crime as a person eligible for the reimbursement of crime scene clean-up. New York State Executive Law, section 631(3) provides that the Office may only make an award for loss of earnings in an amount equal to the actual loss sustained.

2. Legislative objectives: By enacting the New York State Executive Law, sections 624 and 631, the Legislature sought to ensure that the Office could reimburse claims for certain family members of homicide victims, certain costs related to sexual assault examinations and a victim's loss of earnings.

3. Needs and benefits: The New York State Office of Victims Services' Albany office was recently relocated, necessitating several address changes in its regulations. Substantively, Chapter 233 of the Laws of 2012 amended New York State Executive Law, section 624(1)(b) adding guardian, brother, sister, stepbrother and stepsister to those family members of a homicide victim eligible for counseling reimbursement from the Office. Chapter 39 of the Laws of 2012 amended New York State Public Health Law, section 2805-i(1)(c) and Executive Law, section 631(13) relating to a seven-day starter pack of HIV post-exposure prophylaxis given to victims of sexual assaults. Chapter 119 of the Laws of 2013 amended New York State Executive Law, sections 624(a) and 631 adding a surviving spouse, child or stepchild of a victim of a crime who dies as a result of a crime as a person eligible for the reimbursement of crime scene clean-up. New York State Executive Law, section 631(3) provides that the Office may only make an award for loss of earnings in an amount equal to the actual loss sustained. These proposed regulatory changes would update the Albany office's address and make the changes necessary to conform the OVS's regulations to its enacting statute. These will allow claimants or potential claimants to be aware of who is eligible and what expenses the Office may consider reimbursable under its statutory authority.

4. Costs: a. Costs to regulated parties. It is not expected that the proposed regulations would impose any additional costs to the agency or State than the recent, Chapter laws would otherwise impose. The interpretation of New York State Executive Law, section 631(3) and the conforming regulatory changes should prove to create operational efficiencies within the Office and save the State money.

b. Costs to local governments. These proposed regulations do not apply to local governments and would not impose any additional costs on local governments.

c. Costs to private regulated parties. The proposed regulations do not apply to private regulated parties and would not impose any additional costs on private regulated parties.

5. Local government mandates: These proposed regulations do not impose any program, service duty or responsibility upon any local government.

6. Paperwork: These proposed regulations do not require any additional paperwork requirements more than is currently required of the Office's claimants.

7. Duplication: These proposed regulations do not duplicate any other existing state or federal requirements.

8. Alternatives: The changes to the Albany office address and the conforming changes as a result of the 2012 and 2013 Chapter Laws are required and there are no alternatives. It was the past practice of the Crime Victims Board (OVS' predecessor) to reimburse some claimants for loss of earnings notwithstanding the fact that they may have received salary for such lost time from their employer. It is the determination of the OVS that this was an overly-broad, incorrect interpretation of the statute which, in its application, would lead to the agency treating claimants with different employers unequally. This past practice, codified in the current regulations, includes in the calculation of one's loss of earnings any time they were absent from work and utilized accumulated, paid leave. Accumulated leave was interpreted as something an employee "earned" from week to week. This resulted in these claimants receiving double-pay for the time lost. Additionally, not all employers offer such accumulated leave and their employees would be denied loss of earnings by the agency. Besides being required by statute, this regulatory change is necessary to treat employees, no matter how their employer provides them with paid leave, equally. Finally, it is current OVS practice, carried-over from the past practice of the Crime Victims Board (OVS' predecessor) to reimburse claimants for loss of earnings or support notwithstanding the fact that they

had not appropriately reported their income to an appropriate taxing authority. The OVS would like to limit such awards to the victim's income which was properly and lawfully reported to their appropriate taxing authority. As a government entity with a close relationship to law enforcement, the OVS does not feel it is proper to make any compensation award to a person based upon illegal activity. In addition, the supporting documentation related to such a request is unreliable and ripe for fraudulent submissions. Limiting LOE/LOS awards to reported income is an important step to prevent such fraud.

9. Federal standards: The OVS is funded, in part by the federal Victims of Crime Act (VOCA). The statute which determines how state crime victim compensation programs may determine awards are enumerated in 42 USCS 10602. This rule change does not contradict any of the federal provisions of section 10602 and each change contained therein is permissible under such provisions.

10. Compliance schedule: The regulations will be effective on the date they are adopted.

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

The Office of Victim Services projects there will be no adverse economic impact or reporting, recordkeeping or other compliance requirements on small businesses or local governments in the State of New York as a result of this proposed rule change. This proposed rule change is simply designed to update the Office's Albany address and conform its regulations to its enacting statute. Since nothing in this proposed rule change will create any adverse impacts on any small businesses or local governments in the state, no further steps were needed to ascertain these facts and none were taken. As apparent from the nature and purpose of this proposed rule change, a full Regulatory Flexibility Analysis is not required and therefore one has not been prepared.

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

The Office of Victim Services projects there will be no adverse impact on rural areas or reporting, recordkeeping or other compliance requirements on public or private entities in rural areas in the State of New York as a result of this proposed rule change. This proposed rule change is simply designed to update the Office's Albany address and conform its regulations to its enacting statute. Since nothing in this proposed rule change will create any adverse impacts on any public or private entities in rural areas in the state, no further steps were needed to ascertain these facts and none were taken. As apparent from the nature and purpose of this proposed rule change, a full Rural Area Flexibility Analysis is not required and therefore one has not been prepared.

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

The Office of Victim Services projects there will be no adverse impact on jobs or employment opportunities in the State of New York as a result of this proposed rule change. This proposed rule change is simply designed to update the Office's Albany address and conform its regulations to its enacting statute. Since nothing in this proposed rule change will create any adverse impacts on jobs or employment opportunities in the state, no further steps were needed to ascertain these facts and none were taken. As apparent from the nature and purpose of this proposed rule change, a full Job Impact Statement is not required and therefore one has not been prepared.