RULE MAKING ACTIVITIES

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

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

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

Department of Corrections and Community Supervision

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Parole Board Decision-Making

I.D. No. CCS-51-13-00013-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 8001; amendment of sections 8002.1(a), (b), 8002.2(a) and 8002.3 of Title 9 NYCRR.

Statutory authority: Executive Law, section 59-c

Subject: Parole Board decision-making.

Purpose: To reduce to regulation the Parole Board's written procedures for parole release decision-making.

Substance of proposed rule (Full text is posted at the following State website:doccs.ny.gov/RulesRegs/index.html): On March 31, 2011, the Division of Parole and Department of Correctional Services were merged into one State agency pursuant to Chapter 62 of the Laws of 2011, Part C, subpart A. Contained within that legislation were various amendments to Article 12-b of the Executive Law. In particular, Executive Law §§ 259-c(4) and 259-i(1) were amended to remove the requirement that the Board of Parole utilize guidelines for setting minimum periods of imprisonment and making parole release decisions. In light of these changes to the Executive Law, the Board is repealing 9 N.Y.C.R.R. Part 8001 in it entirety, for that part is devoted to the use and application of the no longer required guidelines.

In addition, the amendment to Executive Law § 259-c(4) called for the Parole Board to establish written procedures for its use in making parole release decisions, and that such procedures incorporate risk and needs principles to measure the rehabilitation of inmates, their likelihood of success if released and assist the Board in making its release decisions. By memorandum dated October 5, 2011, former Parole Board Chairwoman Andrea W. Evans outlined this change to section 259(4) of the Executive Law; since that time, the memorandum has served as the written procedures of the Board under Executive Law § 259-c(4). The proposed rule making memorializes in regulation the Parole Board's written procedures of October 5, 2011 under Executive Law § 259-c(4).

Section 8002.1 of 9 N.Y.C.R.R. is being amended to make technical changes warranted as a result of the merger of the former Department of Correctional Services and the Division of Parole. This section continues to specify which of the two standards the Board must apply when making its release decision, as well as the standards themselves. As before, which standard the Board applies depends upon the inmate being granted a certificate of earned eligibility pursuant to Correction Law § 805.

Section 8002.2 of 9 N.Y.C.R.R. is being amended to make technical changes warranted as a result of the merger of the former Department of Correctional Services and the Division of Parole. This section continues to provide for the scheduling of a parole release interview within the statutorily prescribed time frame.

Section 8002.3 of 9 N.Y.C.R.R. is being amended so that consistent with Executive Law § 259-i(2)(c)(A), the regulation sets forth within one subdivision all of the statutory factors the Board must consider when making a release decision. Included within these factors to be considered are the case plan, as well as the risk and needs assessment, that staff of the Department of Corrections and Community Supervision may have prepared for the inmate.

Text of proposed rule and any required statements and analyses may be obtained from: Terrence X. Tracy, Counsel, Board of Parole, Dept. of Corrections & Community Supervision, Parole Board, The Harriman State Campus -Bldg. #2, 1220 Washington Ave., Albany, N.Y. 12226-2050, (518) 473-5671, email: terrence.tracy@doccs.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: Section 259-c(4) of the Executive Law authorizes the Board of Parole to establish written procedures for its use in making parole decisions. Section 259-c(11) authorizes the Board to make rules for the conduct of its work and for the Chairman to file the same with the Secretary of State.

2. Legislative Objectives: On March 31, 2011, the Division of Parole and Department of Correctional Services were merged into one State agency pursuant to Chapter 62 of the Laws of 2011, Part C, subpart A. Contained within that legislation were amendments to Article 12-b of the Executive Law. Among those amendments was a change to Executive Law § 259-c(4) requiring the Board of Parole to:

> establish written procedures for its use in making parole decisions as required by law. Such written procedures shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the Board, the likelihood of success of such persons upon release, and assist members of the State Board of Parole in determining which inmates may be released to parole supervision.

See Chapter 62 of the Laws of 2011, Part C, subpart A, § 38-b. The amendment to Executive Law § 259-c(4) became effective October 1, 2011. See Chapter 62 of the Laws of 2011, Part C, subpart A, § 49-f. The proposed amendments to certain sections of Title 9 N.Y.C.R.R. Part 8002 reduce to regulation the Parole Board's written procedures for making parole decisions as required by law.

In addition to the above-described amendment of Executive Law § 259-c(4), section 38-f of Chapter 62 of the Laws of 2011, Part C, subpart A re-

pealed Executive Law § 259-i(1). That portion of the former Executive Law conferred upon the Parole Board the authority to establish an inmate's minimum period of imprisonment and prescribed the manner for doing so. As part of that process, the Board was to make use of "guidelines" to structure its decision making; the guidelines are set forth in Title 9 N.Y.C.R.R. Part 8001. Because the Board is no longer statutorily authorized to establish an inmate's minimum period of imprisonment and the Executive Law no longer requires guidelines for both that function, as well as the Board's parole release decision-making function, Title 9 N.Y.C.R.R. Part 8001 is being repealed in its entirety through this proposed rule-making.

3. Needs and Benefits: Section 259-c(4) requires the Parole Board to establish written procedures for its parole release decision making. By memorandum dated October 5, 2011, former Parole Board Chairwoman Andrea W. Evans outlined the change made to Executive Law § 259-c(4). In addition, Chairwoman Evans' memorandum instructed the Parole Board as to how it should proceed in light of this legislative change when assessing the appropriateness of granting an inmate parole pursuant to section 259-i of the Executive Law. Since October 5, 2011, the memorandum of former Chairwoman Evans has served as the written procedures of the Board under section 259-c(4) of the Executive Law. Through this proposed rule making, the Board is memorializing in regulation the written procedures of October 5, 2011.

In addition, with the repeal of Executive Law § 259-i(1), the Parole Board no longer requires regulations or guidelines for the purpose of setting an inmate's minimum period of imprisonment. Accordingly, there is no longer any justification for Title 9 N.Y.C.R.R Part 8001 as a body of regulations to govern the decision making process of the Board. The proposed rule making will bring the Parole Board's regulations into conformity with the 2011 amendments to Article 12-b of the Executive Law and its current practices thereunder.

4. Costs: The proposed rule making will not impose any additional costs.

5. Local Government Mandates: The proposed rule making does not impose any new mandates or legal obligations on local governments.

6. Paperwork: The proposed rule making will not require additional paperwork.

7. Duplication: The proposed rule making will not duplicate any existing State or federal rule.

8. Alternatives: The approach to parole decision making as reflected by the proposed rule making has been deemed appropriate by courts that have reviewed decisions of the Parole Board made after October 1, 2011, the effective date of the amendments made to section 259-c(4) of the Executive Law.

9. Federal Standards: There are no federal standards governing the subject matter of the proposed rulemaking.

10. Compliance Schedule: The proposed rule making will published by a notice of proposed rule making and the text of the rule shall be available on the website maintained by the Department of Corrections and Community Supervision; a 45 day comment period shall follow publication of the notice of proposed rule making. The proposed rule making shall be effective upon the filing of a notice of adoption.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Business and Local Government is not being submitted with this notice, for the proposed rule changes will have no adverse impact upon small businesses and local governments, nor do the rule changes impose any reporting, record keeping or other compliance requirements upon small businesses and local governments. Small businesses and local governments have no role in the Parole Board's parole release decision-making function. The proposed rule making with only affect the Parole Board's decision-making practices for inmates confined in State correctional facilities.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not being submitted with this notice, for the proposed rules will have no adverse impact upon rural areas, nor do the proposed rules impose any reporting, record keeping or other compliance requirements upon rural areas. The proposed rules will only affect the Parole Board's decision-making practices for inmates confined in State correctional facilities.

Job Impact Statement

A Job Impact Statement is not being submitted with this notice, for the proposed rules will have no adverse impact upon jobs or employment opportunities, nor do the proposed rules impose any reporting, record keeping or other compliance requirements upon employers. The proposed rules only affect the decision-making practices of the Parole Board for inmates confined in State correctional facilities.

Department of Environmental Conservation

NOTICE OF ADOPTION

CO_2 Budget Trading Program

I.D. No. ENV-28-13-00025-A
Filing No. 1167
Filing Date: 2013-11-27
Effective Date: 2014-01-01

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

Action taken: Amendment of Parts 200 and 242 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101, 1-0303, 3-0301, 19-0103, 19-0105, 19-0107, 19-0301, 19-0303, 19-0305, 71-2103 and 71-2105

Subject: CO_2 Budget Trading Program.

Purpose: To lower the emissions cap established under Part 242 starting in 2014, declining by 2.5 percent per year through 2020.

Substance of final rule: The New York State CO_2 Budget Trading Program, 6 NYCRR Part 242 (CO_2 Budget Trading Program or Part 242), is designed to stabilize and then reduce anthropogenic emissions of carbon dioxide (CO_2), a greenhouse gas (GHG), from CO_2 budget sources in an economically efficient manner. The proposed revisions to Part 242, including most notably the proposed reduction in the annual CO_2 emission budgets, are designed to further these objectives.

While the proposed revisions to Part 242 maintain annual base budgets for CO_2, the most significant proposed revision to Part 242 is the approximately 45 percent reduction in the amount of such annual base budgets. In particular, the proposed revisions to Section 242-5.1 establish that, for allocation year 2014, the Statewide CO_2 Budget Trading Program base budget will be reduced from 64,310,805 tons to 35,228,822 tons[1]. The annual base budgets under Part 242 then decrease thereafter, as follows: to 34,348,101 tons in 2015, to 33,489,399 tons in 2016, to 32,837,536 tons in 2017, to 32,016,597 tons in 2018, to 31,216,182 tons in 2019, and to 30,435,778 tons for 2020. Each year thereafter, the annual CO_2 Budget Trading Program base budget will remain at 30,435,778 tons.

In addition to the proposed reduction in the annual CO_2 Budget Trading Program base budgets, the proposed revisions to Part 242 also include a new Section 242-5.2 for annual CO_2 Budget Trading Program adjusted budgets. The CO_2 Budget Trading Program adjusted budget is defined as the annual amount of CO_2 allowances allocated each year. In order to account for the existing private bank of CO_2 emissions allowances already acquired, and in order to help create a binding cap, the proposed revisions to Part 242 provides for two distinct budget adjustments. The First Control Period Interim Adjustment for Banked Allowances will reduce the budget for 100 percent of the first control period private bank of allowances (vintages 2009, 2010, and 2011) held by market participants after the first control period. The first adjustment will reduce New York's budget (the annual cap) by this amount, multiplied by New York's portion of the RGGI regional cap (approximately 38.93 percent), in each allocation year over the seven year period 2014-2020. The Second Control Period Interim Adjustment for Banked Allowances will reduce the budget for 100 percent of the surplus 2012 and 2013 vintage allowances held by market participants as of the end of 2013. The second adjustment will reduce New York's budget (the annual cap) by this amount, multiplied by New York's portion of the RGGI regional cap (approximately 38.93 percent) in each allocation year over the six year period 2015-2020. These are referred to as the CO_2 Budget Trading Program adjusted budget(s).

The proposed revisions to Part 242 also include the creation of the Cost Containment Reserve (CCR), which will help provide additional flexibility and cost containment for the Program. The CCR allocation and the rules for the sale of CO_2 CCR allowances are set forth in subdivision 242-5.3(b) of the proposed revisions to Part 242. CO_2 CCR allowances are separate from and additional to CO_2 allowances allocated from the CO_2 Budget Trading Program base and adjusted budgets. The CCR allowances

will be triggered and released at auctions at $4/ton in 2014, $6/ton in 2015, $8/ton in 2016, and $10/ton in 2017. Each year after 2017 the CCR trigger price will increase by 2.5 percent.

If the CCR trigger price is reached, up to 10 million additional CCR allowances will be available for purchase at auction regionally under the RGGI program, except in 2014, when the reserve will be limited to five million allowances in the RGGI region. New York's portion of the regional CCR is approximately 38.93 percent, such that the State's portion of the CCR in Part 242 is limited in 2014 to 1,946,639 CO_2 CCR allowances in 2014 and 3,893,277 CO_2 CCR allowances in 2015 and each calendar year thereafter.

The proposed revisions to Part 242 create a new interim compliance obligation, set forth in proposed paragraph 242-1.5(c)(2). An interim control period is defined as a one-year period, consisting of each of the first and second calendar years of each three year control period. In addition to demonstrating full compliance at the end of each three-year control period, at the end of each interim control period, regulated entities must now demonstrate that they are holding CO_2 allowances equal to at least 50 percent of their CO_2 emissions during the previous year.

Under the proposed revisions to Part 242, the second control period, which commenced on January 1, 2012, still concludes on December 31, 2014. Likewise, under the proposed revisions to Part 242, the CO_2 allowance transfer deadline for the second control period will remain March 1, 2015. Subsequent control periods begin on January 1st and conclude on the December 31st three years later. In each of the first two calendar years of each three year control period the owners and operators of each source subject to the revised Program shall hold a number of CO_2 allowances available for compliance deductions, as of the CO_2 allowance transfer deadline (midnight of March 1st or, if March 1st is not a business day, midnight of the first business day thereafter), in the source's compliance account that is not less than 50 percent of the total tons of CO_2 emissions for that interim control period. For example, the first interim control period will be the year 2015 and the second interim control period will be the year 2016 under the proposed revisions to Part 242, with associated CO_2 allowance transfer deadlines of March 1, 2016 and March 2017 respectively. At the end of the control period in 2017, all sources must demonstrate full compliance and account for 100 percent of their control period emissions with an allowance transfer deadline of March 1, 2018. Under the proposed revisions to Part 242, a compliance certification report is still required at the end of each control period; however, a report is not required at the end of each interim control period. Moreover, pursuant to the proposed revisions, the so-called treble damages provision in paragraph 242-6.5(d)(1), which applies to excess emissions, will not apply to excess interim emissions.

The proposed revisions to Part 242 do not change the applicability provisions of the regulation, and maintain the limited exemption for units with electrical output to the electric grid restricted by permit conditions pursuant to subdivision 242-1.4(b). The proposed revisions do, however, eliminate the provision in paragraph 242-1.4(b)(4) to reduce the CO_2 Budget Trading Program base budget and remove the tons equal to the exempt unit's average annual emissions from the previous three calendar years. These allowances will now be available to the market.

The Department will continue to allocate most of the CO_2 Budget Trading Program adjusted budget to the energy efficiency and clean energy technology account. Although New York State Energy Research and Development Authority's (NYSERDA) CO_2 Allowance Auction Program (21 NYCRR Part 507) will not be revised as part of this rulemaking, NYSERDA will continue to administer the energy efficiency and clean technology account so that allowances will be sold in an open and transparent allowance auction. The proceeds of the auctions will be used to promote the purposes of the energy efficiency and clean technology account and for administrative costs associated with the CO_2 Budget Trading Program.

The Reserve Price is the minimum acceptable price for each CO_2 allowance in a specific auction. Under the proposed revisions to Part 242, the reserve price at an auction is either the Minimum Reserve Price (MRP) or the CCR trigger price, depending on the level of demand for allowances at the auction. The proposed revisions to Part 242 provide that the MRP will be set at $2.00 in 2014 and increase by 2.5 percent each year thereafter. The provisions for a current market reserve price are eliminated under the proposed revisions.

Under the proposed revisions to Part 242, the Department has maintained the inclusion of two set-asides in subdivisions 242-5.3(c) and (d). In particular, the department shall continue to allocate 700,000 and 1,500,000 tons each year, respectively, from the CO_2 Budget Trading Program adjusted budgets to these two set-asides.

While the amount of allowances set-aside remains the same, the revisions to Pat 242 include a proposal to modify the existing "voluntary renewable energy market set-aside" in subdivision 242-5.3(c) to include eligible biomass. This revision expands eligibility for retiring CO_2 allowances from the set-aside to include CO_2 budget sources that co-fire eligible biomass as a compliance mechanism. Therefore, when a CO_2 budget source deducts CO_2 emissions from its compliance obligation as a result of co-firing eligible biomass, the Department proposes to also allow for the retirement of the corresponding number of CO_2 allowances from the set-aside. The proposed revisions to the Program maintain the existing provisions for voluntary renewable energy purchases. The Department will continue to retire allowances under the voluntary renewable energy market and eligible biomass set-aside for voluntary renewable energy purchases.

Similarly, while the amount of allowances set-aside remains the same, under the proposed revisions to Part 242, the long-term contract set-aside in subdivision 242-5.3(d) will continue to be available to CO_2 budget sources that can make the necessary demonstration to the Department's satisfaction. The changes proposed in this subdivision are merely intended to clarify the operation and administration of the set-aside, consistent with the Department's interpretation of subdivision 242-5.3(d) pursuant to Declaratory Ruling 19-18, which the Department issued on November 5, 2009.

The proposed revisions to Part 242 delete the existing stage one and stage two triggers and associated provisions. These price triggers raised the allowable percentage of offsets to be used for compliance, allowed for the use of international CO_2 emission credit retirements, and created the potential extension of the control period to four years. The offset price triggers and the potential extension of the control period to four years are replaced by the CCR mechanism, to provide measurable cost control in an efficient, transparent and predictable manner. For CO_2 offset allowances, the proposed revisions retain the number of CO_2 offset allowances that are available to be deducted for compliance with a CO_2 budget source's CO_2 2 budget emissions limitation for a control period at 3.3 percent of the CO_2 budget source's CO_2 emissions for that control period.

The proposed revisions to Part 242 eliminate the provision to award early reduction allowances, in existing subdivision 242-5.2(b), as those provisions are no longer applicable. Finally, the proposed revisions to Part 200 include updated cites for the portions of Federal statute and regulations, as well as other documents, that are incorporated by reference into the proposed revisions to Part 242.

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[1] This amount reflects New York State's portion of the regional cap of 91,000,000 tons for 2014, proposed by the states participating in the Regional Greenhouse Gas Initiative (RGGI).

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 200.9, 242-1.2(b)(18), (50), 242-5.2(a), (b), 242-5.3(d)(3), (5), 242-8.2(a), 242-10.2(k), (ag), 242-10.5(b)(1), (d)(1), (5) and (e)(5).

Text of rule and any required statements and analyses may be obtained from: Michael Sheehan, PE, NYSDEC, Division of Air Resources, 625 Broadway, Albany, NY 12233-3254, (518) 402-8396, email: airregs@gw.dec.state.ny.us

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

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

No changes were made to previously published Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement.

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

6 NYCRR Part 242, CO_2 Budget Trading Program
6 NYCRR Part 200, General Provisions
Comments Received from July 10, 2013 to September 9, 2013

The Regional Greenhouse Gas Initiative (RGGI) is a cooperative, historic effort among New York and eight Participating States[1] and is the first mandatory, market-based carbon dioxide (CO_2) emissions reduction program in the United States. Since its inception in 2008, RGGI has utilized a market-based mechanism to cap and cost-effectively reduce CO_2 emissions that cause climate change. Recently, New York along with the Participating States completed a comprehensive program review and announced a proposal to lower the regional CO_2 emissions cap established under RGGI to 91 million tons in 2014, declining 2.5 percent a year through 2020[2]. Accordingly, New York and the Participating States com-

mitted to propose revisions, pursuant to state-specific regulatory processes, to their respective CO_2 Budget Trading Programs to further reduce CO_2 emissions from power plants in the region. To implement the updated RGGI program in New York State, the Department of Environmental Conservation (Department) is adopting revisions to 6 NYCRR Part 242, CO_2 Budget Trading Program (the Program) and 6 NYCRR Part 200, General Provisions (collectively "Part 242").

The Department proposed revisions to Part 242 on July 10, 2013. Public hearings on the proposed revisions, and the associated draft Supplemental Generic Environmental Impact Statement (SGEIS), were held in Albany on August 26, 2013, in Avon on August 27, 2013, and in New York City on August 29, 2013. The public comment period closed at 5:00 P.M. on September 9, 2013. The Department received written and oral comments from approximately 2,300 commenters on the proposed revisions to Part 242 and the draft SGEIS. All of these comments have been reviewed, summarized, and responded to by the Department.

The vast majority of the commenters generally supported the Department's adoption of the revisions to the Program. A few commenters, primarily those affiliated with the energy industry, expressed some concerns regarding certain revisions to the Program for various reasons. Most notably, comments on specific aspects of the proposed revisions to the Program addressed alleged legal issues, the reduction in the CO_2 emissions cap, the cost containment reserve (CCR) and set-asides, potential emissions leakage caused by the revisions to the Program, and the modeling analyses conducted in support of the revisions to the Program. Many commenters also raised issues not directly related to this rulemaking, such as CO_2 emissions associated with electricity imports, the use and allocation of CO_2 allowance proceeds by the New York State Energy Research and Development Authority (NYSERDA), and the need for additional policies to address climate change. The Department responded to all comments received, including those not directly related to this rulemaking.

A substantial number of comments were received that expressed support for the Program and New York's participation and leadership in RGGI. Many of these commenters also emphasized the critical consequences of climate change and the need for actions, in addition to the Program, to reduce greenhouse gas (GHG) emissions. In response, the Department acknowledged that adequately addressing climate change requires numerous actions, including regulatory actions by multiple levels of government.

One commenter alleged that the Department's adoption of the Program may be unconstitutional, either because the Department does not have the Legislative authority to establish the revisions to the Program, or because the Program imposes a tax. In response to the claim that the Department does not have the Legislative authority to establish the Program, the Department cited its statutory authority to establish the Program and make revisions to the Program. Principally, the Department has the power to promulgate "regulations for preventing, controlling or prohibiting air pollution, [including] controlling air contamination." Environmental Conservation Law (ECL) section 19-0301(1)(a). Furthermore, in any such regulations, the Department may prescribe "the extent to which air contaminants may be emitted to the air by any air contamination source." ECL section 19-0301(1)(b)(2). CO_2 is a gas that meets the definition of "air contaminant." ECL section 19-0107(2). As described in the Regulatory Impact Statement (RIS), CO_2 causes "air pollution" as defined in the ECL, because it is present in the atmosphere in quantities that contribute to climate change, which is injurious to life and property in the State. ECL section 19-0107(3). Finally, CO_2 budget sources subject to the Program are an "air contamination source" as defined in the ECL, because such power plants emit the air contaminant CO_2 into the atmosphere. ECL section 19-0107(5).

Moreover, it is the policy of the State "to require the use of all available practical and reasonable methods to prevent and control air pollution in the [S]tate." ECL section 19-0103. Furthermore, the Legislature has also declared a policy "to improve and coordinate the environmental plans, functions, powers and programs of the state, in cooperation with. . . regions." ECL section 1-0101. Consistent with this policy, the Legislature has specifically authorized the Department to cooperate with other states in its promulgation of rules and regulations to prevent and control air pollution. See ECL sections 3-0301 and 19-0301. Finally, in adopting regulations regarding the prevention and control of air pollution, the Department follows the procedures set forth in ECL section 19-0303, including that any such regulation "may differ in its terms and provisions as between particular types and conditions of air pollution or of air contamination [and] particular air contamination sources." ECL section 19-0303(2). These provisions make clear that the Program, including the Department's adoption of revisions to the Program, is consistent with the Department's existing statutory authority.

In response to the same commenter's claim that the Program constitutes an unlawful tax, the Department stated that the Program does not operate as a tax, either by design or in practice. Instead, it is a cap-and-trade program that includes a regional limit on CO_2 emissions from subject power plants. Through the revisions to the Program, the Department is not substantially altering the means by which the Program regulates emissions of CO_2 from power plants. That is, the Program will continue to utilize an interstate market-based cap-and-trade mechanism, in order to control CO_2 emissions from power plants. Moreover, the primary purpose and intent of the Program is to cap and reduce emissions of CO_2, a GHG, from subject power plants, not to raise revenue for general governmental purposes. The CO_2 emission budget under the Program is set by the Department to minimize contribution to climate change, at a level protective of public health and the environment. In addition, the proceeds from the auction of CO_2 allowances are used by NYSERDA to further the CO_2 emission reduction goals of the Program, and are not primarily used for general governmental revenues. In particular, the Program sets forth that CO_2 allowance proceeds are used to promote energy efficiency, renewable energy, and carbon abatement technologies.

This commenter also alleged that the RGGI program may violate the U.S. Constitution, including specifically the Compact Clause. The Department responded that RGGI does not constitute a compact requiring Congressional consent. This is because, for example, the 2005 RGGI Memorandum of Understanding (MOU) is merely a non-binding political agreement amongst the states to propose respective programs in their individual states, pursuant to their own independent legal processes. Moreover, among other reasons, neither the RGGI MOU nor any other agreement amongst the states serves as the legal basis for the State's adoption of a RGGI program in New York. Instead, the Program was initially adopted, and the revisions to the Program are now being promulgated, pursuant to the Department's existing statutory authority and consistent with the State's own regulatory process.

Several commenters expressed concern over the potential for emissions leakage caused by the Program. This was also the single potential issue addressed in the SGEIS, consistent with the public scoping process. The Department responded by first noting that, when referring to so-called "emissions leakage," it is important to recognize that, at least as used by the Department, this term only refers to any changes caused by the Program itself. Therefore, consistent with the Final Scope, the SGEIS only considers any emissions leakage to the extent it may be caused by the revisions to the Program itself, because that is the action subject to review under the State Environmental Quality Review Act (SEQRA). Based on the reports and studies conducted to date, there is no evidence that the existing Program (prior to the revisions) caused any emissions leakage.

Second, the Department responded by acknowledging, as described in the RIS and SGEIS, that modeling analyses project that the revisions to the Program may result in some emissions leakage. In particular, these analyses project that, over the 2014-2020 period, the revisions to the Program will cause cumulative CO_2 emission reductions of 86 million tons across the RGGI region. Over the same period, because some emissions may shift location to areas outside of the RGGI region, modeling projects 28 million tons in cumulative CO_2 emission reductions across the larger Eastern Interconnection region. Therefore, although potential emissions leakage may reduce the effectiveness of the Program when measured in terms of cumulative CO_2 emission reductions across the Eastern Interconnection region, the revisions to the Program are still projected to cause overall CO_2 emission reductions in both the RGGI region and across the larger Eastern Interconnection region. In other words, the revisions to the Program are projected to result in positive environmental impacts regardless of the potential impact of emissions leakage caused by the Program.

Furthermore, the Department also responded to concerns regarding emissions leakage by noting that, regardless of the existence of the Program or the revisions to the Program, there are already considerable CO_2 emissions associated with electricity that is generated outside of the State and imported into the State. Although not part of this rulemaking, the Department stated that it is now engaged in an ongoing collaborative process with other Participating States and stakeholders, to identify a mechanism that could address this broader category of all CO_2 emissions associated with electricity imports. Any potential policy that addresses CO_2 emissions associated with imported electricity would also address the smaller category of potential emissions leakage caused by the Program.

Some commenters suggested that the emissions cap was set too high and that the Department should have evaluated lower caps. The Department responded that the Participating States proposed lowering the regional CO_2 emissions cap to align it with current emissions levels, while

accounting for allowances held by market participants through the first and second control period interim adjustments. There were calls to evaluate many different alternatives for most of the revised program elements, including the stringency of the cap. The Department determined that a regional cap of 91 million tons, coupled with the other elements contained in the revisions to the Program, best achieves the purposes of the RGGI program while also minimizing costs and impacts on ratepayers.

Some of these commenters also raised concerns that the 2.5 percent annual cap reduction should have been tied to the 2014 baseline, and that the Department should follow the lead of other Participating States in this regard. In response to these concerns, the Department noted that the 2.5 percent per year reduction methodology utilized under the revisions to the Program is consistent with the modeling conducted during RGGI Program Review. Moreover, under the revisions to the Program, the 2.5 percent reduction will continue annually through 2020, with the annual CO_2 emissions budget remaining constant thereafter. Furthermore, the Department clarified that all other Participating States proposed the same 2.5 percent annual reduction methodology in their respective programs.

Some comments were received on the inclusion of the Cost Containment Reserve (CCR) in the revisions to the Program. The Department responded that the CCR represents a reserved quantity of allowances, in addition to the cap, that are only available if defined allowance price triggers are exceeded. The Department determined that the CCR, coupled with other program elements, best accomplishes the emission reduction goals of the Program while adding flexibility to guard against unforeseen events and to minimize any dramatic or volatile CO_2 allowance price increases. The CCR also replaces other elements of the Program, including offset price triggers and the potential extension of the control period to four years, because of its ability to provide measurable cost control in a more immediate, efficient, transparent and predictable manner.

One comment was received regarding the behind-the-meter exemption, expressing an opinion that there should be no such exemption to the Program. The Department responded that it did not intend to remove this provision as part of the revisions to the Program. The Department included this provision to exempt industrial sources, not typically regulated in New York as electric generators, that provide little or no electrical output to the grid. This exemption is currently limited to two sources in the State, and pursuant to the terms of the Program, the amount of sources receiving the exemption cannot increase.

All of the comments received regarding the revisions to the voluntary renewable energy set-aside supported such revisions. One commenter was concerned that the retirement of allowances from this set-aside was not adequately modeled because all allowances were assumed to reach the market. The Department responded to this comment by noting that it anticipates the amount to be relatively small, and in any case, it does not anticipate that this would have a significant impact on modeling projections of CO_2 allowance prices. Moreover, the Department believes that the modeling analyses already performed, including the existing sensitivity analyses, already account for these and other variables.

Two commenters addressed the size of the Long-term Contract (LTC) set-aside. The Department responded that it is not altering the 1.5 million allowance size of this set-aside. While the Department has received annual requests for allowances from the set-aside in excess of the 1.5 million available, the Department anticipates that the amount of allowances requested from the set-aside will decrease in the future, as existing LTCs expire. Moreover, the LTC set-aside is intended to be limited in scope, as the Department generally intends for CO_2 allowances to be auctioned. Furthermore, none of the CO_2 budget sources that have received CO_2 allowances from the set-aside have recently expressed any concerns regarding the size of the set-aside.

In addition, a small number of comments were received regarding the retirement of unsold and undistributed allowances and the need for certainty in the market. The Department responded by indicating that it does not see a need for additional language addressing unsold and undistributed allowances. The revisions to the Program retain the Department's ability to retire unsold and undistributed allowances at the end of the control period.

A number of comments were submitted questioning the modeling work done to support the revisions to the Program and the assumptions made in that modeling effort. For each comment received, the Department responded by explaining how the model worked and the rationale behind the assumptions made.

A few commenters suggested that the Program should be expanded to other generators and sectors. The Department responded by explaining that the revisions to the Program are aimed at correcting the significant over-allocation of allowances under the Program. The primary goal of the Program is to reduce CO_2 emissions from power plants, while maintaining energy affordability and reliability. Expansion of the Program to generators smaller than 25 MW in capacity is not included in the revisions to the Program. The expansion of RGGI to other power generators may be considered as part of the next RGGI comprehensive program review, which is scheduled for 2016. The Department further acknowledged that adequately addressing climate issues requires regulation of GHG emissions from all sectors. In fact, the State and the Department are already engaged in efforts to address GHG emissions from all sectors. The Department's Office of Climate Change continues to conduct research and develop policy as it relates to all areas of climate change. The Department is also developing its first ever base year inventory for GHG emissions and will use this to evaluate other areas to address in New York.

A couple of commenters raised concerns regarding the CO_2 allowance auctions, including participation by noncompliance entities and the existing 25 percent bid limitation. In response, the Department noted that the CO_2 Allowance Program regulation adopted by NYSERDA, 21 NYCRR Part 507 (Part 507), is not being revised as part of this rulemaking. Part 507 retains the ability to potentially close auctions to participation by noncompliance entities, as well as decrease the existing 25 percent bid limitation.

There were a number of comments in regard to the use of proceeds. The Department responded that the revisions to the Program do not change existing provisions which have, since the inception of the Program, provided that CO_2 allowance proceeds be used to further the CO_2 emission reduction objectives of the Program, through investments in energy efficiency, renewable energy, and carbon abatement technologies. NYSERDA allocates proceeds pursuant to its Operating Plan and consistent with the Program. The Department also included details on the use of proceeds and the programs that those proceeds sponsor.

Lastly, the Department responded to a number of comments by noting that all of the program elements, including the stringency of the cap, potential emission leakage, and the CCR, will be evaluated during the next RGGI program review, which will start no later than 2016. This will allow the Department and Participating States to assess the efficacy of the Program, while also tracking and participating in the development of the U.S. Environmental Protection Agency's federal program for regulating CO_2 emissions from new and existing electric generating sources under Section 111 of the Clean Air Act.

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[1]In addition to New York, the RGGI Participating States include: Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, Rhode Island, and Vermont. The Participating States released the Updated Model Rule on February 7, 2013.

[2]The Participating States released the Updated Model Rule on February 7, 2013.

Department of Financial Services

EMERGENCY RULE MAKING

Registration and Financial Responsibility Requirements for Mortgage Loan Servicers

I.D. No. DFS-51-13-00003-E
Filing No. 1168
Filing Date: 2013-11-29
Effective Date: 2013-12-03

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

Action taken: Addition of Part 418 and Supervisory Procedures MB 109 and 110 to Title 3 NYCRR.

Statutory authority: Banking Law, art. 12-D

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

Specific reasons underlying the finding of necessity: Chapter 472 of the Laws of 2008, which requires mortgage loan servicers to be registered with the Superintendent of Financial Services (formerly the Superintendent of Banks), went into effect on July 1, 2009. These regulations implement the registration requirement and inform servicers of the details of the

registration process so as to permit applicants to prepare, submit and review applications for registrations on a timely basis.

Excluding persons servicing loans made under the Power New York Act from the mortgage loan servicer rules is necessary to facilitate the immediate implementation of such loan program so that the anticipated energy efficiency benefits can be realized without delay.

Subject: Registration and Financial Responsibility Requirements for Mortgage Loan Servicers.

Purpose: To require that persons or entities which service mortgage loans on residential real property on or after July 1, 2009 be registered with the Superintendent of Financial Services.

Substance of emergency rule: Section 418.1 summarizes the scope and application of Part 418. It notes that Sections 418.2 to 418.11 implement the requirement in Article 12-D of the Banking Law that certain mortgage loan servicers ("servicers") be registered with the Superintendent of Financial Services (formerly the Superintendent of Banks), while Sections 418.12 and 418. 13 set forth financial responsibility requirements that are applicable to both registered and exempt servicers. {Section 418.14 sets forth the transitional rules.]

Section 418.2 implements the provisions in Section 590(2)(b-1) of the Banking Law requiring registration of servicers and exempting mortgage bankers, mortgage brokers, and most banking and insurance companies, as well as their employees. Servicing loans made pursuant to the Power New York Act of 2011 is excluded. The Superintendent is authorized to approve other exemptions.

Section 418.3 contains a number of definitions of terms that are used in Part 418, including "Mortgage Loan", "Mortgage Loan Servicer", "Third Party Servicer" and "Exempted Person".

Section 418.4 describes the requirements for applying for registration as a servicer.

Section 418.5 describes the requirements for a servicer applying to open a branch office.

Section 418.6 covers the fees for application for registration as a servicer, including processing fees for applications and fingerprint processing fees.

Section 418.7 sets forth the findings that the Superintendent must make to register a servicer and the procedures to be followed upon approval of an application for registration. It also sets forth the grounds upon which the Superintendent may refuse to register an applicant and the procedure for giving notice of a denial.

Section 418.8 defines what constitutes a "change of control" of a servicer, sets forth the requirements for prior approval of a change of control, the application procedure for such approval and the standards for approval. The section also requires servicers to notify the Superintendent of changes in their directors or executive officers.

Section 418.9 sets forth the grounds for revocation of a servicer registration and authorizes the Superintendent, for good cause or where there is substantial risk of public harm, to suspend a registration for 30 days without a hearing. The section also provides for suspension of a servicer registration without notice or hearing upon non-payment of the required assessment. The Superintendent can also suspend a registration when a servicer fails to file a required report, when its surety bond is cancelled, or when it is the subject of a bankruptcy filing. If the registrant cures the deficiencies its registration can be reinstated. The section further provides that in all other cases, suspension or revocation of a registration requires notice and a hearing.

The section also covers the right of a registrant to surrender its registration, as well as the effect of revocation, termination, suspension or surrender of a registration on the obligations of the registrant. It provides that registrations will remain in effect until surrendered, revoked, terminated or suspended.

Section 418.10 describes the power of the Superintendent to impose fines and penalties on registered servicers.

Section 418.11 sets forth the requirement that applicants demonstrate five years of servicing experience as well as suitable character and fitness.

Section 418.12 covers the financial responsibility and other requirements that apply to applicants for servicer registration, registered servicers and exempted persons (other than insured depository institutions to which Section 418.13 applies. The financial responsibility requirements include a required net worth (as defined in the section) of at least $250,000 plus 1/4 % of total loans serviced or, for a Third Party Servicer, 1/4 of 1% of New York loans serviced; (2) a corporate surety bond of at least $250,000 and (3) a Fidelity and E&O bond in an amount that is based on the volume of New York mortgage loans serviced, with a minimum of $300,000.

The Superintendent is empowered to waive, reduce or modify the financial responsibility requirements for certain servicers who service an aggregate amount of loans not exceeding $4,000,000.

Section 418.13 exempts from the otherwise applicable net worth and surety bond requirements, but not the Fidelity and E&O bond requirements, entities that are subject to the capital requirements applicable to insured depositary institutions and that are considered at least adequately capitalized.

Section 418.14 provides a transitional period for registration of mortgage loan servicers. A servicer doing business in this state on June 30, 2009 which files an application for MLS registration by July 31, 2009 will be deemed in compliance with the registration requirement until notified that its application has been denied. A person who is required to register as a servicer solely because of the changes in the provisions of the rule regarding use of third party servicers which became effective on August 23, 2011 and who files an application for registration within 30 days thereafter will not be required to register until six months from the effective date of the amendment or until the application is denied, whichever is earlier.

Section 109.1 defines a number of terms that are used in the Supervisory Procedure.

Section 109.2 contains a general description of the process for registering as a mortgage loan servicer ("servicer") and contains information about where the necessary forms and instructions may be found.

Section 109.3 lists the documents to be included in an application for servicer registration, including the required fees. It also sets forth the execution and attestation requirements for applications. The section makes clear that the Superintendent of Financial Services (formerly the Superintendent of Banks) can require additional information or an in person conference, and that the applicant can submit additional pertinent information.

Section 109.4 describes the information and documents required to be submitted as part of an application for registration as a servicer. This includes various items of information about the applicant and its regulatory history, if any, information demonstrating compliance with the applicable financial responsibility and experience requirements, information about the organizational structure of the applicant, and other documents, such as fingerprint cards and background reports.

Section 110.1 defines a number of terms that are used in the Supervisory Procedure.

Section 110.2 contains a general description of the process for applying for approval of a change of control of a mortgage loan servicer ("servicer") and contains information about where the necessary forms and instructions may be found.

Section 110.3 lists the documents to be included in an application for approval of a change of control of a servicer, including the required fees. It sets forth the time within which the Superintendent of Financial Services (formerly the Superintendent of Banks) must approve or disapprove an application. It also sets forth the execution and attestation requirements for applications. The section makes clear that the Superintendent can require additional information or an in person conference, and that the applicant can submit additional pertinent information. Last, the section lists the types of changes in a servicer's operations resulting from a change of control which should be notified to the Department of Financial Services (formerly the Banking Department).

Section 110.4 describes the information and documents required to be submitted as part of an application for approval of a change of control of servicer. This includes various items of information about the applicant and its regulatory history, if any, information demonstrating continuing compliance with the applicable financial responsibility and experience requirements, information about the organizational structure of the applicant, a description of the acquisition and other documents regarding the applicant, such as fingerprint cards and background reports.

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires February 26, 2014.

Text of rule and any required statements and analyses may be obtained from: Sam L. Abram, New York State Department of Financial Services, One State Street, New York, NY 10004-1417, (212) 709-1658, email: sam.abram@dfs.ny.gov

Regulatory Impact Statement

1. Statutory Authority.

Article 12-D of the Banking Law, as amended by the Legislature in the Subprime Lending Reform Law (Ch. 472, Laws of 2008, hereinafter, the "Subprime Law"), creates a framework for the regulation of mortgage loan servicers. Mortgage loan servicers (MLS) are individuals or entities which engage in the business of servicing mortgage loans for residential real property located in New York. That legislation also authorizes the adoption of regulations implementing its provisions. (See, e.g., Banking Law Sections 590(2) (b-1) and 595-b.)

Subsection (1) of Section 590 of the Banking Law was amended by the Subprime Law to add the definitions of "mortgage loan servicer" and "servicing mortgage loans". (Section 590(1)(h) and Section 590(1)(i).)

A new paragraph (b-1) was added to Subdivision (2) of Section 590 of the Banking Law. This new paragraph prohibits a person or entity from

engaging in the business of servicing mortgage loans without first being registered with the Superintendent of Financial Services (formerly the Superintendent of Banks). The registration requirements do not apply to an "exempt organization," licensed mortgage banker or registered mortgage broker.

This new paragraph also authorizes the Superintendent to refuse to register an MLS on the same grounds as he or she may refuse to register a mortgage broker under Banking Law Section 592-a(2).

Subsection (3) of Section 590 was amended by the Subprime Law to clarify the power of the banking board to promulgate rules and regulations and to extend the rulemaking authority regarding regulations for the protection of consumers and regulations to define improper or fraudulent business practices to cover mortgage loan servicers, as well as mortgage bankers, mortgage brokers and exempt organizations. (Note that under Section 89 of Part A of Chapter 62 of the Laws of 2011, the functions and powers of the banking board have been transferred to the Superintendent.)

New Paragraph (d) was added to Subsection (5) of Section 590 by the Subprime Law and requires mortgage loan servicers to engage in the servicing business in conformity with the Banking Law, such rules and regulations as may be prescribed by the Superintendent, and all applicable federal laws, rules and regulations.

New Subsection (1) of Section 595-b was added by the Subprime Law and requires the Superintendent to promulgate regulations and policies governing the grounds to impose a fine or penalty with respect to the activities of a mortgage loan servicer. Also, the Subprime Law amends the penalty provision of Subdivision (1) of Section 598 to apply to mortgage loan servicers as well as to other entities.

New Subdivision (2) of Section 595-b was added by the Subprime Law and authorizes the Superintendent to prescribe regulations relating to disclosure to borrowers of interest rate resets, requirements for providing payoff statements, and governing the timing of crediting of payments made by the borrower.

Section 596 was amended by the Subprime Law to extend the Superintendent's examination authority over licensees and registrants to cover mortgage loan servicers. The provisions of Banking Law Section 36(10) making examination reports confidential are also extended to cover mortgage loan servicers.

Similarly, the books and records requirements in Section 597 covering licensees, registrants and exempt organizations were amended by the Subprime Law to cover servicers and a provision was added authorizing the Superintendent to require that servicers file annual reports or other regular or special reports.

The power of the Superintendent to require regulated entities to appear and explain apparent violations of law and regulations was extended by the Subprime Law to cover mortgage loan servicers (Subdivision (1) of Section 39), as was the power to order the discontinuance of unauthorized or unsafe practices (Subdivision (2) of Section 39) and to order that accounts be kept in a prescribed manner (Subdivision (5) of Section 39).

Finally, mortgage loan servicers were added to the list of entities subject to the Superintendent's power to impose monetary penalties for violations of a law, regulation or order. (Paragraph (a) of Subdivision (1) of Section 44).

The fee amounts for MLS registration applications and for MLS branch applications are established in accordance with Banking Law Section 18-a.

2. Legislative Objectives.

The Subprime Law is intended to address various problems related to residential mortgage loans in this State. The Subprime Law reflects the view of the Legislature that consumers would be better protected by the supervision of mortgage loan servicing. Even though mortgage loan servicers perform a central function in the mortgage industry, there had previously been no general regulation of servicers by the state or the Federal government.

The Subprime Law requires that entities be registered with the Superintendent in order to engage in the business of servicing mortgage loans in this state. The law further requires mortgage loan servicers to engage in the business of servicing mortgage loans in conformity with the rules and regulations promulgated by the Superintendent.

The mortgage servicing statute has two main components: (i) the first component addresses the registration requirement for persons engaged in the business of servicing mortgage loans; and (ii) the second authorizes the Superintendent to promulgate appropriate rules and regulations for the regulation of servicers in this state.

The regulations implement the first component of the mortgage servicing statute – the registration of mortgage servicers. In doing so, the rule utilizes the authority provided to the Superintendent to set standards for the registration of such entities. For example, the rule requires that a potential loan servicer would have to provide, under Sections 418.11 to 418.13 of the proposed regulations, evidence of their character and fitness to engage in the servicing business and demonstrate to the Superintendent their financial responsibility. The rule also utilizes the authority provided by the Legislature to revoke, suspend or otherwise terminate a registration or to fine or penalize a registered mortgage loan servicer.

Consistent with this requirement, the rule authorizes the Superintendent to refuse to register an applicant if he/she shall find that the applicant lacks the requisite character and fitness, or any person who is a director, officer, partner, agent, employee, substantial stockholder of the applicant has been convicted of certain felonies. These are the same standards as are applicable to mortgage bankers and mortgage brokers in New York. (See Section 418.7.)

Further, in carrying out the Legislature's mandate to regulate the mortgage servicing business, Section 418.8 sets out certain application requirements for prior approval of a change in control of a registered mortgage loan servicer and notification requirements for changes in the entity's executive officers and directors. Collectively, these various provisions implement the intent of the Legislature to register and supervise mortgage loan servicers.

The Department has separately adopted emergency regulations dealing with business conduct and consumer protection requirements for MLSs. (3 NYCRR Part 419).

3. Needs and Benefits.

The Subprime Law adopted a multifaceted approach to the lack of supervision of the mortgage loan industry. It affected a variety of areas in the residential mortgage loan industry, including: i. loan originations; ii. loan foreclosures; and iii. the conduct of business by residential mortgage loans servicers.

Previously, the Department of Financial Services (formerly the Banking Department) regulated the brokering and making of mortgage loans, but not the servicing of these mortgage loans. Servicing is vital part of the residential mortgage loan industry; it involves the collection of mortgage payments from borrowers and remittance of the same to owners of mortgage loans; to governmental agencies for taxes; and to insurance companies for insurance premiums. Mortgage servicers also may act as agents for owners of mortgages in negotiations relating to modifications. As "middlemen," moreover, servicers also play an important role when a property is foreclosed upon. For example, the servicer may typically act on behalf of the owner of the loan in the foreclosure proceeding.

Further, unlike in the case of a mortgage broker or a mortgage lender, borrowers cannot "shop around" for loan servicers, and generally have no input in deciding what company services their loans. The absence of the ability to select a servicer obviously raises concerns over the character and viability of these entities given the central part of they play in the mortgage industry. There also is evidence that some servicers may have provided poor customer service. Specific examples of these activities include: pyramiding late fees; misapplying escrow payments; imposing illegal prepayment penalties; not providing timely and clear information to borrowers; and erroneously force-placing insurance when borrowers already have insurance.

While minimum standards for the business conduct of servicers is the subject of another emergency regulation which has been promulgated by the Department. (3 NYCRR Part 419) Section 418.2 makes it clear that persons exempted by from the registration requirement must notify the Department that they are servicing mortgage loans and must otherwise comply with the regulations.

As noted above, these regulations relate to the first component of the mortgage servicing statute – the registration of mortgage loan servicers. It is intended to ensure that only those persons and entities with adequate financial support and sound character and general fitness will be permitted to register as mortgage loan servicers.

Further, consumers in this state will also benefit under these regulations because in the event there is an allegation that a mortgage servicer is involved in wrongdoing and the Superintendent finds that there is good cause, or that there is a substantial risk of public harm, he or she can suspend such mortgage servicer for 30 days without a hearing. And in other cases, he or she can suspend or revoke such mortgage servicer's registration after notice and a hearing. Also, the requirement that servicers meet minimum financial standards and have performance and other bonds will act to ensure that consumers are protected.

As noted above, the MLS regulations are divided into two parts. The Department had separately adopted emergency regulations dealing with business conduct and consumer protection requirements for MLSs. (3 NYCRR Part 419)

All Exempt Organizations, mortgage bankers and mortgage brokers that perform mortgage loan servicing with respect to New York mortgages must notify the Superintendent that they do so, and will be required to comply with the conduct of business and consumer protection rules applicable to MLSs.

Under Section 418.2, a person servicing loans made under the Power New York Act of 2011 will not thereby be considered to be engaging in the business of servicing mortgage loans. Consequently, a person would not be subject to the rules applicable to MLSs by reason of servicing such loans.

4. Costs.

The mortgage business will experience some increased costs as a result of the fees associated with MLS registration. The amount of the application fee for MLS registration and for an MLS branch application is $3,000.

The amount of the fingerprint fee is set by the State Division of Criminal Justice Services and the processing fees of the National Mortgage Licensing System are set by that body. MLSs will also incur administrative costs associated with preparing applications for registration.

The ability by the Department to regulate mortgage loan servicers is expected to reduce costs associated with responding to consumers' complaints, decrease unnecessary expenses borne by mortgagors, and, through the timely response to consumers' inquiries, should assist in decreasing the number of foreclosures in this state.

The regulations will not result in any fiscal implications to the State. The Department is funded by the regulated financial services industry. Fees charged to the industry will be adjusted periodically to cover Department expenses incurred in carrying out this regulatory responsibility.

5. Local Government Mandates.

None.

6. Paperwork.

An application process has been established for potential mortgage loan servicers to apply for registration electronically through the National Mortgage Licensing System and Registry (NMLSR) - a national system, which currently facilitates the application process for mortgage brokers, bankers and loan originators. Therefore, the application process is virtually paperless; however, a limited number of documents, including fingerprints where necessary, would have to be submitted to the Department in paper form.

The specific procedures that are to be followed in order to apply for registration as a mortgage loan servicer are detailed in Supervisory Procedure MB 109.

7. Duplication.

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

An exemption was created under Section 418.13, from the otherwise applicable net worth and surety bond requirements, for entities that are subject to the capital requirements applicable to insured depository institutions and are considered adequately capitalized.

8. Alternatives.

The purpose of the regulation is to carry out the statutory mandate to register mortgage loan servicers while at the same time avoiding overly complex and restrictive rules that would have imposed unnecessary burdens on the industry. The Department is not aware of any alternative that is available to the instant regulations. The Department also has been cognizant of the possible burdens of this regulation, and it has accordingly concluded that an exemption from the registration requirement for persons or entities that are involved in a de minimis amount of servicing would address the intent of the statute without imposing undue burdens those persons or entities.

The procedure for suspending servicers that violate certain financial responsibility or customer protection requirements, which provides a 90-day period for corrective action, during which there can be an investigation and hearing on the existence of other violations, provides flexibility to the process of enforcing compliance with the statutory requirements.

9. Federal Standards.

Currently, mortgage loan servicers are not required to be registered by any federal agencies. However, although not a registration process, in order for any mortgage loan servicer to service loans on behalf of certain federal instrumentalities such servicers have to demonstrate that they have specific amounts of net worth and have in place Fidelity and E&O bonds.

These regulations exceed those minimum standards, in that, a mortgage loan servicer will now have to demonstrate character and general fitness in order to be registered as a mortgage loan servicer. In light of the important role of a servicer – collecting consumers' money and acting as agents for mortgagees in foreclosure transactions – the Department believes that it is imperative that servicers be required to meet this heightened standard.

10. Compliance Schedule.

The emergency regulations will become effective on September 17, 2012. Similar emergency regulations have been in effect since July 1, 2009.

The Department expects to approve or deny applications within 90 days of the Department's receipt (through NMLSR) of a completed application.

A transitional period is provided for mortgage loan servicers which were doing business in this state on June 30, 2009 and which filed an application for registration by July 31, 2009. Such servicers will be deemed in compliance with the registration requirement until notified by the Superintendent that their application has been denied.

Additionally, the version of Part 418 adopted on an emergency basis effective August 5, 2011 requires holders of mortgage servicing rights to register as mortgage loans servicers even where they have sub-contracted servicing responsibilities to a third-party servicer. Such servicers were given until October 15, 2011 to file an application for registration.

Regulatory Flexibility Analysis

1. Effect of the Rule:

The emergency rule will not have any impact on local governments. It is estimated that there are approximately 120 mortgage loan servicers in the state which are not mortgage bankers, mortgage brokers or exempt organizations, and which are therefore required to register under the Subprime Lending Reform Law (Ch. 472, Laws of 2008) (the "Subprime Law") Of these, it is estimated that a very few of the remaining entities will be deemed to be small businesses.

2. Compliance Requirements:

The provisions of the Subprime Law relating to mortgage loan servicers has two main components: it requires the registration by the Department of Financial Services (formerly the Banking Department) of servicers who are not mortgage bankers, mortgage brokers or exempt organizations (the "MLS Registration Regulations") , and it authorizes the Department to promulgate rules and regulations that are necessary and appropriate for the protection of consumers, to define improper or fraudulent business practices, or otherwise appropriate for the effective administration of the provisions of the Subprime Law relating to mortgage loan servicers (the "MLS Business Conduct Regulations").

The provisions of the Subprime Law requiring registration of mortgage loan servicers which are not mortgage bankers, mortgage brokers or exempt organizations became effective on July 1, 2009. The emergency MLS Registration Regulations here adopted implement that statutory requirement by providing a procedure whereby MLSs can apply to be registered and standards and procedures for the Department to approve or deny such applications. The emergency regulations also set forth financial responsibility standards applicable to applicants for MLS registration, registered MLSs and servicers which are exempted from the registration requirement.

Additionally, the regulations set forth standards and procedures for Department action on applications for approval of change of control of an MLS. Finally, the emergency regulations set forth standards and procedures for, suspension, revocation, expiration, termination and surrender of MLS registrations, as well as for the imposition of fines and penalties on MLSs.

3. Professional Services:

None.

4. Compliance Costs:

Applicants for mortgage loan servicer registration will incur administrative costs associated with preparing applications for registration. Applicants, registered MLSs and mortgage loan servicers exempted from the registration requirement may incur costs in complying with the financial responsibility regulations. Registration fees of $3000, plus fees for fingerprint processing and participation in the National Mortgage Licensing System and Registry (NMLS) will be required of non-exempt servicers.

5. Economic and Technological Feasibility:

The emergency rule-making should impose no adverse economic or technological burden on mortgage loan servicers who are small businesses. The NMLS is now available. This technology will benefit registrants by saving time and paperwork in submitting applications, and will assist the Department by enabling immediate tracking, monitoring and searching of registration information; thereby protecting consumers.

6. Minimizing Adverse Impacts:

The regulations minimize the costs and burdens of the registration process by utilizing the internet-based NMLS, developed by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators. This system uses an on-line application form for servicer registration. A common form will be accepted by New York and the other participating states.

As noted above, most servicers are not small businesses. As regards servicers that are small businesses and not otherwise exempted, the regulations give the Superintendent of Financial Services (formerly the Superintendent of Banks) the authority to reduce, waive or modify the financial responsibility requirements for entities that do a de minimis amount of servicing.

7. Small Business and Local Government Participation:

Industry representatives have participated in outreach programs regarding regulation of servicers. The Department also maintains continuous contact with large segments of the servicing industry though its regulation of mortgage bankers and brokers. The Department likewise maintains close contact with a variety of consumer groups through its community outreach programs and foreclosure mitigation programs. In response to comments received regarding earlier versions of this regulation, the Department has modified the financial responsibility requirements. The revised requirements should generally be less burdensome for mortgage loan servicers, particularly smaller servicers and those located in rural areas.

Rural Area Flexibility Analysis

Types and Estimated Numbers. Approximately 70 mortgage loan servicers have been registered by the Department of Financial Services or have applied for registration. Very few of these entities operate in rural areas of New York State and of those, most are individuals that do a de minimus business. As discussed below, the Superintendent can modify the requirements of the regulation in such cases.

Compliance Requirements. Mortgage loan servicers in rural areas which are not mortgage bankers, mortgage brokers or exempt organizations must be registered with the Superintendent to engage in the business of mortgage loan servicing. An application process will be established requiring a MLS to apply for registration electronically and to submit additional background information and fingerprints to the Mortgage Banking unit of the Department.

MLSs are required to meet certain financial responsibility requirements based on their level of business. The regulations authorize the Superintendent of Financial Services (formerly the Superintendent of Banks) to reduce or waive the otherwise applicable financial responsibility requirements in the case of MLSs which service not more than $4,000,000 in aggregate mortgage loans in New York and which do not collect tax or insurance payments. The Superintendent is also authorized to reduce or waive the financial responsibility requirements in other cases for good cause. The Department believes that this will ameliorate any burden which those requirements might otherwise impose on entities operating in rural areas.

Costs. The mortgage business will experience some increased costs as a result of the fees associated with MLS registration. The application fee for MLS registration will be $3,000. The amount of the fingerprint fee is set by the State Division of Criminal Justice Services and the processing fees of the National Mortgage Licensing System and Registry ("NMLSR") are set by that body. Applicants for mortgage loan servicer registration will also incur administrative costs associated with preparing applications for registration.

Applicants, registered MLSs and mortgage loan servicers exempted from the registration requirement may incur costs in complying with the financial responsibility regulations.

Minimizing Adverse Impacts. The regulations minimize the costs and burdens of the registration process by utilizing the internet-based NMLSR, developed by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators. This system uses an online application form for servicer registration. A common form will be accepted by New York and the other participating states.

Of the servicers which operate in rural areas, it is believed that most are mortgage bankers, mortgage brokers or exempt organizations. Additionally, in the case of servicers that operate in rural areas and are not otherwise exempted, the Superintendent has the authority to reduce, waive or modify the financial responsibility requirements for individuals that do a *de minimis* amount of servicing.

Rural Area Participation. Industry representatives have participated in outreach programs regarding regulation of servicers. The Department also maintains continuous contact with large segments of the servicing industry though its regulation of mortgage bankers and brokers. The Department likewise maintains close contact with a variety of consumer groups through its community outreach programs and foreclosure mitigation programs. In response to comments received regarding earlier versions of this regulation, the Department has modified the financial responsibility requirements. The revised requirements should generally be less burdensome for mortgage loan servicers, particularly smaller servicers and those located in rural areas.

Job Impact Statement

Article 12-D of the Banking Law, as amended by the Subprime Lending Reform Law (Ch. 472, Laws of 2008), requires persons and entities which engage in the business of servicing mortgage loans to be registered with the Superintendent of Financial Services (formerly the Superintendent of Banks). This emergency regulation sets forth the application, exemption and approval procedures for registration as a Mortgage Loan servicer (MLS), as well as financial responsibility requirements for applicants, registrants and exempted persons. The regulation also establishes requirements with respect to changes of officers, directors and/or control of MLSs and provisions with respect to suspension, revocation, termination, expiration and surrender of MLS registrations.

The requirement to comply with the emergency regulations is not expected to have a significant adverse effect on jobs or employment activities within the mortgage loan servicing industry. Many of the larger entities engaged in the mortgage loan servicing business are already subject to oversight by the Department of Financial Services (formerly the Banking Department) and exempt from the new registration requirement. Additionally, the regulations give the Superintendent the authority to reduce, waive or modify the financial responsibility requirements for entities that do a de minimis amount of servicing.

The registration process itself should not have an adverse effect on employment. The regulations require the use of the internet-based National Mortgage Licensing System and Registry, developed by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators. This system uses a common on-line application for servicer registration in New York and other participating states. It is believed that any remaining adverse impact would be due primarily to the nature and purpose of the statutory registration requirement rather than the provisions of the emergency regulations.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Regulation of Shared Appreciation Mortgages

I.D. No. DFS-51-13-00002-P

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

Proposed Action: Renumbering of Part 82 to Subpart 82-1 and addition of Subpart 82-2 to Title 3 NYCRR.

Statutory authority: Banking Law, art. 1, section 6-f

Subject: Regulation of shared appreciation mortgages.

Purpose: Permits shared appreciation mortgages in certain limited circumstances.

Substance of proposed rule (Full text is posted at the following State website:DFS Website): Part 82 is renumbered to be Subpart 82-1. Alternative Mortgage Instruments - General. A new Subpart 82-2 is added.

Subpart 82-2 (Shared Appreciation)

§ 82-2.1 summarizes the scope and application of Part 82-A. It notes that Section 6-f of the Banking Law authorizes the Superintendent to adopt rules and regulations relating to shared appreciation mortgages that would permit banks and other financial institutions to make residential mortgage loans that provide for the lender or its assignee (the "Holder") to receive a share in the appreciation of the market value of the residential property securing the loan.

§ 82-2.2 defines certain terms used in Part 82-A.

§ 82-2.3 sets forth the eligibility requirements for a shared appreciation mortgage modification.

§ 82-2.4 sets forth the calculation of the mortgagor's unpaid principal, as well as the calculation of the mortgagor's debt-to-income ratio.

§ 82-2.5 sets forth the circumstances that can and cannot trigger a sharing of the appreciation under a shared appreciation mortgage agreement.

§ 82-2.6 sets forth the calculation used to determine the Holder's share of appreciation.

§ 82-2.7 sets forth the disclosures that must be provided to borrowers entering into shared appreciation mortgage modifications.

§ 82-2.8 sets forth a statement that must be conspicuously placed on every shared appreciation agreement.

§ 82-2.9 requires Holders that offered shared appreciation mortgage modifications to adopt policies and procedures for notifying eligible customers of the shared appreciation option.

§ 82-2.10 sets forth fees, charges, and interest rates that may be imposed or used in connection with shared appreciation agreements.

§ 82-2.11 sets forth prohibitions on certain conduct in connection with shared appreciation mortgages.

Text of proposed rule and any required statements and analyses may be obtained from: Harry Goberdhan, New York State Department of Financial Services, One State Street, New York, NY 10004, (212) 709-1669, email: Harry.Goberdhan@DFS.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.

Revised Section 6-f of the Banking Law became effective on December 15, 2009 (Chapter 507 of the Laws of 2009). The revised Section 6-f authorizes the Superintendent to adopt rules permitting shared appreciation agreements where the lender or holder of a residential mortgage loan or cooperative apartment unit loan reduces the principal amount of a mortgage loan in order to assist a borrower at risk of foreclosure. Under such an agreement, the lender is entitled to share in any appreciation of the market value of the real property or coop shares between the effective date of the reduction in the principal amount of the mortgage until the date when the property is sold, but not more than the lesser of (i) the amount of

the reduction in principal, plus interest at the same rate as applies to the remaining principal amount, and (ii) 50% of the amount of appreciation. The law requires certain disclosures with respect to shared appreciation mortgages. New York does not currently allow shared appreciation mortgages (other than certain FHA-insured mortgages).

2. Legislative Objectives.

Revised Section 6-f of the Banking Law was intended to provide New York mortgage lenders and struggling borrowers with another tool to help the borrowers keep their homes. The shared appreciation agreements allow lenders to share with the homeowner the future appreciation of the home's value, providing lenders with an additional incentive to allow borrowers to stay in their homes. At the same time, the disclosure requirements and the limitations on the amount of appreciation that lenders can share serve to guard against abuse of vulnerable New Yorkers. The intended result is that more homeowners will keep their homes, which allows homeowners to avoid the costly and protracted foreclosure process, allows lenders to recoup their investment, and provides local communities with stability.

3. Needs and Benefits.

Data by research provider CoreLogic indicates that 7.7% of New York homeowners owed more than their homes were worth as of the first quarter of 2013. Meanwhile, foreclosures have soared in recent years. Mortgage modifications have helped many homeowners keep their homes, but many modification applications are rejected by lenders and servicers because it is not in the lenders' or investors' best interests to grant the modifications. Shared appreciation agreements allow lenders to share with the homeowner the future appreciation of the home's value, thus providing a new incentive to such lenders to reduce the principal amount on the loan and thus permit the borrower to keep the home. Lenders thus have an additional non-foreclosure option that they can offer to struggling homeowners. The intended benefit is to homeowners, lenders, and local communities alike. Qualifying homeowners will avoid the costly and protracted foreclosure process, lenders will recoup more of their investment, and local communities will become more stable.

4. Costs.

This proposed regulation will not result in any fiscal implications to the State. Moreover, because shared appreciation agreements are not required but instead would become available as an option to lenders and borrowers if they mutually agree to enter into such agreements, the regulation does not impose any required costs on regulated entities or consumers.

To avoid losing their homes, homeowners who enter into shared appreciation agreements agree to give up a portion of their right to recover the appreciation in the value of their property upon sale.

5. Local government mandates.

None.

6. Paperwork.

The proposed regulation does not require regulated entities or consumers to complete any paperwork. Rather, if lenders and borrowers choose to enter into shared appreciation agreements, then the regulation requires certain terms and disclosures to be provided in those agreements.

7. Duplication.

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

8. Alternatives.

The Department could choose not to adopt a regulation with respect to shared appreciation agreements. The proposed regulation, however, will provide lenders and struggling borrowers with another tool to keep borrowers in their homes and combat the ongoing foreclosure crisis. If such a regulation is not adopted, homeowners will be deprived of an opportunity to remain in their homes, lenders will be denied an opportunity to recoup their investment, and communities will be denied the benefits that accompany greater stability in the housing market.

9. Federal Standards.

There are no applicable federal standards.

10. Compliance Schedule.

Revised Section 6-f became effective on December 15, 2009. It is proposed that the regulation be effective immediately.

Regulatory Flexibility Analysis

1. Effect of the Rule:

The proposed regulation will help qualifying borrowers to avoid foreclosure, which will provide stability to local communities and, therefore, local governments, including a more stable tax base. The regulation may help small businesses including community banks and mortgage bankers to maintain an income stream from delinquent loans that would otherwise fall into the costly foreclosure process.

2. Compliance Requirements:

The proposed regulation does not impose any requirements on small businesses. To the extent lenders are small businesses that choose to enter into shared appreciation agreements, they must do so within the restrictions set forth in the regulation, which include making certain disclosures and limiting the amount of the appreciation in which they can share.

3. Professional Services:

None.

4. Compliance Costs:

Costs associated with making required disclosures are negligible. If any small business finds the costs to be excessive, they can choose not to enter into shared appreciation agreements.

5. Economic and Technological Feasibility:

The rule-making should impose no adverse economic or technological burden on small businesses.

6. Minimizing Adverse Impacts:

The proposed regulation provides small businesses with an option to enter into shared appreciation agreements if they choose to do so. They have no obligation to enter into such agreements, and therefore the regulation should impose no adverse impacts.

7. Small Business and Local Government Participation:

The Department solicited input on the proposed regulation from industry representatives and consumer groups. The Department also maintains regular contact with large segments of the mortgage industry through its regulation of mortgage bankers, servicers, brokers, and loan originators. The Department likewise maintains close contact with a variety of consumer groups through its community outreach programs and foreclosure mitigation programs. In response to feedback from various industry and consumer groups, the Department has tailored this regulation to protect consumer interests while also serving the needs of mortgage lenders and servicers.

Rural Area Flexibility Analysis

Types and Estimated Numbers of Rural Areas. Approximately 10% of all mortgage loans in New York State are made to borrowers located in rural areas. To the extent that these loans meet the shared appreciation qualifications in the proposed regulation, lenders and borrowers may mutually agree to enter into a shared appreciation agreement.

Compliance Requirements. Compliance requirements in rural areas do not differ from those in non-rural areas. Both are minimal, and require making certain disclosures and limiting the amount of appreciation in which lenders can share.

Costs. Costs in rural areas do not differ from those in non-rural areas. The proposed regulation provides lenders and borrowers with an option to enter into shared appreciation agreements if they choose to do so. There is have no obligation to enter into such agreements, and if any party finds the costs to be prohibitive, they can choose not to enter into shared appreciation agreements.

Minimizing Adverse Impacts. Adverse impacts in rural areas do not differ from those in non-rural areas. The proposed regulation provides lenders and borrowers with an option to enter into shared appreciation agreements if they choose to do so. There is have no obligation to enter into such agreements, and therefore the regulation should impose no adverse impacts.

Rural Area Participation. The Department maintains regular contact with large segments of the mortgage industry through its regulation of mortgage bankers, servicers, brokers, and loan originators, including those in rural areas. The Department likewise maintains close contact with a variety of consumer groups through its community outreach programs and foreclosure mitigation programs, which serve the interests of rural areas. In response to feedback from various industry and consumer groups, the Department has tailored this regulation to protect consumer interests while also serving the needs of mortgage lenders and servicers.

Job Impact Statement

The proposed regulation is not expected to have an adverse effect on jobs or employment activities. Rather, to the extent it helps struggling homeowners to keep their homes, it may give such homeowners the confidence and stability they need to keep their jobs or obtain new jobs.

Department of Health

EMERGENCY RULE MAKING

NYS Medical Indemnity Fund

I.D. No. HLT-51-13-00001-E
Filing No. 1166
Filing Date: 2013-11-27
Effective Date: 2013-11-27

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

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

Statutory authority: Public Health Law, section 2999-j

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

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

Subject: NYS Medical Indemnity Fund.

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

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

The application process itself has been developed to be as streamlined as possible. Submission of (a) a completed application form, (b) a signed release form, (c) a certified copy of a judgment or court-ordered settlement that finds or deems the plaintiff to have sustained a birth-related neurological injury, (d) documentation regarding the specific nature and degree of the applicant's neurological injury or injuries at present, (e) copies of medical records that substantiate the allegation that the applicant sustained a "birth-related neurological injury," and (f) documentation of any other health insurance the applicant may have are required for actual enrollment in the Fund.

The parent or other authorized person must submit the name, address, and phone number of all providers providing care to the applicant at the time of enrollment for purposes of both claims processing and case management. To the extent that documents prepared for litigation and/or other health related purposes contain the required background information, such documentation may be submitted to meet these requirements as well, provided that this documentation still accurately describes the applicant's condition and treatment being provided.

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

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire February 24, 2014.

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: regsqna@health.state.ny.us

Regulatory Impact Statement

Statutory Authority:

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

Legislative Objectives:

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

Needs and Benefits:

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

Costs to Regulated Parties:

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

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

Costs to administering agencies and the State associated with the Fund will be covered by applicable appropriations, as provided in Public Health Law § 2999-i(3)-(5). There are no costs imposed on local governments by these regulations.

Local Government Mandates:

The proposed regulations do not impose any new programs, services, duties of responsibilities upon any county, city, town, village, school district, fire district or other special district.

Paperwork:

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

Duplication:

There are no other State or Federal requirements that duplicate, overlap, or conflict with the statute and the proposed regulations. Although some of the services to be provided by the Fund are the same as those available under certain Medicaid waivers, the waivers have limited slots and the Fund becomes the primary payer for dually enrolled individuals. Coordination of benefits will be one of the responsibilities of the Fund Administrator. Health care services, equipment, medications or other items that any commercial insurer providing coverage to a qualified plaintiff is legally obligated to provide will not be covered by the Fund (except for copayments and/or deductibles) nor will the Fund cover any health care service, equipment, or other item that is potentially available through another State or Federal program (except Medicaid and Medicare) or similar program in another country, if applicable, such as the Early Intervention Program or as part of an Individualized Education Plan unless the parent or guardian can demonstrate that he or she has made a reasonable effort to obtain such service, equipment or item for the qualified plaintiff through the applicable program.

Alternatives:

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

Federal Standards:

There are no minimum Federal standards regarding this subject.

Compliance Schedule:

The Fund is statutorily required to be operational by October 1, 2011.

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.

Cure Period:

Chapter 524 of the Laws of 2011 requires agencies to include a "cure period" or other opportunity for ameliorative action to prevent the imposition of penalties on the party or parties subject to enforcement when developing a regulation or explain in the Regulatory Flexibility Analysis why one was not included. This regulation creates no new penalty or sanction. Hence, a cure period is not necessary.

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 amendment does not impose an adverse impact on rural areas, and it does not impose reporting, record keeping or other compliance requirements on public or private entities 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.

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Presumptive Eligibility for Family Planning Benefit Program

I.D. No. HLT-51-13-00004-EP
Filing No. 1169
Filing Date: 2013-12-02
Effective Date: 2013-12-02

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

Proposed Action: Amendment of section 360-3.7 of Title 18 NYCRR.

Statutory authority: Social Services Law, section 366(1)

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

Specific reasons underlying the finding of necessity: Chapter 59 of the laws of 2011 enacted a number of proposals recommended by the Medicaid Redesign Team established by the Governor to reduce costs and increase quality and efficiency in the Medicaid program. The changes to SSL section 366(1) that require the Department, by regulation, to implement criteria for presumptive eligibility for the Family Planning Benefit Program, took effect April 1, 2011. Paragraph (t) of section 111 of Part H of Chapter 59 authorizes the Commissioner to promulgate, on an emergency basis, any regulations needed to implement such law. The Commissioner has determined it necessary to file these regulations on an emergency basis.

Subject: Presumptive Eligibility for Family Planning Benefit Program.

Purpose: To set criteria for the Presumptive Eligibility for Family Planning Benefit Program.

Text of emergency/proposed rule: Section 360-3.7 is amended to add a new subdivision (e) to read as follows:

(e) Presumptive eligibility for coverage of family planning benefit program (FPBP) services.

(1) An individual will be presumed eligible to receive the MA care, services and supplies listed in paragraph (8) of this subdivision when a qualified provider determines, on the basis of preliminary information, that the individual's family income does not exceed 200 percent of the Federal poverty line applicable to a family of the same size.

(2) For purposes of this subdivision, the individual's family income will be determined according to section 360-4.6 of this Part relating to financial eligibility for MA. The resources of the individual's family will not be considered in determining the individual's presumptive eligibility for coverage of FPBP services.

(3) For purposes of this subdivision, an individual's family includes the individual, any legally responsible relatives and any legally dependent relatives with whom he or she resides. In determining eligibility for children under 21, parental income is disregarded when the child requests confidentiality, has good cause not to provide or is otherwise unable to obtain parental income information.

(4) As used in this subdivision, the term qualified provider means a provider who:

(i) is eligible to receive payment under the MA program;

(ii) provides family planning services, treatment and supplies; and

(iii) has been found by the department to be capable of making presumptive eligibility determinations based on family income.

(5) An individual who has been determined presumptively eligible for coverage of FPBP services must submit a FPBP application to the social services district in which he or she resides, or to the department or its agent, by the last day of the month following the month in which a qualified provider determined him or her to be presumptively eligible.

(6) A qualified provider that has determined an individual to be presumptively eligible for coverage of FPBP services must:

(i) on the day the qualified provider determines the individual to be presumptively eligible, inform the individual that a FPBP application must be submitted to the social services district in which he or she resides, or to the department or its agent, by the last day of the following month in order to continue presumptive eligibility until the day his or her FPBP eligibility is determined;

(ii) assist the individual to complete the FPBP application and submit the application on his or her behalf; and

(iii) within five business days after the day the qualified provider determines the individual to be presumptively eligible, notify the social services district in which the individual resides, or the department or its agent, of its presumptive eligibility determination on forms the department develops or approves.

(7) The period of presumptive eligibility for coverage of FPBP services begins on the day a qualified provider determines the individual to be presumptively eligible. If the individual submits a FPBP application to the social services district in which he or she resides, or to the department or its agent, by the last day of the following month, the period of presumptive eligibility continues through the day the individual's eligibility for FPBP is determined; if the individual fails to submit such an application, the period of presumptive eligibility continues through the last day of the following month.

(8) An individual found presumptively eligible pursuant to this subdivision is eligible for coverage of the following medically necessary FPBP services and appropriate transportation to obtain such services:

(i) hospital based and free standing clinics;

(ii) county health department clinics;

(iii) federally qualified health centers or rural health centers;

(iv) obstetricians and gynecologists;

(v) family practice physicians;

(vi) licensed midwives, nurse practitioners; and

(vii) family planning related services from pharmacies and laboratories.

(9) If a presumptively eligible individual is subsequently determined to be ineligible for FPBP, he or she may request a fair hearing pursuant to Part 358 of this Title to dispute the denial of FPBP, but the presumptive eligibility period will not be extended by such request.

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 March 1, 2014.

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: 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.

Regulatory Impact Statement

Statutory Authority:

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

Legislative Objectives:

Subdivision (1) of section 366 of the Social Services Law (SSL), as amended by Chapter 59 of the Laws of 2011, provides that pursuant to regulations promulgated by the Commissioner of Health, that the Department will establish criteria for presumptive eligibility for the Family Planning Benefit Program. The legislative objective, expressed through SSL section 366 (1) is to expand access to family planning services by easing the application process.

Needs and Benefits:

New York included in Chapter 59 of the Laws of 2011, the option afforded by the Affordable Care Act, of providing individuals with a period of presumptive eligibility for family planning-only services. This regulation will provide the necessary criteria, as required by subdivision 1 of Section 366 of the Social Services Law, to implement the Presumptive Eligibility for the Family Planning Benefit Program.

COSTS:

Costs for the Implementation of, and Continuing Compliance with the Regulation to the Regulated Entity:

This amendment will not increase costs to the regulated parties.

Costs to State and Local Government:

This amendment will not increase costs to the State or local governments.

Costs to the Department of Health:

Any costs associated with this amendment will be offset by administrative savings.

Local Government Mandates:

This amendment will not impose any program, service, duty, additional cost, or responsibility on any county, city, town, village, school district, fire district, or other special district.

Paperwork:

Any provider choosing to act as a "qualified provider" will be required to notify the local social services district when a presumptive eligibility determination has been made.

Duplication:

There are no duplicative or conflicting rules identified.

Alternatives:

Establishing criteria for presumptive eligibility for the Family Planning Benefit Program is mandated by section 366(1) of the SSL. Processing through a statewide vendor was chosen over processing through local districts to centralize administration of eligibility determinations.

Federal Standards:

The federal Medicaid statute at section 2303 (b) of the Affordable Care Act (ACA) added a new section (1920C) to the Social Security Act that gives States that adopt the new family planning group the option of also providing a period of presumptive eligibility based on preliminary information that an individual meets the eligibility criteria for family planning services in new section 1902(ii).

Compliance Schedule:

Social services districts should be able to comply with the proposed regulations when they become effective.

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.

Cure Period:

Chapter 524 of the Laws of 2011 requires agencies to include a "cure period" or other opportunity for ameliorative action to prevent the imposition of penalties on the party or parties subject to enforcement when developing a regulation or explain in the Regulatory Flexibility Analysis why one was not included. This regulation creates no new penalty or sanction. Hence, a cure period is not necessary.

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 amendment 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.

Long Island Power Authority

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Authority's Tariff for Electric Service (''Tariff'')

I.D. No. LPA-51-13-00005-P

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

Proposed Action: The Authority is considering a proposal to modify its Tariff for Electric Service to revise the Tariff to implement changes in connection with the new oversight responsibilities of the New York State Department of Public Service.

Statutory authority: Public Authorities Law, section 1020-f(z) and (u)

Subject: Authority's Tariff for Electric Service (''Tariff'').

Purpose: To revise the Tariff in connection with the new oversight responsibilities of the New York State Department of Public Service.

Public hearing(s) will be held at: 10:00 a.m., Feb. 3, 2014 at H. Lee Dennison Bldg., 100 Veterans Memorial Hwy., Hauppauge, NY; and 2:00 p.m., Feb. 3, 2014 at Long Island Power Authority, 333 Earle Ovington Blvd., 4th Fl., Uniondale, 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: The Long Island Power Authority ("Authority") is considering a proposal to modify its Tariff for Electric Service ("Tariff") to revise the consumer complaint procedures and other miscellaneous Tariff provisions to implement changes in connection with the new oversight responsibilities of the New York State Department of Public Service ("DPS"). The changes include: (1) substituting the DPS for the Authority Staff in the consumer complaint and appeal process; (2) eliminating LIPA's ability to require advance payments (pre-payments) for service to residential customers; (3) eliminating the charge for testing meters; and (4) allowing physicians assistants and nurse practitioners to certify conditions of medical emergencies that would qualify a residential customer for specific protections under the Tariff. The Authority may approve, modify, or reject, in whole or part, the proposal.

Text of proposed rule and any required statements and analyses may be obtained from: John Little, Long Island Power Authority, 333 Earle Ovington Blvd., Suite 403, Uniondale, NY 11553, (516) 222-7700, email: jlittle@lipower.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.

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.

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Authority's Tariff for Electric Service (''Tariff'')

I.D. No. LPA-51-13-00006-P

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

Proposed Action: The Authority is considering a proposal to modify its Tariff for Electric Service to authorize the billing of securitization charges; restructure the Energy Efficiency Cost Recovery Rate; update Delivery Charges and make miscellaneous changes.

Statutory authority: Public Authorities Law, section 1020-f(z) and (u)

Subject: Authority's Tariff for Electric Service (''Tariff'').

Purpose: To authorize the billing of securitization charges; restructure and update rates and charges and make miscellaneous changes.

Public hearing(s) will be held at: 10:00 a.m., Feb. 3, 2014 at H. Lee Dennison Bldg., 100 Veterans Memorial Hwy., Hauppauge, NY; and 2:00 p.m., Feb. 3, 2014 at Long Island Power Authority, 333 Earle Ovington Blvd., 4th Fl., Uniondale, 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: The Long Island Power Authority ("Authority") is considering a proposal to modify its Tariff for Electric Service ("Tariff") to: (1) authorize the billing of securitization charges on behalf of the Utility Debt Securitization Authority; (2) restructure the Energy Efficiency Cost Recovery Rate: (3) update Delivery Charges consistent with the approved LIPA budget for 2014; and (4) to make miscellaneous changes that more closely align LIPA's tariff with current PSC policies.

LIPA's approved budget for 2014 incorporates a level of revenues that assumes no increase in rates, other than changes to the Power Supply Charge (also known as the Fuel and Purchased Power Cost Adjustment). As presented in the budget, however, a number of revenue-neutral changes are required to accommodate aspects of the LIPA Reform Act of 2013, accomplish the rate freeze for 2014, and bring the Tariff more into line with Public Service Commission policies for the regulated, investor-owned, utilities. These proposed changes will not materially change the rates paid by customers in the affected rate classes.

The Authority may approve, modify, or reject, in whole or part, the proposal.

Text of proposed rule and any required statements and analyses may be obtained from: John Little, Long Island Power Authority, 333 Earle Ovington Blvd., Suite 403, Uniondale, NY 11553, (516) 222-7700, email: jlittle@lipower.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.

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.

Office of Mental Health

EMERGENCY RULE MAKING

Prevention of Influenza Transmission

I.D. No. OMH-51-13-00007-E

Filing No. 1170

Filing Date: 2013-12-02

Effective Date: 2013-12-02

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

Action taken: Addition of Part 509 to Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.07, 7.09 and 31.04

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

Specific reasons underlying the finding of necessity: The immediate adoption of these amendments is necessary for the preservation of the health, safety, and welfare of individuals receiving services in OMH-operated psychiatric centers and freestanding psychiatric hospitals licensed under Article 31 of the Mental Hygiene Law.

Influenza is an unpredictable disease that can cause serious illnesses, death, and healthcare disruption during any given year. Recent influenza seasons in New York State have been worse than those experienced a decade ago. In response to this increased public health threat, New York must take active steps to prevent and control transmission of seasonal influenza. The seriousness of the continuing influenza threat and the failure of the health care system to achieve acceptable vaccination rates through voluntary programs necessitate further action.

Although masks are not as effective as vaccination, evidence indicates that wearing a surgical or procedure mask will lessen transmission of influenza from patients experiencing respiratory symptoms. It is also known that persons incubating influenza may shed the influenza virus before they have noticeable symptoms of influenza. The Centers for Disease Control and Prevention (CDC) recommends that patients who may have an infectious respiratory illness wear a mask when not in isolation and that healthcare personnel wear a mask when in close contact with symptomatic patients. Further, the Infectious Disease Society of America recommends that healthcare personnel who are not vaccinated for influenza wear masks. Recently, the New York State Department of Health adopted regulations at 10 NYCRR Section 2.59 to require all unvaccinated personnel in certain health settings to wear surgical or procedure masks during the time when the Commissioner of Health determines that influenza is prevalent.

It is critical for the Office of Mental Health to join in a statewide effort to reduce the morbidity and mortality of influenza, by combining efforts and pursuing a common path of prevention and intervention. Therefore, OMH is adopting on an emergency basis this rule to require that, during the influenza season, all OMH-operated psychiatric centers (including all programs and services operated by, or under the auspices of such psychiatric centers) and "free standing" Article 31 psychiatric hospitals shall ensure that all personnel who have not been vaccinated against influenza for the current influenza season wear a surgical or procedure mask while in areas where patients may be present. Facilities shall supply such masks to personnel, free of charge.

OMH was not able to use the regular rule making process established by the State Administrative Procedure Act because there was not sufficient time to develop and promulgate regulations prior to influenza season. Therefore, for the health and safety of patients in OMH-operated psychiatric hospitals and Article 31 licensed freestanding psychiatric facilities, this rule is being adopted on an emergency basis until such time as it has been formally adopted through the SAPA rule promulgation process.

Subject: Prevention of Influenza Transmission.

Purpose: Require unvaccinated personnel to wear surgical masks in certain OMH-licensed or operated psychiatric centers during flu season.

Text of emergency rule: A new Part 509 is added to Title 14 NCYRR as follows:

PART 509

PREVENTION OF INFLUENZA TRANSMISSION

(Statutory Authority: Mental Hygiene Law § § 7.07, 7.09, 31.04)

§ 509.1 Background and Intent.

(a) Influenza is an unpredictable disease that can cause serious illnesses, death, and healthcare disruption during any given year. Recent influenza seasons in New York State have been worse than those experienced a decade ago.

(b) In response to this increased public health threat, New York must take active steps to prevent and control transmission of seasonal influenza. The seriousness of the continuing influenza threat and the failure of the health care system to achieve acceptable vaccination rates through voluntary programs necessitate further action.

(c) Although masks are not as effective as vaccination, evidence indicates that wearing a surgical or procedure mask will lessen transmission of influenza from patients experiencing respiratory symptoms. It is also known that persons incubating influenza may shed the influenza virus before they have noticeable symptoms of influenza. The Centers for Disease Control and Prevention (CDC) recommends that patients who may have an infectious respiratory illness wear a mask when not in isolation and that healthcare personnel wear a mask when in close contact with symptomatic patients. Further, the Infectious Disease Society of America recommends that healthcare personnel who are not vaccinated for influenza wear masks.

(d) Recently, the New York State Department of Health (DOH)adopted regulations at 10 NYCRR Section 2.59 to require all unvaccinated personnel in certain health settings to wear surgical or procedure masks during the time when the Commissioner of Health determines that influenza is prevalent. Specifically, the DOH regulations apply to general hospitals, nursing homes, diagnostic and treatment centers, certified home health agencies, long term home health care programs, acquired immune deficiency syndrome (AIDS) home care programs, licensed home care service agencies, limited licensed home care service agencies and hospices (licensed by DOH under Public Health Law, Articles 28, 36 and 40).

(e) It is critical for the Office of Mental Health to join in a statewide effort to reduce the morbidity and mortality of influenza, by combining efforts and pursuing a common path of prevention and intervention.

§ 509.2 Legal Base.

(a) Section 7.07 of the Mental Hygiene Law charges the Office of Mental Health with the responsibility for seeing that persons with mental illness are provided with care and treatment, and that such care, treatment and rehabilitation is of high quality and effectiveness.

(b) Section 7.09 of the Mental Hygiene Law gives the Commissioner of the Office of Mental Health the power and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction.

(c) Section 31.04 of the Mental Hygiene Law grants the Commissioner of Mental Health the power and responsibility to adopt regulations to effectuate the provisions and purposes of article 31 of such law, including procedures for the issuance and amendment of operating certificates, and for setting standards of quality and adequacy of facilities.

§ 509.3 Definitions. For the purposes of this Part:

(a) Facility shall mean:

(1) a psychiatric center established pursuant to Section 7.17 of the Mental Hygiene Law; including all programs or services operated by, or under the auspices of, such psychiatric center;

(2) a hospital operated pursuant to Part 582 of this Title.

(b) Influenza season shall mean the period of time during which influenza is prevalent as determined by the Commissioner of Health.

(c) Personnel shall mean all persons employed or affiliated with a facility, as defined in this Section, whether paid or unpaid, including but not limited to employees, members of the medical, nursing, and other treatment staff, contract staff, students, and volunteers, who engage in activities such that if they were infected with influenza, they could potentially expose patients to the disease.

Section 509.4 Documentation Requirements.

(a) All facilities shall determine and document which persons qualify as ''personnel'' under this Part.

(b) All facilities shall document the influenza vaccination status of all personnel for the current influenza season in a secure file separate from their personnel history folder. Documentation of vaccination must include

the name and address of the individual who ordered or administered the vaccine and the date of vaccination.

(c) During the influenza season, all facilities shall ensure that all personnel who have not been vaccinated against influenza for the current influenza season wear a surgical or procedure mask while in areas where patients may be present. Facilities shall supply such masks to personnel, free of charge.

(d) Upon the request of the Office, a facility must report the number and percentage of personnel that have been vaccinated against influenza for the current influenza season.

(e) All facilities shall develop and implement a policy and procedure to ensure compliance with the provisions of this Part. The policy and procedure shall include, but is not limited to, the identification of those areas where unvaccinated personnel must wear a mask pursuant to subdivision (c) of this Section.

(f) For those facilities that are required to comply with 10 NYCRR Section 2.59, compliance with such Section shall be deemed compliance with this Part.

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 March 1, 2014.

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

Regulatory Impact Statement

1. Statutory Authority: Section 7.07 of the Mental Hygiene Law charges the Office of Mental Health with the responsibility for seeing that persons with mental illness are provided with care and treatment, and that such care, treatment and rehabilitation is of high quality and effectiveness.

Section 7.09 of the Mental Hygiene Law gives the Commissioner of the Office of Mental Health the power and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction.

Section 31.04 of the Mental Hygiene Law grants the Commissioner of Mental Health the power and responsibility to adopt regulations to effectuate the provisions and purposes of article 31 of such law, including procedures for the issuance and amendment of operating certificates, and for setting standards of quality and adequacy of facilities.

2. Legislative Objectives: Articles 7 and 31 of the Mental Hygiene Law reflect the Commissioner's authority to establish regulations regarding mental health programs and charges OMH with the responsibility for ensuring that persons with mental illness receive high quality care and treatment. The proposed rule creates a new 14 NYCRR Part 509 to establish provisions designed to reduce the transmission of the influenza virus in inpatient psychiatric facilities operated or licensed by OMH. This rule furthers the legislative policy of providing high quality services to individuals with mental illness in a safe and secure environment.

3. Needs and Benefits: Influenza is an unpredictable disease that can cause serious illnesses, death, and healthcare disruption during any given year. Recent influenza seasons in New York State were worse than experienced in a decade, and serve as a reminder that influenza could have this devastating effect in any year. In response to this increased public health threat, New York must take active steps to prevent and control transmission of seasonal influenza. The seriousness of the continuing influenza threat and the failure of the health care system to achieve acceptable vaccination rates through voluntary programs necessitate further action.

The new 14 NYCRR Part 509 establishes provisions whereby all OMH-operated psychiatric centers (including all programs and services operated by, or under the auspices of such psychiatric centers) and Article 31 "free standing" psychiatric hospitals shall ensure that, during the influenza season, all personnel who have not been vaccinated against influenza for the current influenza season wear a surgical or procedure mask while in areas where patients may be present. Such masks shall be provided free of charge to personnel. Although masks are not as effective as vaccination, evidence indicates that wearing a surgical or procedure mask will lessen transmission of influenza from patients experiencing respiratory symptoms. It is also known that persons incubating influenza may shed the influenza virus before they have noticeable symptoms of influenza. The Centers for Disease Control and Prevention (CDC) recommends that patients who may have an infectious respiratory illness wear a mask when not in isolation and that healthcare personnel wear a mask when in close contact with symptomatic patients. Further, the Infectious Disease Society of America recommends that healthcare personnel who are not vaccinated for influenza wear masks.

Recently, the New York State Department of Health adopted regulations at 10 NYCRR Section 2.59 to require all unvaccinated personnel in certain health settings to wear surgical or procedure masks during the time when the Commissioner of Health determines that influenza is prevalent. Specifically, the DOH regulations apply to general hospitals, nursing homes, diagnostic and treatment centers, certified home health agencies, long term home health care programs, acquired immune deficiency syndrome (AIDS) home care programs, licensed home care service agencies, limited licensed home care service agencies and hospices (licensed by DOH under Public Health Law, Articles 28, 36 and 40).

It is critical for the Office of Mental Health to join in a statewide effort to reduce the morbidity and mortality of influenza, by combining efforts and pursuing a common path of prevention and intervention.

4. Costs:

(a) Costs to Local Government: These regulatory amendments will not result in any additional costs to local government.

(b) Costs to State and Regulated Parties: Although it is impossible to quantify the exact cost of providing surgical or procedure masks for those personnel who have not been vaccinated, it is anticipated that this cost will not be significant. The Department of Health estimates that on average, the price of a surgical or procedure mask varies between approximately 10 to 25 cents per mask, subject to the quantity ordered. This is a modest investment to protect the health and safety of patients and personnel, especially when compared to both the direct medical costs and indirect costs of personnel absenteeism, including personnel working less effectively or being unable to work. Therefore, the minimal cost of surgical or procedure masks is expected to be offset by the savings reflected in a reduction of influenza in personnel and the loss of productivity and available staff.

5. Local Government Mandates: These regulatory amendments will not result in any additional imposition of duties or responsibilities upon county, city, town, village, school or fire districts, except to the extent that the local governmental unit is a provider of services.

6. Paperwork: This rule will result in a minor increase in the paperwork requirements of all facilities covered by the regulation as they will have to determine and document which persons qualify as personnel under the new Part 509. Facilities must document the influenza vaccination status of all personnel for the current influenza season in a secure file separate from an individual's personnel history folder. Upon request of OMH, facilities must report the number and percentage of personnel that have been vaccinated against influenza for the current influenza season. Facilities must develop and implement a policy and procedure to ensure compliance with the provisions of this Part.

7. Duplication: These regulatory amendments do not duplicate existing State or federal requirements. In instances where an inpatient program is required to comply with the Department of Health regulations found in 10 NYCRR Section 2.59, compliance with that section shall be deemed compliance with this Part.

8. Alternatives: One alternative to requiring a surgical or procedure mask for unvaccinated personnel would be to require all personnel to be vaccinated for influenza. While OMH strongly encourages all personnel be vaccinated, requiring unvaccinated staff to wear a surgical or procedure mask is the most effective and least burdensome way to immediately reduce the potential for transmission of influenza at this time. The only other alternative that was considered was inaction, but because of the seriousness of the influenza threat and the failure of the health care system to achieve acceptable vaccination rates through voluntary programs, that alternative was necessarily rejected.

9. Federal Standards: The regulatory amendments do not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance Schedule: These regulatory amendments are effective immediately upon adoption.

Regulatory Flexibility Analysis

The provisions of the new 14 NYCRR Part 509 apply to OMH-operated psychiatric centers (including all programs and services operated by, or under the auspices of such psychiatric centers) and "free standing" psychiatric hospitals licensed under Article 31 of the Mental Hygiene Law. All of these hospitals employ more than 100 people; therefore, none of them qualify as a small business. The proposed rule creating a new 14 NYCRR Part 509 establishes provisions designed to reduce the transmission of the influenza virus by ensuring that, during the influenza season, all personnel who have not been vaccinated against influenza for the current influenza season wear a surgical or procedure mask while in areas where patients may be present. Costs to regulated parties are expected to be minimal and offset by the savings reflected in the reduction of influenza in personnel. As there will be no adverse economic impact on small business or local governments, a Regulatory Flexibility Analysis for Small Business and Local Governments has not been submitted with this notice.

Rural Area Flexibility Analysis

1. Description of the types and estimation of the number of rural areas in which the rule will apply: In New York State, 43 counties have a popula-

tion of less than 200,000: Allegany, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Ontario, Orleans, Oswego, Otsego, Putnam, Rensselaer, St. Lawrence, Schenectady, Schoharie, Schuyler, Seneca, Steuben, Sullivan, Tioga, Tompkins, Ulster, Warren, Washington, Wayne, Wyoming and Yates. Additionally, 10 counties with certain townships have a population density of 150 persons or less per square mile: Albany, Broome, Dutchess, Erie, Monroe, Niagara, Oneida, Onondaga, Orange, and Saratoga.

The rule establishes provisions designed to reduce the transmission of the influenza virus in OMH-operated psychiatric centers (including all programs and services operated by, or under the auspices of such psychiatric centers) and "free standing" Article 31 psychiatric hospitals by ensuring that, during the influenza season, all personnel who have not been vaccinated against influenza for the current influenza season wear a surgical or procedure mask while in areas where patients may be present. Costs to regulated parties are expected to be minimal and offset by the savings reflected in the reduction of influenza in personnel. The geographic location of any given program (urban or rural) will not be a contributing factor to any additional costs to providers.

2. Reporting, recordkeeping and other compliance requirements and professional services: All facilities covered by the regulation will have to determine and document which persons qualify as personnel under the new Part 509. In addition, facilities must document the influenza vaccination status of all personnel for the current influenza season in a secure file separate from their personnel history folder. At the request of OMH, facilities must report the number and percentage of personnel that have been vaccinated against influenza for the current flu season. Facilities must develop and implement a policy and procedure to ensure compliance with the provisions of this Part. No additional professional services are required as a result of this regulation.

3. Compliance costs: There will be modest costs to providers, regardless of their geographic location, as a result of this regulation. The exact costs, while impossible to quantify, are not expected to be significant. The Department of Health has estimated that on average, the price of a surgical or procedure mask varies between approximately 10 to 25 cents per mask, subject to the quantity ordered. These costs are expected to be offset by the savings reflected in the reduction of influenza in personnel and the loss of productivity and available staff.

4. Minimizing adverse impact: The regulations could have required all personnel be vaccinated for influenza; however, OMH believes it to be less burdensome to require the use of surgical or procedure masks for personnel who have not been vaccinated. The requirement to wear a surgical mask does not impose any physical limitations on the individual wearing the mask, as it would if the regulation required the use of a respirator, which would provide a higher level of protection. In addition, the requirement that personnel who have not been vaccinated wear a mask is only in effect during influenza season as determined by the Commissioner of Health.

5. Participation of public and private interests in rural areas: OMH is releasing a health advisory notifying OMH-operated psychiatric centers and free standing Article 31 psychiatric hospitals that the agency is promulgating a regulation establishing provisions designed to reduce the transmission of the influenza virus. The health advisory was shared with union representatives. In accordance with statutory requirements, the rule will be presented to the Behavioral Health Services Advisory Council for review and recommendation.

Job Impact Statement

A Job Impact Statement for these amendments is not being submitted with this rule making. The new 14 NYCRR Part 509 is being created to establish provisions designed to reduce the transmission of the influenza virus in OMH-operated psychiatric centers (including all programs and services operated by, or under the auspices of such psychiatric centers) and "free standing" Article 31 psychiatric hospitals. It is apparent from the nature and purpose of the rule that it will not have an impact on jobs and employment opportunities.

Public Service Commission

NOTICE OF WITHDRAWAL

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

The following rule makings have been withdrawn from consideration:

I.D. No.	Publication Date of Proposal
PSC-11-09-00008-P	March 18, 2009
PSC-23-11-00017-P	June 8, 2011
PSC-40-12-00012-P	October 3, 2012
PSC-43-12-00006-P	October 24, 2012
PSC-08-13-00013-P	February 20, 2013
PSC-11-13-00012-P	March 13, 2013
PSC-13-13-00006-P	March 27, 2013
PSC-27-13-00007-P	July 3, 2013

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Consolidated Edison Proposing to Use Data from a Test Period Ending September 30, 2013 to Support Its Next Rate Filing

I.D. No. PSC-51-13-00009-P

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

Proposed Action: The Commission is considering whether to grant, deny or modify, in whole or in part the petition of Consolidated Edison Company of New York, Inc. for a limited waiver of the Commission's Statement of Policy on Test Periods in Major rate Proceedings.

Statutory authority: Public Service Law, sections 4(1), 65(1), 66(1) and (12)

Subject: Consolidated Edison proposing to use data from a test period ending September 30, 2013 to support its next rate filing.

Purpose: To ensure there is a reasonable basis for data submitted in support of a request for a change in rates.

Substance of proposed rule: The Commission is considering whether to grant, deny or modify, in whole or in part, the request of Consolidated Edison Company of New York, Inc. (Con Edison) as set forth in its petition dated November 19, 2013, seeking a limited waiver of the applicable test period as established by the Commission's "Statement of Policy on Test Periods in Major Rate Proceedings." Con Edison seeks to utilize a historic test year consisting of the 12 months ending September 30, 2013 in presenting its next electric, gas and/or steam major rate change requests should the outcome of the current rate proceedings (Cases 13-E-0030, 13-G-0031 and 13-S-0032) be other than a Commission adoption of multi-year plans on terms acceptable to Con Edison and such filing is made on or before April 28, 2014.

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: Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: secretary@dps.ny.gov

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

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

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

(13-E-0030SP3)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Consolidated Edison Proposing to Use Data from a Test Period Ending September 30, 2013 to Support Its Next Rate Filing

I.D. No. PSC-51-13-00010-P

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

Proposed Action: The Commission is considering whether to grant, deny or modify, in whole or in part the petition of Consolidated Edison Company of New York, Inc. for a limited waiver of the Commission's Statement of Policy on Test Periods in Major rate Proceedings.

Statutory authority: Public Service Law, sections 4(1), 65(1), 66(1) and (12)

Subject: Consolidated Edison proposing to use data from a test period ending September 30, 2013 to support its next rate filing.

Purpose: To ensure there is a reasonable basis for data submitted in support of a request for a change in rates.

Substance of proposed rule: The Commission is considering whether to grant, deny or modify, in whole or in part, the request of Consolidated Edison Company of New York, Inc. (Con Edison) as set forth in its petition dated November 19, 2013, seeking a limited waiver of the applicable test period as established by the Commission's "Statement of Policy on Test Periods in Major Rate Proceedings." Con Edison seeks to utilize a historic test year consisting of the 12 months ending September 30, 2013 in presenting its next electric, gas and/or steam major rate change requests should the outcome of the current rate proceedings (Cases 13-E-0030, 13-G-0031 and 13-S-0032) be other than a Commission adoption of multi-year plans on terms acceptable to Con Edison and such filing is made on or before April 28, 2014.

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: Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: secretary@dps.ny.gov

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

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

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

(13-G-0031SP3)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Consolidated Edison Proposing to Use Data from a Test Period Ending September 30, 2013 to Support Its Next Rate Filing

I.D. No. PSC-51-13-00011-P

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

Proposed Action: The Commission is considering whether to grant, deny or modify, in whole or in part the petition of Consolidated Edison Company of New York, Inc. for a limited waiver of the Commission's Statement of Policy on Test Periods in Major rate Proceedings.

Statutory authority: Public Service Law, sections 4(1), 65(1), 66(1) and (12)

Subject: Consolidated Edison proposing to use data from a test period ending September 30, 2013 to support its next rate filing.

Purpose: To ensure there is a reasonable basis for data submitted in support of a request for a change in rates.

Substance of proposed rule: The Commission is considering whether to grant, deny or modify, in whole or in part, the request of Consolidated Edison Company of New York, Inc. (Con Edison) as set forth in its petition dated November 19, 2013, seeking a limited waiver of the applicable test period as established by the Commission's "Statement of Policy on Test Periods in Major Rate Proceedings." Con Edison seeks to utilize a historic test year consisting of the 12 months ending September 30, 2013 in presenting its next electric, gas and/or steam major rate change requests should the outcome of the current rate proceedings (Cases 13-E-0030, 13-G-0031 and 13-S-0032) be other than a Commission adoption of multi-year plans on terms acceptable to Con Edison and such filing is made on or before April 28, 2014.

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: Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: secretary@dps.ny.gov

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

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

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

(13-S-0032SP3)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Whether a Proposed Agreement for Providing Water Service by Saratoga Water Services, Inc., and a Loan Is in the Public Interest

I.D. No. PSC-51-13-00012-P

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

Proposed Action: PSC is considering whether to approve, deny, or modify, in whole or in part, a petition of Saratoga Water Services, Inc. for a waiver of its tariff, approval of a service agreement, and a loan of $175,000 to buy facilities owned by Lakeview Outlets, Inc.

Statutory authority: Public Service Law, sections 4(1), 20(1), 89-b and 89-f

Subject: Whether a proposed agreement for providing water service by Saratoga Water Services, Inc., and a loan is in the public interest.

Purpose: Whether the Commission should issue an order approving the proposed provision of water service and loan to acquire facilities.

Substance of proposed rule: The Commission is considering whether to approve, deny, or modify, in whole or in part a Petition in which Saratoga Water Services, Inc. (Saratoga) seeks issuance of an Order (1)(a) approving the terms and conditions of a certain "Agreement For The Provision of Water Service and Sale and Purchase of Water Facilities", dated October 17, 2013 (Agreement) between Saratoga and Lakeview Outlets, Inc. as being in the public interest; (b) determining that the provision of water service by Saratoga in accordance with the terms set forth in the Agreement is in the public interest; (c) waiving Saratoga's tariff provisions to the extent they are inconsistent with the Agreement, and (d) waiving the applicability of the provisions of 16 N.Y.C.R.R. Parts 501 and 502 to the extent they are inconsistent with the Agreement; and (2) approval of a loan agreement with the Adirondack Trust Company for $175,000. Saratoga is proposing to acquire existing water facilities owned by of Lakeview Outlets, Inc., which provides water supply service to the commercial tenants in Malta Commons Park. Lakeview has requested that Saratoga take over the provision of service to Malta Commons Park and acquire its facilities. In order to acquire these assets, Saratoga wants to issue and sell long-term debt in the amount not to exceed $175,000. The Commission shall consider all other 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: Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-4535, 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-W-0486SP1)

Workers' Compensation Board

EMERGENCY RULE MAKING

Filing Written Reports of Independent Medical Examinations (IMEs)

I.D. No. WCB-51-13-00008-E
Filing No. 1171
Filing Date: 2013-12-03
Effective Date: 2013-12-03

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

Action taken: Amendment of section 300.2(d)(11) of Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 117 and 137

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

Specific reasons underlying the finding of necessity: This amendment is adopted as an emergency measure because time is of the essence. Memorandum of Decisions issued by Panels of three members of the Workers' Compensation Board (Board) have interpreted the current regulation as requiring reports of independent medical examinations be received by the Board within ten calendar days of the exam. Due to the time it takes to prepare the report and mail it, the fact the Board is not open on legal holidays, Saturdays and Sundays to receive the report, and the U.S. Postal Service is not open on legal holidays and Sundays, it is extremely difficult to timely file said reports. If a report is not timely filed it is not accepted into evidence and is not considered when a decision is rendered. As the medical professional preparing the report must send the report on the same day and in the same manner to the Board, the workers' compensation insurance carrier/self-insured employer, the claimant's treating provider, the claimant's representative and the claimant it is not possible to send the report by facsimile or electronic means. The Decisions have greatly, negatively impacted the professionals who conduct independent medical examinations and the entities that arrange and facilitate these exams, as well as the workers' compensation insurance carriers and self-insured employers. When untimely reports are not accepted into evidence, the insurance carriers and self-insured employers are prevented from adequately defending their position in a workers' compensation claim. Accordingly, emergency adoption of this rule is necessary.

Subject: Filing written reports of Independent Medical Examinations (IMEs).

Purpose: To amend the time for filing written reports of IMEs with the Board and furnished to all others.

Text of emergency rule: Paragraph (11) of subdivision (d) of section 300.2 of Title 12 NYCRR is amended to read as follows:

(11) A written report of a medical examination duly sworn to, shall be filed with the Board, and copies thereof furnished to all parties as may be required under the Workers' Compensation Law, within 10 *business* days after the examination, or sooner if directed, except that in cases of persons examined outside the State, such reports shall be filed and furnished within 20 *business* days after the examination. *A written report is filed with the Board when it has been received by the Board pursuant to the requirements of the Workers' Compensation Law.*

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires March 2, 2014.

Text of rule and any required statements and analyses may be obtained from: Heather MacMaster, Workers' Compensation Board, Office of General Counsel, 328 State Street, Schenectady, NY 12305-2318, (518) 486-9564, email: regulations@wcb.ny.gov

Regulatory Impact Statement

1. Statutory Authority:

The Workers' Compensation Board (hereinafter referred to as Board) is authorized to amend 12 NYCRR 300.2(d)(11). Workers' Compensation Law (WCL) Section 117(1) authorizes the Chair to make reasonable regulations consistent with the provisions of the Workers' Compensation Law and the Labor Law. Section 141 of the Workers' Compensation Law authorizes the Chair to make administrative regulations and orders providing, in part, for the receipt, indexing and examining of all notices, claims and reports, and further authorizes the Chair to issue and revoke certificates of authorization of physicians, chiropractors and podiatrists as provided in sections 13-a, 13-k, and 13-l of the Workers' Compensation Law. Section 137 of the Workers' Compensation Law mandates requirements for the notice, conduct and reporting of independent medical examinations. Specifically, paragraph (a) of subdivision (1) requires a copy of each report of an independent medical examination to be submitted by the practitioner on the same day and in the same manner to the Board, the carrier or self-insured employer, the claimant's treating provider, the claimant's representative and the claimant. Sections 13-a, 13-k, 13-l and 13-m of the Workers' Compensation Law authorize the Chair to prescribe by regulation such information as may be required of physicians, podiatrists, chiropractors and psychologists submitting reports of independent medical examinations.

2. Legislative Objectives:

Chapter 473 of the Laws of 2000 amended Sections 13-a, 13-b, 13-k, 13-l and 13-m of the Workers' Compensation Law and added Sections 13-n and 137 to the Workers' Compensation Law to require authorization by the Chair of physicians, podiatrists, chiropractors and psychologists who conduct independent medical examinations, guidelines for independent medical examinations and reports, and mandatory registration with the Chair of entities that derive income from independent medical examinations. This rule would amend one provision of the regulations adopted in 2001 to implement Chapter 473 regarding the time period within which to file written reports from independent medical examinations.

3. Needs and Benefits:

Prior to the adoption of Chapter 473 of the Laws of 2000, there were limited statutory or regulatory provisions applicable to independent medical examiners or examinations. Under this statute, the Legislature provided a statutory basis for authorization of independent medical examiners, conduct of independent medical examinations, provision of reports of such examinations, and registration of entities that derive income from such examinations. Regulations were required to clarify definitions, procedures and standards that were not expressly addressed by the Legislature. Such regulations were adopted by the Board in 2001.

Among the provisions of the regulations adopted in 2001 was the requirement that written reports from independent medical examinations be filed with the Board and furnished to all parties as required by the WCL within 10 days of the examination. Guidance was provided in 2002 to some participants in the process from executives of the Board that filing was accomplished when the report was deposited in a U.S. mailbox and that "10 days" meant 10 calendar days. In 2003 claimants began raising the issue of timely filing with the Board of the written report and requesting that the report be excluded if not timely filed. In response some representatives for the carriers/self-insured employers presented the 2002 guidance as proof they were in compliance. In some cases the Workers' Compensation Law Judges (WCLJs) found the report to be timely, while others found it to be untimely. Appeals were then filed to the Board and assigned to Panels of Board Commissioners. Due to the differing WCLJ decisions and the appeals to the Board, Board executives reviewed the matter and additional guidance was issued in October 2003. The guidance clarified that filing is accomplished when the report is received by the Board, not when it is placed in a U.S. mailbox. In November 2003, the Board Panels began to issue decisions relating to this issue. The Panels held that the report is filed when received by the Board, not when placed in a U.S. mailbox, the CPLR provision providing a 5-day grace period for mailing is not applicable to the Board (WCL Section 118), and therefore the report must be filed within 10 days or it will be precluded.

Since the issuance of the October 2003 guidance and the Board Panel decisions, the Board has been contacted by numerous participants in the system indicating that ten calendar days from the date of the examination is not sufficient time within which to file the report of the exam with the Board. This is especially true if holidays fall within the ten day period as the Board and U.S. Postal Service do not operate on those days. Further the Board is not open to receive reports on Saturdays and Sundays. If a report is precluded because it is not filed timely, it is not considered by the WCLJ in rendering a decision.

By amending the regulation to require the report to be filed within ten business days rather than calendar days, there will be sufficient time to file the report as required. In addition by stating what is meant by filing there can be no further arguments that the term "filed" is vague.

4. Costs:

This proposal will not impose any new costs on the regulated parties, the Board, the State or local governments for its implementation and continuation. The requirement that a report be prepared and filed with the Board currently exists and is mandated by statute. This rule merely modifies the manner in which the time period to file the report is calculated and clarifies the meaning of the word "filed".

5. Local Government Mandates:

Approximately 2511 political subdivisions currently participate as municipal employers in self-insured programs for workers' compensation coverage in New York State. These self-insured municipal employers will

be affected by the proposed rule in the same manner as all other employers who are self-insured for workers' compensation coverage. As with all other participants, this proposal merely modifies the manner in which the time to file a report is calculated, and clarifies the meaning of the word "filed".

6. Paperwork:

This proposed rule does not add any reporting requirements. The requirement that a report be provided to the Board, carrier, claimant, claimant's treating provider and claimant's representative in the same manner and at the same time is mandated by WCL Section 137(1). Current regulations require the filing of the report with the Board and service on all others within ten days of the examination. This rule merely modifies the manner in which the time period to file the report is calculated and clarifies the meaning of the word "filed".

7. Duplication:

The proposed rule does not duplicate or conflict with any state or federal requirements.

8. Alternatives:

One alternative discussed was to take no action. However, due to the concerns and problems raised by many participants, the Board felt it was more prudent to take action. In addition to amending the rule to require the filing within ten business days, the Board discussed extending the period within which to file the report to fifteen days. In reviewing the law and regulations the Board felt the proposed change was best. Subdivision 7 of WCL Section 137 requires the notice of the exam be sent to the claimant within seven business days, so the change to business days is consistent with this provision. Further, paragraphs (2) and (3) of subdivision 1 of WCL Section 137 require independent medical examiners to submit copies of all requests for information regarding a claimant and all responses to such requests within ten days of receipt or response. Further, in discussing this issue with participants to the system, it was indicated that the change to business days would be adequate.

The Medical Legal Consultants Association, Inc., suggested that the Board provide for electronic acceptance of IME reports directly from IME providers. However, at this time the Board cannot comply with this suggestion as WCL Section 137(1)(a) requires reports to be submitted by the practitioners on the same day and in the same manner to the Board, the insurance carrier, the claimant's attending provider and the claimant. Until such time as the report can be sent electronically to all of the parties, the Board cannot accept it in this manner.

9. Federal Standards:

There are no federal standards applicable to this proposed rule.

10. Compliance Schedule:

It is expected that the affected parties will be able to comply with this change immediately.

Regulatory Flexibility Analysis

1. Effect of rule:

Approximately 2511 political subdivisions currently participate as municipal employers in self-insured programs for workers' compensation coverage in New York State. Any independent medical exams conducted at their request must be filed by the physician, chiropractor, psychologist or podiatrist conducting the exam or by an independent medical examination (IME) entity. Workers' Compensation Law § 137 (1)(a) does not permit self-insured employers or insurance carriers to file these reports, therefore there is no direct action a self-insured local government must or can take with respect to this rule. However, self-insured local governments are concerned about the timely filing of an IME report as one filed late will not be admissible as evidence in a workers' compensation proceeding. This rule makes it easier for a report to be timely filed as it expands the timeframe from 10 calendar days to 10 business days. Small businesses that are self-insured will also be affected by this rule in the same manner as self-insured local governments.

Small businesses that derive income from independent medical examinations are a regulated party and will be required to file reports of independent medical examinations conducted at their request within ten business days of the exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

Individual providers of independent medical examinations who own their own practices or are engaged in partnerships or are members of corporations that conduct independent medical examinations also constitute small businesses that will be affected by the proposed rule. These individual providers will be required to file reports of independent medical examinations conducted at their request within ten business days of the exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

2. Compliance requirements:

This rule requires the filing of IME reports within 10 business days rather than 10 calendar days. Prior to this rule medical providers authorized to conduct IMEs and IME entities hired to perform administrative functions for IME examiners, such as filing the report with the Board, had less time to file such reports. Self-insured local governments and small employers, who are not authorized or registered with the Chair to perform IMEs or related administrative services, are not required to take any action to comply with this rule. As noted above, WCL § 137(1)(a) does not permit self-insured employers or insurance carriers to file IME reports with the Board. The new requirement is solely the manner in which the time period to file reports of independent medical examinations is calculated.

3. Professional services:

It is believed that no professional services will be needed to comply with this rule.

4. Compliance costs:

This proposal will not impose any compliance costs on small business or local governments. The rule solely changes the manner in which a time period is calculated and only requires the use of a calendar.

5. Economic and technological feasibility:

No implementation or technology costs are anticipated for small businesses and local governments for compliance with the proposed rule. Therefore, it will be economically and technologically feasible for small businesses and local governments affected by the proposed rule to comply with the rule.

6. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impacts due to the current regulations for small businesses and local governments. This rule provides only a benefit to small businesses and local governments.

7. Small business and local government participation:

The Board received input from a number of small businesses who derive income from independent medical examinations, some providers of independent medical examinations and the Medical Legal Consultants Association, Inc. which is a non-for-profit association of independent medical examination firms and practitioners across the State.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

This rule applies to all claimants, carriers, employers, self-insured employers, independent medical examiners and entities deriving income from independent medical examinations, in all areas of the state.

2. Reporting, recordkeeping and other compliance requirements:

Regulated parties in all areas of the state, including rural areas, will be required to file reports of independent medical examinations within ten business days, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding. The new requirement is solely the manner in which the time period to file reports of independent medical examinations is calculated.

3. Costs:

This proposal will not impose any compliance costs on rural areas. The rule solely changes the manner in which a time period is calculated and only requires the use of a calendar.

4. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impact for small businesses and local government that already exist in the current regulations. This rule provides only a benefit to small businesses and local governments.

5. Rural area participation:

The Board received input from a number of entities who derive income from independent medical examinations, some providers of independent medical examinations and the Medical Legal Consultants Association, Inc. which is a non-for-profit association of independent medical examination firms and practitioners across the State.

Job Impact Statement

The proposed regulation will not have an adverse impact on jobs. The regulation merely modifies the manner in which the time period to file a written report of an independent medical examination is filed and clarifies the meaning of the word "filed". These regulations ultimately benefit the participants to the workers' compensation system by providing a fair time period in which to file a report.