RULE MAKING ACTIVITIES

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

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

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

Department of Agriculture and Markets

NOTICE OF ADOPTION

Farm Brewery and Farm Distillery Exemption

I.D. No. AAM-48-12-00001-A
Filing No. 82
Filing Date: 2013-01-24
Effective Date: 2013-02-13

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

Action taken: Amendment of Part 276.4 of Title 1 NYCRR.

Statutory authority: Agriculture and Markets Law, sections 16, 18, 251-Z-4 and 251-z-9

Subject: Farm brewery and farm distillery exemption.

Purpose: Provide farm breweries and farm distilleries with AML Article 20-C food processing license exemption.

Text or summary was published in the November 28, 2012 issue of the Register, I.D. No. AAM-48-12-00001-P.

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

Text of rule and any required statements and analyses may be obtained from: Stephen D. Stich, Director, Food Safety Inspection, New York State Department of Agriculture and Markets, 10B Airline Drive, Albany, New York 12235, (518) 457-4492, email: stephen.stich@agriculture.ny.gov

Assessment of Public Comment
The agency received no public comment.

Education Department

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Institutional Accreditation for Title IV Purposes

I.D. No. EDU-07-13-00011-P

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

Proposed Action: Amendment of section 3.12 and Subpart 4-1 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 210(not subdivided), 214(not subdivided), 215(not subdivided) and 305(1) and (2)

Subject: Institutional accreditation for Title IV purposes.

Purpose: To conform Regents Rules to federal regulations relating to voluntary institutional accreditation for Title IV purposes.

Substance of proposed rule (Full text is posted at the following State website:http://www.regents.nysed.gov/meeting): Paragraph (2) of subdivision (d) of section 3.12 of the Rules of the Board of Regents is amended to require that the Regents Advisory Council be comprised of at least 9 members, at least 2 of which shall be senior administrators; at least two 2 shall have experience as full-time faculty members in degree-granting institutions and at least one shall be a full-time faculty member at the time of appointment. At least two other voting members or one-seventh of the total voting members of the council, whichever is greater, shall be representatives of the public as defined in the proposed amendment.

Subdivision (e) shall be added to section 3.12 to create an institutional accreditation appeals board to review and decide appeals from an institution(s) of an adverse accreditation action(s) or probationary accreditation decision(s) of the Board of Regents pursuant the procedures outlined in section 4-1.5 of this Title. The proposed amendment defines the composition of the board.

Subdivision (d) of section 4-1.3 of the Rules of the Board of Regents is amended to clarify that the corrective action period may be extended for a maximum period of 12 months.

Subdivision (f) of section 4-1.3 of the Rules of the Board of Regents is amended to require an institution to obtain approval from the Commissioner and the Board of Regents before the department will include the substantive change in the scope of accreditation it previously granted to the institution.

Paragraph (3) of subdivision (f) of section 4-1.3 of the Rules of the Board of Regents is repealed.

Subdivision (g) of section 4-1.3 of the Rules of the Board of Regents is repealed and a new subdivision (g) is added to prohibit the Commissioner and the Board of Regents from granting initial or a renewal of accreditation to an institution, or a program offered by an institution, if the Commissioner and the Board of Regents knows, or has reasonable cause to know, that the institution is the subject of:

(1) a pending or final action against the institution or a program at such institution by a State agency to suspend, revoke, withdraw, or terminate the institution's legal authority to provide postsecondary education in the State;

(2) a decision by a nationally recognized accrediting agency to deny accreditation or preaccreditation;

(3) a pending or final action brought by a nationally recognized accrediting agency to suspend, revoke, withdraw, or terminate the institution's accreditation or preaccreditation; or

(4) probation or an equivalent status imposed by a recognized agency.

A new subdivision (h) shall be added to section 4-1.3 of the Rules of the Board of Regents to provide that if the Commissioner and the Board of Regents learn that an accredited institution, or an institution that offers a program it accredits, is the subject of an adverse action by another recognized accrediting agency or has been placed on probation or an equivalent status by another recognized agency, the Commissioner and the Board of Regents shall promptly review its accreditation through the compliance review procedure in section 4-1.5 of this Subpart to determine if it should also take adverse action or place the institution on probation. The Commissioner and the Board of Regents shall only grant accreditation or a renewal of accreditation to an institution described in subdivision (g) of this section if the institution satisfactorily meets the standards of the compliance review procedure described in section 4-1.5 of this Subpart. If the Commissioner and the Board of Regents grant accreditation or a renewal of accreditation after a compliance review, the Commissioner and the Board of Regents shall provide to the U.S. Secretary of Education, within 30 days of its action, a thorough and reasonable explanation, consistent with its standards, why the action of the other body does not preclude the grant of accreditation or renewal of accreditation.

Subdivision (g) of section 4-1.4 of the Rules of the Board of Regents is amended to require that the process and criteria for accepting transfer of credit be publicly disclosed and include a statement of the criteria established by the institution regarding the transfer of credit earned at another institution of higher education and a list of the institutions with which the institution has established articulation agreements.

Paragraph (2) of subdivision (l) of section 4-1.4 of the Rules of the Board of Regents shall be renumbered to paragraph (3) of subdivision (l) of section 4-1.4 of the Rules of the Board of Regents and a new paragraph (2) shall be added to subdivision (l) of section 4-1.4 to require an institution's teach-out plan to ensure that it provides for the equitable treatment of students pursuant to criteria established by the Commissioner and the Board of Regents and that the plan specifies additional charges, if any, and provides for notification to the students of any additional charges.

Subdivision (a) of section 4-1.5 of the Rules of the Board of Regents is amended to allow an institution to seek the review of new financial information only once and to clarify that any determination on the new financial information does not provide a basis for appeal.

Subdivision (a) of section 4-1.5 of the Rules of the Board of Regents is amended to specifically provide that the Regents shall review any papers, written responses filed, the record before the advisory council, the record of its deliberations, and its findings and recommendations and any other information considered by the commissioner. In addition, if the Board of Regents decision includes an adverse accreditation action or probationary accreditation, the Board of Regents shall notify the institution of its right to a hearing before the institutional accreditation appeals board.

This subdivision is also amended to set forth the process for an appeal and/or a hearing of a determination of adverse accreditation action or probationary accreditation before the institutional accreditation appeals board.

Section 4-1.5 of the Rules of the Board of Regents shall be amended to require the Board of Regents to review any papers, written responses filed, the record before the advisory council, the record of its deliberations, and its findings and recommendations and any other information considered by the commissioner.

Paragraphs (9) and (10) of subdivision (c) of section 4-1.5 to require the Board of Regents to review any papers, written responses filed, the record before the advisory council, the record of its deliberations, and its findings and recommendations and any other information considered by the commissioner before issuing its decision.

It also describes the process for an institution to appeal a Regents determination of adverse accreditation action or granting probationary accreditation to the institutional accreditation appeals board.

Subdivision (d) of section 4-1.5 of the Rules of the Board of Regents shall be amended to changes the procedures for a change in scope of accreditation when there is a substantive change to conform with the federal requirements.

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

Data, views or arguments may be submitted to: Peg Rivers, State Education Department, 89 Washington Avenue, Rm 977 EBA, Albany, NY 12234, (518) 478-1189, email: privers@mail.nysed.gov

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

Section 210 of the Education Law grants to the Board of Regents the authority to register domestic and foreign institutions in terms of New York standards.

Section 214 of the Education Law provides that higher educational institutions that are incorporated in New York State shall be members of The University of the State of New York.

Section 215 of the Education Law authorizes the Commissioner of Education to visit, examine, and inspect schools or institutions under the educational supervision of the State and require reports from such schools.

Subdivision (1) of section 305 of the Education Law empowers the Commissioner of Education to enforce all laws relating to the educational system of the State and execute all educational policies determined by the Board of Regents.

Subdivision (2) of section 305 of the Education Law authorizes the Commissioner of Education to have general supervision over all schools and institutions subject to the Education Law.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment carries out the legislative objectives of the above-referenced statutes by clarifying the standards and procedures that must be met by institutions of higher education that voluntarily seek institutional accreditation by the Board of Regents and the Commissioner of Education in order to participate in programs established by Title IV of the Higher Education Act.

3. NEEDS AND BENEFITS:

In June 2001, the Board of Regents adopted Part 4 of the Rules of the Board of Regents, Voluntary Institutional Accreditation for Title IV Purposes (now Subpart 4-1) as part of a process of complying with the requirements in regulations of the U.S. Department of Education (34 CFR Part 602) for continued recognition of the Board of Regents as an institutional accrediting agency. One of the Federal regulations requires each Nationally Recognized Accrediting Agency to have "a systematic program of review that demonstrates that its standards are adequate to evaluate the quality of the education or training provided by the institutions and programs it accredits and relevant to the educational or training needs of students". (34 CFR 602.21[a])

As a result of the review of accreditation standards, including an assessment of their alignment with revised Federal standards for accreditation agencies (34 CFR Part 602), the Department proposes to clarify and update the existing regulation.

In addition, as part of its final analysis of the Department's application to continue as an accrediting agency, the United States Department of Education identified items on which it could not confirm technical compliance with the federal accreditation regulations. The proposed amendment addresses their findings in the following areas: appeals procedure; conflict-of-interest and recusal training; processes for handling substantive changes and distance education; notifications of actions demonstrating compliance with accreditation standards; and demonstration of the Regents role in the decision-making process. These changes are summarized as follows:

Paragraph (2) of subdivision (d) of section 3.12 of the Rules of the Board of Regents is amended to require that the Regents Advisory Council be comprised of at least 9 members, at least 2 of which shall be senior administrators; at least two 2 shall have experience as full-time faculty members in degree-granting institutions and at least one shall be a full-time faculty member at the time of appointment. At least two other voting members or one-seventh of the total voting members of the council, whichever is greater, shall be representatives of the public as defined in the proposed amendment.

Subdivision (e) shall be added to section 3.12 to create an institutional accreditation appeals board to review and decide appeals from an institution(s) of an adverse accreditation action(s) or probationary accreditation decision(s) of the Board of Regents pursuant the procedures outlined in section 4-1.5 of this Title. The proposed amendment defines the composition of the board.

Subdivision (d) of section 4-1.3 of the Rules of the Board of Regents is amended to clarify that the corrective action period may be extended for a maximum period of 12 months.

Subdivision (f) of section 4-1.3 of the Rules of the Board of Regents is amended to require an institution to obtain approval from the Commissioner and the Board of Regents before the department will include the substantive change in the scope of accreditation it previously granted to the institution.

Paragraph (3) of subdivision (f) of section 4-1.3 of the Rules of the Board of Regents is repealed.

Subdivision (g) of section 4-1.3 of the Rules of the Board of Regents is repealed and a new subdivision (g) is added to prohibit the Commissioner and the Board of Regents from granting initial or a renewal of accreditation to an institution, or a program offered by an institution, if the Commissioner and the Board of Regents knows, or has reasonable cause to know, that the institution is the subject of:

(1) a pending or final action against the institution or a program at such institution by a State agency to suspend, revoke, withdraw, or terminate the institution's legal authority to provide postsecondary education in the State;

(2) a decision by a nationally recognized accrediting agency to deny accreditation or preaccreditation;

(3) a pending or final action brought by a nationally recognized accrediting agency to suspend, revoke, withdraw, or terminate the institution's accreditation or preaccreditation; or

(4) probation or an equivalent status imposed by a recognized agency.

A new subdivision (h) shall be added to section 4-1.3 of the Rules of the Board of Regents to provide that if the Commissioner and the Board of Regents learn that an accredited institution, or an institution that offers a program it accredits, is the subject of an adverse action by another recognized accrediting agency or has been placed on probation or an equivalent status by another recognized agency, the Commissioner and the Board of Regents shall promptly review its accreditation through the compliance review procedure in section 4-1.5 of this Subpart to determine if it should also take adverse action or place the institution on probation. The Commissioner and the Board of Regents shall only grant accreditation or a renewal of accreditation to an institution described in subdivision (g) of this section if the institution satisfactorily meets the standards of the compliance review procedure described in section 4-1.5 of this Subpart. If the Commissioner and the Board of Regents grant accreditation or a renewal of accreditation after a compliance review, the Commissioner and the Board of Regents shall provide to the U.S. Secretary of Education, within 30 days of its action, a thorough and reasonable explanation, consistent with its standards, why the action of the other body does not preclude the grant of accreditation or renewal of accreditation.

Subdivision (g) of section 4-1.4 of the Rules of the Board of Regents is amended to require that the process and criteria for accepting transfer of credit be publicly disclosed and include a statement of the criteria established by the institution regarding the transfer of credit earned at another institution of higher education and a list of the institutions with which the institution has established articulation agreements.

Paragraph (2) of subdivision (l) of section 4-1.4 of the Rules of the Board of Regents shall be renumbered to paragraph (3) of subdivision (l) of section 4-1.4 of the Rules of the Board of Regents and a new paragraph (2) shall be added to subdivision (l) of section 4-1.4 to require an institution's teach-out plan to ensure that it provides for the equitable treatment of students pursuant to criteria established by the Commissioner and the Board of Regents and that the plan specifies additional charges, if any, and provides for notification to the students of any additional charges.

Subdivision (a) of section 4-1.5 of the Rules of the Board of Regents is amended to allow an institution to seek the review of new financial information only once and to clarify that any determination on the new financial information does not provide a basis for appeal.

Subdivision (a) of section 4-1.5 of the Rules of the Board of Regents is amended to specifically provide that the Regents shall review any papers, written responses filed, the record before the advisory council, the record of its deliberations, and its findings and recommendations and any other information considered by the commissioner. In addition, if the Board of Regents decision includes an adverse accreditation action or probationary accreditation, the Board of Regents shall notify the institution of its right to a hearing before the institutional accreditation appeals board.

This subdivision is also amended to set forth the process for an appeal and/or a hearing of a determination of adverse accreditation action or probationary accreditation before the institutional accreditation appeals board.

Section 4-1.5 of the Rules of the Board of Regents shall be amended to require the Board of Regents to review any papers, written responses filed, the record before the advisory council, the record of its deliberations, and its findings and recommendations and any other information considered by the commissioner.

Paragraphs (9) and (10) of subdivision (c) of section 4-1.5 to require the Board of Regents to review any papers, written responses filed, the record before the advisory council, the record of its deliberations, and its findings and recommendations and any other information considered by the commissioner before issuing its decision.

It also describes the process for an institution to appeal a Regents determination of adverse accreditation action or granting probationary accreditation to the institutional accreditation appeals board.

Subdivision (d) of section 4-1.5 of the Rules of the Board of Regents shall be amended to changes the procedures for a change in scope of accreditation when there is a substantive change to conform with the federal requirements.

4. COSTS:

(a) Costs to State government. This amendment will not impose any additional costs on State government over and above the current costs for accrediting institutions pursuant to Subpart 4-1 of the Rules of the Board of Regents. The Department will use existing personnel and resources to review institutions for accreditation under this Subpart.

(b) Costs to local government. None.

(c) Costs to private regulated parties. The proposed amendment relates to voluntary institutional accreditation. The State Education Department expects that existing faculty and staff at colleges and universities choosing the Board of Regents as their institutional accrediting agency will have the necessary expertise to satisfy the requirements of the proposed amendment as part of their ongoing responsibilities. The amendment does not impose additional costs on such colleges and universities.

(d) Costs to the regulatory agency. As stated above under Costs to State Government, the proposed amendment would not impose additional costs on the State Education Department.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment concerns the institutional accreditation of institutions of higher education. It does not impose any program, service, duty, or responsibility on local governments.

6. PAPERWORK:

There are no additional paperwork requirements beyond those imposed by the federal regulations.

7. DUPLICATION:

The standards and procedures for voluntary institutional accreditation build on requirements and standards for the registration of undergraduate and graduate programs set forth in Part 52 of the Regulations of the Commissioner of Education. In some cases, additional requirements are imposed for accreditation, but these standards do not conflict with program registration standards.

8. ALTERNATIVES:

There are no viable alternatives to the proposed amendment, and none were considered.

9. FEDERAL STANDARDS:

The proposed amendment is consistent with Federal requirements, which specify the standards, for which an accrediting agency will be approved by U.S. Secretary of Education. In addition, Federal standards require a recognized accreditation agency to carry out periodic reviews of the agency's accreditation standards.

10. COMPLIANCE SCHEDULE:

The amendment will be effective on its stated effective date. No additional time is needed to comply.

Regulatory Flexibility Analysis

Small Businesses:

1. EFFECT OF RULE:

The proposed amendment to the Rules of the Board of Regents applies to institutions of higher education applying for institutional accreditation or renewal of such accreditation by the Board of Regents and the Commissioner of Education for Title IV purposes. On the basis of the most recent data transmitted to the State Education Department, 3 of the 25 institutions of higher education that have voluntarily chosen the Commissioner and the Board of Regents as their institutional accreditor are for-profit small businesses with 100 or fewer employees.

2. COMPLIANCE REQUIREMENTS:

In its final analysis of the Department's application to continue as an accrediting agency, the United States Department of Education identified items on which it could not confirm technical compliance with the federal accreditation regulations. The proposed amendment addresses their findings in the following areas: appeals procedure; conflict-of-interest and recusal training; processes for handling substantive changes and distance education; notifications of actions demonstrating compliance with accreditation standards; and demonstration of the Regents role in the decision-making process. These changes are summarized as follows:

Paragraph (2) of subdivision (d) of section 3.12 of the Rules of the Board of Regents is amended to require that the Regents Advisory Council be comprised of at least 9 members, at least 2 of which shall be senior administrators; at least two 2 shall have experience as full-time faculty members in degree-granting institutions and at least one shall be a full-time faculty member at the time of appointment. At least two other voting members or one-seventh of the total voting members of the council, whichever is greater, shall be representatives of the public as defined in the proposed amendment.

Subdivision (e) shall be added to section 3.12 to create an institutional accreditation appeals board to review and decide appeals from an institution(s) of an adverse accreditation action(s) or probationary accreditation decision(s) of the Board of Regents pursuant the procedures outlined in section 4-1.5 of this Title. The proposed amendment defines the composition of the board.

Subdivision (d) of section 4-1.3 of the Rules of the Board of Regents is amended to clarify that the corrective action period may be extended for a maximum period of 12 months.

Subdivision (f) of section 4-1.3 of the Rules of the Board of Regents is amended to require an institution to obtain approval from the Commis-

sioner and the Board of Regents before the department will include the substantive change in the scope of accreditation it previously granted to the institution.

Paragraph (3) of subdivision (f) of section 4-1.3 of the Rules of the Board of Regents is repealed.

Subdivision (g) of section 4-1.3 of the Rules of the Board of Regents is repealed and a new subdivision (g) is added to prohibit the Commissioner and the Board of Regents from granting initial or a renewal of accreditation to an institution, or a program offered by an institution, if the Commissioner and the Board of Regents knows, or has reasonable cause to know, that the institution is the subject of:

(1) a pending or final action against the institution or a program at such institution by a State agency to suspend, revoke, withdraw, or terminate the institution's legal authority to provide postsecondary education in the State;

(2) a decision by a nationally recognized accrediting agency to deny accreditation or preaccreditation;

(3) a pending or final action brought by a nationally recognized accrediting agency to suspend, revoke, withdraw, or terminate the institution's accreditation or preaccreditation; or

(4) probation or an equivalent status imposed by a recognized agency.

A new subdivision (h) shall be added to section 4-1.3 of the Rules of the Board of Regents to provide that if the Commissioner and the Board of Regents learn that an accredited institution, or an institution that offers a program it accredits, is the subject of an adverse action by another recognized accrediting agency or has been placed on probation or an equivalent status by another recognized agency, the Commissioner and the Board of Regents shall promptly review its accreditation through the compliance review procedure in section 4-1.5 of this Subpart to determine if it should also take adverse action or place the institution on probation. The Commissioner and the Board of Regents shall only grant accreditation or a renewal of accreditation to an institution described in subdivision (g) of this section if the institution satisfactorily meets the standards of the compliance review procedure described in section 4-1.5 of this Subpart. If the Commissioner and the Board of Regents grant accreditation or a renewal of accreditation after a compliance review, the Commissioner and the Board of Regents shall provide to the U.S. Secretary of Education, within 30 days of its action, a thorough and reasonable explanation, consistent with its standards, why the action of the other body does not preclude the grant of accreditation or renewal of accreditation.

Subdivision (g) of section 4-1.4 of the Rules of the Board of Regents is amended to require that the process and criteria for accepting transfer of credit be publicly disclosed and include a statement of the criteria established by the institution regarding the transfer of credit earned at another institution of higher education and a list of the institutions with which the institution has established articulation agreements.

Paragraph (2) of subdivision (l) of section 4-1.4 of the Rules of the Board of Regents shall be renumbered to paragraph (3) of subdivision (l) of section 4-1.4 of the Rules of the Board of Regents and a new paragraph (2) shall be added to subdivision (l) of section 4-1.4 to require an institution's teach-out plan to ensure that it provides for the equitable treatment of students pursuant to criteria established by the Commissioner and the Board of Regents and that the plan specifies additional charges, if any, and provides for notification to the students of any additional charges.

Subdivision (a) of section 4-1.5 of the Rules of the Board of Regents is amended to allow an institution to seek the review of new financial information only once and to clarify that any determination on the new financial information does not provide a basis for appeal.

Subdivision (a) of section 4-1.5 of the Rules of the Board of Regents is amended to specifically provide that the Regents shall review any papers, written responses filed, the record before the advisory council, the record of its deliberations, and its findings and recommendations and any other information considered by the commissioner. In addition, if the Board of Regents decision includes an adverse accreditation action or probationary accreditation, the Board of Regents shall notify the institution of its right to a hearing before the institutional accreditation appeals board.

This subdivision is also amended to set forth the process for an appeal and/or a hearing of a determination of adverse accreditation action or probationary accreditation before the institutional accreditation appeals board.

Section 4-1.5 of the Rules of the Board of Regents shall be amended to require the Board of Regents to review any papers, written responses filed, the record before the advisory council, the record of its deliberations, and its findings and recommendations and any other information considered by the commissioner.

Paragraphs (9) and (10) of subdivision (c) of section 4-1.5 to require the Board of Regents to review any papers, written responses filed, the record before the advisory council, the record of its deliberations, and its findings and recommendations and any other information considered by the commissioner before issuing its decision.

It also describes the process for an institution to appeal a Regents determination of adverse accreditation action or granting probationary accreditation to the institutional accreditation appeals board.

Subdivision (d) of section 4-1.5 of the Rules of the Board of Regents shall be amended to changes the procedures for a change in scope of accreditation when there is a substantive change to conform with the federal requirements.

3. PROFESSIONAL SERVICES:

The Department expects that existing faculty and administrative staff of the institutions, including those that are small businesses, will meet the requirements of the proposed amendment as part of their on-going responsibilities.

No additional professional services are expected to be required by small businesses to comply with the proposed amendment.

4. COMPLIANCE COSTS:

The proposed amendment relates to voluntary institutional accreditation. The proposed amendment will not impose costs beyond those currently required under Subpart 4-1 of the Rules of the Board of Regents.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment will not impose any additional technological requirements on colleges and universities that voluntarily choose the Board of Regents and the Commissioner of Education as their institutional accrediting agency. As stated above in "Compliance Costs," the amendment will not result in additional costs to regulated parties.

6. MINIMIZING ADVERSE IMPACT:

The State Education Department has determined that uniform standards for institutional accreditation are necessary to help ensure the quality of all institutions that are accredited. Moreover, the United States Department of Education's regulations require that these standards to be applied Because of the nature of the proposed amendment, different standards for institutions that are small businesses are not feasible.

7. SMALL BUSINESS PARTICIPATION:

The Department solicited comments on the proposed amendment from the Regents Advisory Council, which has representatives from small businesses.

(b) Local governments:

The proposed amendment establishes requirements and clarifies existing standards and procedures for voluntary institutional accreditation of higher education institutions by the Board of Regents and the Commissioner of Education. It does not impose any adverse economic impact, reporting, recordkeeping, or other compliance requirements on local governments. Because it is evident from the nature of the proposed amendment that it does not affect local governments, no further steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for local governments is not required and one has not been prepared.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:

The proposed amendment applies to institutions of higher education voluntarily choosing to apply to the Board of Regents and the Commissioner of Education for institutional accreditation. Three of the 25 institutions currently accredited by the Commissioner and the Board of Regents are located in rural counties with less than 200,000 inhabitants or in towns with a population density of 150 per square mile or less in urban counties.

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

In its final analysis of the Department's application to continue as an accrediting agency, the United States Department of Education identified items on which it could not confirm technical compliance with the federal accreditation regulations. The proposed amendment addresses their findings in the following areas: appeals procedure; conflict-of-interest and recusal training; processes for handling substantive changes and distance education; notifications of actions demonstrating compliance with accreditation standards; and demonstration of the Regents role in the decision-making process. These changes are summarized as follows:

Paragraph (2) of subdivision (d) of section 3.12 of the Rules of the Board of Regents is amended to require that the Regents Advisory Council be comprised of at least 9 members, at least 2 of which shall be senior administrators; at least two 2 shall have experience as full-time faculty members in degree-granting institutions and at least one shall be a full-time faculty member at the time of appointment. At least two other voting members or one-seventh of the total voting members of the council, whichever is greater, shall be representatives of the public as defined in the proposed amendment.

Subdivision (e) shall be added to section 3.12 to create an institutional accreditation appeals board to review and decide appeals from an institution(s) of an adverse accreditation action(s) or probationary accreditation decision(s) of the Board of Regents pursuant the procedures outlined in section 4-1.5 of this Title. The proposed amendment defines the composition of the board.

Subdivision (d) of section 4-1.3 of the Rules of the Board of Regents is amended to clarify that the corrective action period may be extended for a maximum period of 12 months.

Subdivision (f) of section 4-1.3 of the Rules of the Board of Regents is amended to require an institution to obtain approval from the Commissioner and the Board of Regents before the department will include the substantive change in the scope of accreditation it previously granted to the institution.

Paragraph (3) of subdivision (f) of section 4-1.3 of the Rules of the Board of Regents is repealed.

Subdivision (g) of section 4-1.3 of the Rules of the Board of Regents is repealed and a new subdivision (g) is added to prohibit the Commissioner and the Board of Regents from granting initial or a renewal of accreditation to an institution, or a program offered by an institution, if the Commissioner and the Board of Regents knows, or has reasonable cause to know, that the institution is the subject of:

(1) a pending or final action against the institution or a program at such institution by a State agency to suspend, revoke, withdraw, or terminate the institution's legal authority to provide postsecondary education in the State;

(2) a decision by a nationally recognized accrediting agency to deny accreditation or preaccreditation;

(3) a pending or final action brought by a nationally recognized accrediting agency to suspend, revoke, withdraw, or terminate the institution's accreditation or preaccreditation; or

(4) probation or an equivalent status imposed by a recognized agency.

A new subdivision (h) shall be added to section 4-1.3 of the Rules of the Board of Regents to provide that if the Commissioner and the Board of Regents learn that an accredited institution, or an institution that offers a program it accredits, is the subject of an adverse action by another recognized accrediting agency or has been placed on probation or an equivalent status by another recognized agency, the Commissioner and the Board of Regents shall promptly review its accreditation through the compliance review procedure in section 4-1.5 of this Subpart to determine if it should also take adverse action or place the institution on probation. The Commissioner and the Board of Regents shall only grant accreditation or a renewal of accreditation to an institution described in subdivision (g) of this section if the institution satisfactorily meets the standards of the compliance review procedure described in section 4-1.5 of this Subpart. If the Commissioner and the Board of Regents grant accreditation or a renewal of accreditation after a compliance review, the Commissioner and the Board of Regents shall provide to the U.S. Secretary of Education, within 30 days of its action, a thorough and reasonable explanation, consistent with its standards, why the action of the other body does not preclude the grant of accreditation or renewal of accreditation.

Subdivision (g) of section 4-1.4 of the Rules of the Board of Regents is amended to require that the process and criteria for accepting transfer of credit be publicly disclosed and include a statement of the criteria established by the institution regarding the transfer of credit earned at another institution of higher education and a list of the institutions with which the institution has established articulation agreements.

Paragraph (2) of subdivision (l) of section 4-1.4 of the Rules of the Board of Regents shall be renumbered to paragraph (3) of subdivision (l) of section 4-1.4 of the Rules of the Board of Regents and a new paragraph (2) shall be added to subdivision (l) of section 4-1.4 to require an institution's teach-out plan to ensure that it provides for the equitable treatment of students pursuant to criteria established by the Commissioner and the Board of Regents and that the plan specifies additional charges, if any, and provides for notification to the students of any additional charges.

Subdivision (a) of section 4-1.5 of the Rules of the Board of Regents is amended to allow an institution to seek the review of new financial information only once and to clarify that any determination on the new financial information does not provide a basis for appeal.

Subdivision (a) of section 4-1.5 of the Rules of the Board of Regents is amended to specifically provide that the Regents shall review any papers, written responses filed, the record before the advisory council, the record of its deliberations, and its findings and recommendations and any other information considered by the commissioner. In addition, if the Board of Regents decision includes an adverse accreditation action or probationary accreditation, the Board of Regents shall notify the institution of its right to a hearing before the institutional accreditation appeals board.

This subdivision is also amended to set forth the process for an appeal and/or a hearing of a determination of adverse accreditation action or probationary accreditation before the institutional accreditation appeals board.

Section 4-1.5 of the Rules of the Board of Regents shall be amended to require the Board of Regents to review any papers, written responses filed, the record before the advisory council, the record of its deliberations, and its findings and recommendations and any other information considered by the commissioner.

Paragraphs (9) and (10) of subdivision (c) of section 4-1.5 to require the Board of Regents to review any papers, written responses filed, the record before the advisory council, the record of its deliberations, and its findings and recommendations and any other information considered by the commissioner before issuing its decision.

It also describes the process for an institution to appeal a Regents determination of adverse accreditation action or granting probationary accreditation to the institutional accreditation appeals board.

Subdivision (d) of section 4-1.5 of the Rules of the Board of Regents shall be amended to changes the procedures for a change in scope of accreditation when there is a substantive change to conform with the federal requirements.

The proposed changes will help ensure technical alignment with federal requirements for institutional accrediting agencies. In keeping with those requirements, the Department will continue to review its accreditation standards and processes.

3. COSTS.

The State Education Department expects that existing faculty and staff at colleges and universities choosing the Board of Regents as their institutional accrediting agency will have the necessary expertise to satisfy the requirements of the proposed amendment as part of their ongoing responsibilities. The amendment will not impose additional costs on such colleges and universities.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment makes no exception for institutions that are located in rural areas. The standards for institutional accreditation are defined in Federal regulations (34 CFR Part 602). As an accrediting agency recognized by U.S. Secretary of Education, the Board of Regents and Commissioner of Education institutional accreditation standards are aligned with Federal standards. The requirements in each of these subject categories must be met regardless of the location of the institution. As a result, it is not appropriate to establish different standards for institutions located in rural areas of New York State.

5. RURAL AREA PARTICIPATION:

The Department solicited comments on the proposed amendment from the Regents Advisory Council, which has representatives located in rural areas of the State.

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

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

Job Impact Statement

The proposed amendment clarifies existing standards and procedures that must be met by institutions of higher education seeking voluntary accreditation by the Board of Regents and the Commissioner of Education. The State Education Department expects that the proposed amendment will not have a negative impact on the number of jobs or employment opportunities at higher education institutions or in any other field, and that higher education institutions will use existing staff to satisfy accreditation requirements as part of their on-going responsibilities. Therefore, the amendment will have no impact on jobs or employment opportunities at these institutions. Because it is evident from the nature of the proposed amendment that it will have no impact on jobs and employment opportunities, no further steps were needed to ascertain these facts and none were taken. Accordingly, a job impact statement was not required and one was not prepared.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

The Dignity for All Students Act (L. 2010, ch. 482; L. 2012, ch. 102)

I.D. No. EDU-07-13-00012-P

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

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

Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided), 305(1) and (2), 801-a(not subdivided) and 2854(1)(b) and L. 2012, ch. 102

Subject: The Dignity for All Students Act (L. 2010, ch. 482; L. 2012, ch. 102).

Purpose: To prescribe instructional requirements to implement the Dignity Act, as amended by ch. 102 of the Laws of 2012.

Text of proposed rule: Paragraph (2) of subdivision (c) of section 100.2 of the Regulations of the Commissioner of Education is amended, effective July 1, 2013, as follows:

(2) for all public school students, instruction that supports development of a school environment free of [discrimination and] harassment*, bullying and/or discrimination* as required by the Dignity For All Students Act (article 2 of the Education Law), *with an emphasis on discouraging acts of harassment, bullying and/or discrimination,* including but not limited to instruction that raises *students'* awareness and sensitivity to [discrimination or] harassment*, bullying and/or discrimination* based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender*,* or sex*, and instruction in the safe, responsible use of the Internet and electronic communications*; provided that in public schools other than charter schools, such instruction shall be provided as part of a component on civility, citizenship and character education in accordance with section 801-a of the Education Law;

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

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

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

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

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

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

Education Law section 2854(1)(b) provides that charter schools shall meet the same health and safety, civil rights, and student assessment requirements applicable to other public schools, except as otherwise specifically provided in Article 56 of the Education Law.

Chapter 102 of the Laws of 2012 amends Article 2 of the State Education Law (Ed.L. sections 10 through 18) and Education Law section 801-a to significantly expand the scope and intent of the Dignity Act to include provisions on bullying and cyberbullying and to make the Act applicable in certain instances to conduct occurring off school property.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the above statutory authority and is necessary to implement the instructional requirements of the Dignity Act, as amended by Chapter 102 of the Laws of 2012.

3. NEEDS AND BENEFITS:

The proposed amendment to section 100.2(c) of the Commissioner's Regulations implements instructional requirements consistent with Chapter 102 of the Laws of 2012. As amended, section 100.2(c) extends the required instruction for all public school students to explicitly include bullying and cyberbullying. In addition, the regulation would require, for all public school students including charter school students, that required instruction supporting development of a school environment free of harassment, bullying and/or discrimination have an emphasis on discouraging acts of harassment, bullying (including cyberbullying) and discrimination and include instruction in the safe, responsible use of the Internet and electronic communications.

4. COSTS:

(a) Costs to State government: None.

(b) Costs to local government: None.

(c) Costs to private regulated parties: None.

(d) Costs to regulating agency for implementation and continued administration of this rule: None.

The proposed amendment is necessary to implement Chapter 102 of the Laws of 2012 and will not impose any additional costs beyond those imposed by the statute.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment implements instructional requirements, consistent with Chapter 102 of the Laws of 2012, and will not impose any additional program, service, duty or responsibility beyond those by the statute. The proposed amendment extends the required instruction for all public school students to explicitly include bullying and cyberbullying. In addition, the regulation would require, for all public school students including charter school students, that required instruction supporting development of a school environment free of harassment, bullying and/or discrimination have an emphasis on discouraging acts of harassment, bullying (including cyberbullying) and discrimination and include instruction in the safe, responsible use of the Internet and electronic communications.

6. PAPERWORK:

The proposed amendment will not impose any additional reporting requirements, forms or other paperwork, beyond those imposed by the Dignity Act, as amended by Chapter 102 of the Laws of 2012.

7. DUPLICATION:

The proposed amendment does not duplicate existing State or Federal regulations, and is necessary to implement Chapter 102 of the Laws of 2012.

8. ALTERNATIVES:

The proposed amendment is necessary to implement Chapter 102 of the Laws of 2012. There are no significant alternatives and none were considered.

9. FEDERAL STANDARDS:

There are no related Federal standards.

10. COMPLIANCE SCHEDULE:

The proposed amendment is necessary to implement Chapter 102 of the Laws of 2012, and will not impose any additional compliance requirements or costs on regulated parties beyond those imposed by the statute. It is anticipated that school districts, BOCES and charter schools will be able to achieve compliance with proposed amendment by its effective date.

Regulatory Flexibility Analysis

Small Businesses:

The proposed amendment is applicable to school districts, boards of cooperative educational services and charter schools and is necessary to implement the instructional requirements of the Dignity for All Students Act, as amended by Chapter 102 of the Laws of 2012. The proposed amendment does not impose any adverse economic impact, reporting, record keeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local governments:

1. EFFECT OF RULE:

The proposed amendment applies to each school district, board of cooperative educational services (BOCES) and charter schools in the State. At present, there are 695 school districts (including New York City) and 37 BOCES. There are currently approximately 190 charter schools.

2. COMPLIANCE REQUIREMENTS:

The proposed amendment to section 100.2(c) of the Commissioner's Regulations implements instructional requirements consistent with Chapter 102 of the Laws of 2012. As amended, section 100.2(c) extends the required instruction for all public school students to explicitly include bullying and cyberbullying. In addition, the regulation would require, for all public school students including charter school students, that required instruction supporting development of a school environment free of harassment, bullying and/or discrimination have an emphasis on discouraging acts of harassment, bullying (including cyberbullying) and discrimination and include instruction in the safe, responsible use of the Internet and electronic communications.

3. PROFESSIONAL SERVICES:

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

4. COMPLIANCE COSTS:
The proposed amendment is necessary to implement Chapter 102 of the Laws of 2012 and will not impose any additional costs beyond those imposed by the statute.
5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:
The proposed amendment does not impose any additional costs or technological requirements.
6. MINIMIZING ADVERSE IMPACT:
The proposed amendment is necessary to implement Chapter 102 of the Laws of 2012 and will not impose any additional compliance requirements or costs beyond those imposed by the statute. Because these statutory requirements specifically apply, it is not possible to provide exemptions from the proposed amendment's requirements or impose a lesser standard. The proposed amendment has been carefully drafted to meet statutory requirements and Regents policy while minimizing its impact.
Consistent with Chapter 102 of the Laws of 2012, the proposed amendment extends the required instruction for all public school students to explicitly include bullying and cyberbullying. In addition, the regulation would require, for all public school students including charter school students, that required instruction supporting development of a school environment free of harassment, bullying and/or discrimination have an emphasis on discouraging acts of harassment, bullying (including cyberbullying) and discrimination and include instruction in the safe, responsible use of the Internet and electronic communications.
7. LOCAL GOVERNMENT PARTICIPATION:
The proposed amendment was developed in cooperation with the Dignity Act Task Force State Policy Work Group which is comprised of other State agencies, the New York City Department of Education, and several not-for-profit organizations. Copies of the proposed amendment have been provided to District Superintendents with the request that they distribute them to school districts within their supervisory districts for review and comment. Copies were also provided for review and comment to the chief school officers of the five big city school districts and to charter schools.
8. INITIAL REVIEW OF RULE (SAPA § 207):
Pursuant to State Administrative Procedure Act section 207(1)(b), the State Education Department proposes that the initial review of this rule shall occur in the fifth calendar year after the year in which the rule is adopted, instead of in the third calendar year. The justification for a five year review period is that the proposed amendment merely implements, and conforms the Commissioner's Regulations to, statutory requirements under Chapter 102 of the Laws of 2012 and therefore the substantive provisions of the proposed amendment cannot be repealed or modified unless there is a further statutory change. Accordingly, there is no need for a shorter review period. The Department invites public comment on the proposed five year review period for this rule. Comments should be sent to the agency contact listed in item 10. of the Notice of Proposed Rule Making published herewith, and must be received within 45 days of the State Register publication date of the Notice.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:
The proposed amendment applies to all school districts, boards of cooperative educational services (BOCES) and charter schools in the State, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less. There is currently one charter school located in a rural area.
2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS; AND PROFESSIONAL SERVICES:
The proposed amendment to section 100.2(c) of the Commissioner's Regulations implements instructional requirements consistent with Chapter 102 of the Laws of 2012. As amended, section 100.2(c) extends the required instruction for all public school students to explicitly include bullying and cyberbullying. In addition, the regulation would require, for all public school students including charter school students, that required instruction supporting development of a school environment free of harassment, bullying and/or discrimination have an emphasis on discouraging acts of harassment, bullying (including cyberbullying) and discrimination and include instruction in the safe, responsible use of the Internet and electronic communications.
The proposed amendment will not impose any additional professional services requirements.
3. COSTS:
The proposed amendment is necessary to implement Chapter 102 of the Laws of 2012 and will not impose any additional costs beyond those imposed by the statute.
4. MINIMIZING ADVERSE IMPACT:
The proposed amendment is necessary to conform the Commissioner's Regulations to, and otherwise implement, the instructional requirements of Chapter 102 of the Laws of 2012 and will not impose any additional compliance requirements or costs beyond those imposed by the statute. Because these statutory requirements specifically apply, it is not possible to provide exemptions from the proposed amendment's requirements or impose a lesser standard. The proposed amendment has been carefully drafted to meet statutory requirements and Regents policy while minimizing its impact.
Consistent with Chapter 102 of the Laws of 2012, the proposed amendment extends the required instruction for all public school students to explicitly include bullying and cyberbullying. In addition, the regulation would require, for all public school students including charter school students, that required instruction supporting development of a school environment free of harassment, bullying and/or discrimination have an emphasis on discouraging acts of harassment, bullying (including cyberbullying) and discrimination and include instruction in the safe, responsible use of the Internet and electronic communications.
The statute which the proposed amendment implements applies to all school districts and BOCES throughout the State, including those in rural areas. Therefore, it was not possible to establish different requirements for entities in rural areas, or to exempt them from the rule's provisions.
5. RURAL AREA PARTICIPATION:
Comments on the proposed amendment were solicited from the Department's Rural Advisory Committee, whose membership includes school districts located in rural areas. The proposed amendments were developed in cooperation with the Dignity Act Task Force State Policy Work Group which is comprised of other State agencies, the New York City Department of Education, and several not-for-profit organizations.
6. INITIAL REVIEW OF RULE (SAPA § 207):
Pursuant to State Administrative Procedure Act section 207(1)(b), the State Education Department proposes that the initial review of this rule shall occur in the fifth calendar year after the year in which the rule is adopted, instead of in the third calendar year. The justification for a five year review period is that the proposed amendment merely implements, and conforms the Commissioner's Regulations to, statutory requirements under Chapter 102 of the Laws of 2012 and therefore the substantive provisions of the proposed amendment cannot be repealed or modified unless there is a further statutory change. Accordingly, there is no need for a shorter review period. The Department invites public comment on the proposed five year review period for this rule. Comments should be sent to the agency contact listed in item 10. of the Notice of Proposed Rule Making published herewith, and must be received within 45 days of the State Register publication date of the Notice.

Job Impact Statement

The proposed amendment is applicable to school districts, boards of cooperative educational services and charter schools and is necessary to implement the instructional requirements of the Dignity for All Students Act, as amended by Chapter 102 of the Laws of 2012. The proposed amendment will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the proposed amendment that it will have a positive impact, or no impact, on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Code of Conduct

I.D. No. EDU-07-13-00013-P

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

Proposed Action: Amendment of sections 100.2(l) and 119.6 of Title 8 NYCRR.

Statutory authority: Education Law, sections 11(1)-(7), 12(1) and (2), 13(1)-(3), 14(1) and (3), 101 (not subdivided), 207 (not subdivided), 305(1) and (2) and 2801(1)-(5); and L. 2012, ch. 102

Subject: Code of conduct.

Purpose: Conform regulations to code of conduct provisions in the Dignity for All Students Act, as amended by ch.102, L. 2012.

Text of proposed rule: 1. Paragraph (2) of subdivision (l) of section 100.2 of the Regulations of the Commissioner of Education is amended, effective July 1, 2013, as follows:

(2) Code of Conduct
(i) . . .
(ii) The code of conduct shall include, but is not limited to:
(a) provisions regarding conduct, dress and language deemed

appropriate and acceptable on school property and at school functions, and conduct, dress, and language deemed unacceptable and inappropriate on school property *and at school functions* and provisions regarding acceptable civil and respectful treatment of teachers, school administrators, other school personnel, students, and visitors on school property and at school functions, including the appropriate range of disciplinary measures which may be imposed for violation of such code, and the roles of teachers, administrators, other school personnel, the board of education, and parents *or persons in parental relation*;

(b) provisions prohibiting [discrimination and] harassment*, bullying, and/or discrimination* against any student, by employees or students [on school property or at a school function,] that creates a hostile environment by conduct [, with or without physical contact and/or by verbal] *or by* threats, intimidation or abuse, *including cyberbullying as defined in Education Law section 11(8),* [of such a severe nature] that *either*:

(1) has or would have the effect of unreasonably and substantially interfering with a student's educational performance, opportunities or benefits, or mental, emotional and/or physical well-being, *including conduct, threats, intimidation or abuse that reasonably causes or would reasonably be expected to cause emotional harm*; or

(2) reasonably causes or would reasonably be expected to cause *physical injury to* a student *or to cause a student* to fear for his or her physical safety.

(3) Such conduct shall include acts of harassment and/or bullying that occur:

(i) on school property, as defined in section 100.2(kk)(1)(i) of this Part; and/or

(ii) at a school function, as defined in section 100.2(kk)(1) of this Part; or

(iii) off school property where such acts create or would foreseeably create a risk of substantial disruption within the school environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property.

(4) For purposes of this paragraph, the term "threats, intimidation or abuse" shall include verbal and non-verbal actions.

(5) For purposes of this paragraph, ''emotional harm'' that takes place in the context of ''harassment or bullying'' means harm to a student's emotional well-being through creation of a hostile school environment that is so severe or pervasive as to unreasonably and substantially interfere with a student's education.

(6) Such conduct shall include, but is not limited to [, threats, intimidation, or abuse] *acts* based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practices, disability, sexual orientation, gender as defined in Education Law § 11(6), or sex; provided that nothing in this subdivision shall be construed to prohibit a denial of admission into, or exclusion from, a course of instruction based on a person's gender that would be permissible under Education Law sections 3201-a or 2854(2)(a) and Title IX of the Education Amendments of 1972 (20 U.S.C. section 1681, et seq.), or to prohibit, as discrimination based on disability, actions that would be permissible under section 504 of the Rehabilitation Act of 1973;

(c) standards and procedures to assure *the* security and safety of all students and school personnel;

(d) . . .

(e) . . .

(f) disciplinary measures to be taken in incidents on school property or at school functions involving the possession or use of illegal substances or weapons, the use of physical force, vandalism, violation of another student's civil rights[, harassment,] and threats of violence;

(g) disciplinary measures to be taken for incidents on school property or at school functions involving harassment, bullying and/or discrimination;

[(g)] *(h)* provisions for responding to acts of [discrimination, and] harassment*, bullying, and/or discrimination* against students by employees or students pursuant to clause (b) of this subparagraph *which, with respect to such acts against students by students, incorporate a progressive model of student discipline that includes measured, balanced and age-appropriate remedies and procedures that make appropriate use of prevention, education, intervention and discipline, and considers among other things, the nature and severity of the offending student's behavior(s), the developmental age of the student, the previous disciplinary record of the student and other extenuating circumstances, and the impact the student's behaviors had on the individual(s) who was physically injured and/or emotionally harmed. Responses shall be reasonably calculated to end the harassment, bullying, and/or discrimination, prevent recurrence, and eliminate the hostile environment. This progressive model of student discipline shall be consistent with the other provisions of the code of conduct*;

[(h)] *(i)*. . .

[(i)] *(j)*. . .

[(j)] *(k)* provisions ensuring *that* such code and the enforcement thereof are in compliance with State and Federal laws relating to students with disabilities;

[(k)] *(l)* provisions setting forth the procedures by which local law enforcement agencies shall be notified *promptly* of code violations*, including but not limited to incidents of harassment, bullying, and/or discrimination,* which *may* constitute a crime.

[(l)] *(m)*. . .

[(m)] *(n)*. . .

[(n)] *(o)* circumstances under and procedures by which referral to appropriate human service agencies shall be made, *as needed*;

[(o)] *(p)*. . .

[(p)] *(q)* . . .

[(q)] *(r)* a bill of rights and responsibilities of students which focuses upon positive student behavior and a safe and supportive school climate, which shall be written in plain-language, publicized and explained in an age-appropriate manner to all students on an annual basis; [and]

[(r)] *(s)* guidelines and programs for in-service education programs for all district staff members to ensure effective implementation of school policy on school conduct and discipline, including but not limited to, guidelines on promoting a safe and supportive school climate while discouraging, among other things, [discrimination or] harassment*, bullying and discrimination* against students by students and/or school employees; and including safe and supportive school climate concepts in the curriculum and classroom management*; and*

(t) a provision prohibiting retaliation against any individual who, in good faith, reports or assists in the investigation of harassment, bullying, and/or discrimination.

(iii) Additional responsibilities.

(a) . . .

(b) Each board of education and board of cooperative educational services shall ensure community awareness of its code of conduct by:

(1) . . .

(2) . . .

(3) [providing] *mailing* a plain language summary of the code of conduct to all persons in parental relation to students before the beginning of each school year and making such summary available thereafter upon request;

(4) providing each [existing] teacher with a copy of the complete code of conduct and a copy of any amendments to the code as soon as practicable following initial adoption or amendment of the code, and providing new teachers with a complete copy of the current code upon their employment; and

(5) . . .

2. Section 119.6 of the Regulations of the Commissioner of Education is amended, effective July 1, 2013, as follows:

§ 119.6 Policies against [discrimination and] harassment*, bullying, and discrimination*.

Each charter school shall include in its disciplinary rules and procedures pursuant to Education Law section 2851(2)(h) or, if applicable, in its code of conduct:

(a) provisions, in an age-appropriate version and written in plain-language, prohibiting [discrimination and] harassment, *bullying, and/or discrimination* against any student, by employees or students [on school property or at a school function,] that creates a hostile environment by conduct [, with or without physical contact and/or by verbal] *or by* threats, intimidation or abuse, *including cyberbullying as defined in Education Law section 11(8),* [of such a severe nature] that *either*:

(1) has or would have the effect of unreasonably and substantially interfering with a student's educational performance, opportunities or benefits, or mental, emotional and/or physical well-being*, including conduct, threats, intimidation or abuse that reasonably causes or would reasonably be expected to cause emotional harm*; or

(2) reasonably causes or would reasonably be expected to cause *physical injury to* a student *or to cause a student* to fear for his or her physical safety.

(3) Such conduct shall include acts of harassment and/or bullying that occur:

(i) on school property, as defined in section 100.2(kk)(1)(i) of this Part; and/or

(ii) at a school function, as defined in section 100.2(kk)(1) of this Part; or

(iii) off school property where such acts create or would foreseeably create a risk of substantial disruption within the school environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property.

(4) For purposes of this section, the term "threats, intimidation or abuse" shall include verbal and non-verbal actions.

(5) For purposes of this section, ''emotional harm'' that takes place

in the context of ''harassment or bullying'' means harm to a student's emotional well-being through creation of a hostile school environment that is so severe or pervasive as to unreasonably and substantially interfere with a student's education.

(6) Such conduct shall include, but is not limited to [, threats, intimidation, or abuse] *acts* based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practices, disability, sexual orientation, gender as defined in Education Law § 11(6), or sex; provided that nothing in this subdivision shall be construed to prohibit a denial of admission into, or exclusion from, a course of instruction based on a person's gender that would be permissible under Education Law sections 3201-a or 2854(2)(a) and Title IX of the Education Amendments of 1972 (20 U.S.C. section 1681, et seq.), or to prohibit, as discrimination based on disability, actions that would be permissible under section 504 of the Rehabilitation Act of 1973;

(b) provisions for responding to acts of [discrimination and] harassment*, bullying, and/or discrimination* against students by employees or students on school property or at a school function as defined in Education Law sections 11(1) and (2), pursuant to subdivision (a) of this section, including but not limited to disciplinary measures to be taken;

(c) guidelines on promoting a safe and supportive school climate while discouraging, among other things, [discrimination or] harassment*, bullying, and/or discrimination* against students by students and/or school employees; and including safe and supportive school climate concepts in the curriculum and classroom management.

(d) provisions which enable students, parents and persons in parental relation to make an oral or written report of harassment, bullying, and/or discrimination to teachers, administrators, and other school personnel that the school district deems appropriate; and

(e) a provision prohibiting retaliation against any individual who, in good faith, reports or assists in the investigation of harassment, bullying, and/or discrimination.

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

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

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY

Education Law section 11(7), as amended by Chapter 102 of the Laws of 2012, expands the definition of ''Harassment'' to include ''bullying'' and ''cyberbullying'' and to include certain acts occurring off school property, for purposes of the Dignity for All Students Act (''Dignity Act''). Education Law section 11(8), as added by Chapter 102, adds a definition of ''cyberbullying.''

Education Law section 12(1), as amended by Chapter 102 of the Laws of 2012, prohibits harassment, bullying and discrimination against students by students and school employees on school property or at a school function, on the basis of the student's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender, or sex. Section 12(2) provides that an age-appropriate version of the policy outlined in section 12(1), written in plain-language, shall be included in the code of conduct adopted pursuant to Education Law section 2801 and a summary of such policy shall be included in any summaries required by such section 2801.

Education Law section 13, as amended by Chapter 102 of the Laws of 2012, requires school districts to create:

(1) policies and procedures to create a school environment that is free from harassment, bullying and discrimination;

(2) guidelines to be used in school training programs to discourage the development of harassment, bullying and discrimination, and to make school employees aware of the effects of harassment, bullying, cyberbullying and discrimination on students;

(3) guidelines relating to the development of nondiscriminatory instructional and counseling methods, and requiring at least one staff member at every school be thoroughly trained to handle human relations in the areas of race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender and sex;

(4) guidelines relating to the development of measured, balanced and age-appropriate responses to instances of harassment, bullying and discrimination by students with remedies and procedures following a progressive model that make appropriate use of intervention, discipline and education, vary in method according to the nature of the behavior, the developmental age of the student and the student's history of problem behaviors, and are consistent with the district's code of conduct; and

(5) training that addresses the social patterns of harassment, bullying and discrimination, including but not limited to those acts based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender or sex, the identification and mitigation of harassment, bullying and discrimination, and strategies for effectively addressing problems of exclusion, bias and aggression.

Education Law section 14, as amended by Chapter 102 of the Laws of 2012, requires the Commissioner to provide direction, including model policies and, to the extent possible, direct services to school districts in preventing harassment, bullying and discrimination and fostering an environment in every school where all children can learn free of manifestations of bias. Section 14(3), as amended, authorizes the Commissioner to promulgate regulations to assist school districts in developing measured, balanced and age-appropriate response to violations of this policy, with remedies and procedures following a progressive model that makes appropriate use of intervention, discipline and education and provide guidance related to the application of regulations. Section 14(4), as added by Chapter 102, requires the Commissioner to provide guidance and educational materials to schools districts relating to best practices in addressing cyberbullying and helping families and communities work cooperatively with schools in addressing cyberbullying, whether on or off school property or at or away from a school function.

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

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

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

Education Law section 305(2) authorizes the Commissioner to have general supervision over all schools subject to the Education Law.

Education Law section 2801 requires each board of education and each board of cooperative educational services (BOCES) to adopt and amend, as appropriate, a code of conduct for the maintenance of order on school property and at school functions.

Education Law section 2854(1)(b) provides that charter schools shall meet the same health and safety, civil rights, and student assessment requirements applicable to other public schools, except as otherwise specifically provided in Article 56 of the Education Law.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the above statutory authority and is necessary to implement the code of conduct requirements of the Dignity Act, as amended by Ch. 102, L. 2012.

3. NEEDS AND BENEFITS:

The proposed amendment to sections 100.2(l) and 119.6 of the Commissioner's Regulations is necessary to conform the regulations to and implement the code of conduct provisions of Ch. 102, L. 2012, to ensure that no student shall be subjected to harassment, bullying (including cyberbullying) and discrimination by employees or students.

4. COSTS:

(a) Costs to State government: None.

(b) Costs to local government: None.

(c) Costs to private regulated parties: None.

(d) Costs to regulating agency for implementation and continued administration of this rule: None.

The proposed amendment is necessary to implement Ch. 102, L. 2012 and will not impose any additional costs beyond those imposed by the statute.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment implements code of conduct requirements, consistent with Ch. 102, L. 2012, and will not impose any additional program, service, duty or responsibility beyond those by the statute.

The proposed amendment includes:

(1) provisions prohibiting harassment, bullying (including cyberbullying) and discrimination against any student by employees or students, that creates a hostile environment by conduct or by threats, intimidation or abuse that either: (i) has or would have the effect of unreasonably and substantially interfering with a student's educational performance, opportunities or benefits, or mental, emotional and/or physical well-being, including conduct, threats, intimidation or abuse that reasonably causes or would reasonably be expected to cause emotional harm; or (ii) reasonably causes or would reasonably be expected to cause physical injury to a student or to cause a student to fear for his or her physical safety. Such

conduct shall include acts of harassment and/or bullying that occur (a) on school property; or (b) at a school function or (c) off school property where such acts create or would foreseeably create a risk of substantial disruption within the school, environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property;

(2) provisions for responding to acts of harassment, bullying/cyberbullying, which incorporate a progressive model of student discipline that includes measured, balanced and age-appropriate remedies and procedures that make appropriate use of prevention, education, intervention and discipline, and considers among other things, the nature and severity of the offending student's behavior(s), the developmental age of the student, the previous disciplinary record of the student and other extenuating circumstances, and the impact the student's behaviors had on the individual(s) who was physically injured and/or emotionally harmed. Responses shall be reasonably calculated to end the harassment, bullying, and/or discrimination, prevent recurrence, and eliminate the hostile environment; and

(3) provisions requiring that charter schools include in their disciplinary rules and procedures pursuant to Education Law section 2851(2)(h) or, if applicable, in their codes of conduct, similar provisions prohibiting harassment, bullying/cyberbullying and discrimination.

6. PAPERWORK:

The proposed amendment is necessary to conform the Commissioner's regulations to, and implement code of conduct requirements consistent with, Ch. 102, L. 2012 and will not impose any additional paperwork requirements beyond those by the statute.

7. DUPLICATION:

The proposed amendment does not duplicate existing State or Federal regulations, and is necessary to implement Ch. 102, L. 2012.

8. ALTERNATIVES:

The proposed amendment is necessary to implement Ch. 102, L. 2012. There are no significant alternatives and none were considered.

9. FEDERAL STANDARDS:

There are no related Federal standards.

10. COMPLIANCE SCHEDULE:

The proposed amendment is necessary to implement the code of conduct provisions of Ch. 102, L. 2012, and will not impose any additional compliance requirements or costs on regulated parties beyond those imposed by the statute. It is anticipated that school districts, BOCES and charter schools will be able to achieve compliance with proposed amendment by its effective date.

Regulatory Flexibility Analysis

Small Businesses:

The proposed amendment is applicable to school districts, boards of cooperative educational services and charter schools and is necessary to implement the code of conduct requirements of the Dignity for All Students Act, as amended by Chapter 102 of the Laws of 2012. The proposed amendment does not impose any adverse economic impact, reporting, record keeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local governments:

1. EFFECT OF RULE:

The proposed amendment applies to each school district, board of cooperative educational services (BOCES) and charter school in the State. At present, there are 695 school districts (including New York City), 37 BOCES and approximately 190 charter schools.

2. COMPLIANCE REQUIREMENTS:

The proposed amendment implements code of conduct requirements, consistent with Ch. 102, L. 2012, and will not impose any additional program, service, duty or responsibility beyond those by the statute.

The proposed amendment includes:

(1) provisions prohibiting harassment, bullying (including cyberbullying) and discrimination against any student by employees or students, that creates a hostile environment by conduct or by threats, intimidation or abuse that either: (i) has or would have the effect of unreasonably and substantially interfering with a student's educational performance, opportunities or benefits, or mental, emotional and/or physical well-being, including conduct, threats, intimidation or abuse that reasonably causes or would reasonably be expected to cause emotional harm; or (ii) reasonably causes or would reasonably be expected to cause physical injury to a student or to cause a student to fear for his or her physical safety. Such conduct shall include acts of harassment and/or bullying that occur (a) on school property; or (b) at a school function or (c) off school property where such acts create or would foreseeably create a risk of substantial disruption within the school, environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property;

(2) provisions for responding to acts of harassment, bullying/cyberbullying, which incorporate a progressive model of student discipline that includes measured, balanced and age-appropriate remedies and procedures that make appropriate use of prevention, education, intervention and discipline, and considers among other things, the nature and severity of the offending student's behavior(s), the developmental age of the student, the previous disciplinary record of the student and other extenuating circumstances, and the impact the student's behaviors had on the individual(s) who was physically injured and/or emotionally harmed. Responses shall be reasonably calculated to end the harassment, bullying, and/or discrimination, prevent recurrence, and eliminate the hostile environment; and

(3) provisions requiring that charter schools include in their disciplinary rules and procedures pursuant to Education Law section 2851(2)(h) or, if applicable, in their codes of conduct, similar provisions prohibiting harassment, bullying/cyberbullying and discrimination.

3. PROFESSIONAL SERVICES:

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

4. COMPLIANCE COSTS:

The proposed amendment is necessary to conform the Commissioner's Regulations with Ch. 102, L. 2012 and will not impose any additional costs beyond those imposed by the statute.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

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

6. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to implement the code of conduct requirements of the Dignity Act, as amended by Chapter 102 of the Laws of 2012, and will not impose any additional compliance requirements or costs beyond those imposed by the statute. Because these statutory requirements specifically apply, it is not possible to provide exemptions from the proposed amendment's requirements or impose a lesser standard. The proposed amendment has been carefully drafted to meet statutory requirements and Regents policy while minimizing its impact.

7. LOCAL GOVERNMENT PARTICIPATION:

The proposed amendment was developed in cooperation with the Dignity Act Task Force State Policy Work Group which is comprised of other State agencies, the New York City Department of Education, and several not-for-profit organizations. Copies of the proposed amendment have been provided to District Superintendents with the request that they distribute them to school districts within their supervisory districts for review and comment. Copies were also provided for review and comment to the chief school officers of the five big city school districts and to charter schools.

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

Pursuant to State Administrative Procedure Act section 207(1)(b), the State Education Department proposes that the initial review of this rule shall occur in the fifth calendar year after the year in which the rule is adopted, instead of in the third calendar year. The justification for a five year review period is that the proposed amendment merely implements, and conforms the Commissioner's Regulations to, statutory requirements under Chapter 102 of the Laws of 2012 and therefore the substantive provisions of the proposed amendment cannot be repealed or modified unless there is a further statutory change. Accordingly, there is no need for a shorter review period. The Department invites public comment on the proposed five year review period for this rule. Comments should be sent to the agency contact listed in item 10. of the Notice of Proposed Rule Making published herewith, and must be received within 45 days of the State Register publication date of the Notice.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

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

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

The proposed amendment implements code of conduct requirements, consistent with Chapter 102 of the Laws of 2012, and will not impose any additional program, service, duty or responsibility beyond those by the statute.

The proposed amendment includes:

(1) provisions prohibiting harassment, bullying (including cyberbullying) and discrimination against any student by employees or students, that creates a hostile environment by conduct or by threats, intimidation or abuse that either: (i) has or would have the effect of unreasonably and substantially interfering with a student's educational performance, op-

portunities or benefits, or mental, emotional and/or physical well-being, including conduct, threats, intimidation or abuse that reasonably causes or would reasonably be expected to cause emotional harm; or (ii) reasonably causes or would reasonably be expected to cause physical injury to a student or to cause a student to fear for his or her physical safety. Such conduct shall include acts of harassment and/or bullying that occur (a) on school property; or (b) at a school function or (c) off school property where such acts create or would foreseeably create a risk of substantial disruption within the school, environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property;

(2) provisions for responding to acts of harassment, bullying/cyberbullying, which incorporate a progressive model of student discipline that includes measured, balanced and age-appropriate remedies and procedures that make appropriate use of prevention, education, intervention and discipline, and considers among other things, the nature and severity of the offending student's behavior(s), the developmental age of the student, the previous disciplinary record of the student and other extenuating circumstances, and the impact the student's behaviors had on the individual(s) who was physically injured and/or emotionally harmed. Responses shall be reasonably calculated to end the harassment, bullying, and/or discrimination, prevent recurrence, and eliminate the hostile environment; and

(3) provisions requiring that charter schools include in their disciplinary rules and procedures pursuant to Education Law section 2851(2)(h) or, if applicable, in their codes of conduct, similar provisions prohibiting harassment, bullying/cyberbullying and discrimination.

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

3. COSTS:

The proposed amendment is necessary to conform the Commissioner's Regulations with Ch. 102, L. 2012 and will not impose any additional costs beyond those imposed by the statute.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to conform the Commissioner's Regulations to, and to otherwise implement, the code of conduct requirements of Ch. 102, L. 2012 and will not impose any additional compliance requirements or costs beyond those imposed by the statute. Because these statutory requirements specifically apply, it is not possible to provide exemptions from the proposed amendment's requirements or impose a lesser standard. The proposed amendment has been carefully drafted to meet statutory requirements and Regents policy while minimizing its impact.

The statute which the proposed amendment implements applies throughout the State including rural areas. Therefore, it was not possible to establish different requirements for entities in rural areas, or to provide exemptions from the rule's provisions.

5. RURAL AREA PARTICIPATION:

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

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

Pursuant to State Administrative Procedure Act section 207(1)(b), the State Education Department proposes that the initial review of this rule shall occur in the fifth calendar year after the year in which the rule is adopted, instead of in the third calendar year. The justification for a five year review period is that the proposed amendment merely implements, and conforms the Commissioner's Regulations to, statutory requirements under Chapter 102 of the Laws of 2012 and therefore the substantive provisions of the proposed amendment cannot be repealed or modified unless there is a further statutory change. Accordingly, there is no need for a shorter review period. The Department invites public comment on the proposed five year review period for this rule. Comments should be sent to the agency contact listed in item 10. of the Notice of Proposed Rule Making published herewith, and must be received within 45 days of the State Register publication date of the Notice.

Job Impact Statement

The proposed amendment applies to school districts, boards of cooperative educational services (BOCES) and charter schools and is necessary to implement the code of conduct requirements of the Dignity for All Students Act, as amended by Chapter 102 of the Laws of 2012. The proposed amendment will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the proposed amendment that it will have a positive impact, or no impact, on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Reporting Requirements Under the Dignity for All Students Act

I.D. No. EDU-07-13-00014-P

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

Proposed Action: Amendment of section 100.2(kk) of Title 8 NYCRR.

Statutory authority: Education Law, sections 11(7) and (8), 13(1), 15(not subdivided), 16(not subdivided), 101(not subdivided), 207(not subdivided), 305(1) and (2) and 2854(1)(b); and L. 2012, ch. 102

Subject: Reporting requirements under the Dignity for All Students Act.

Purpose: To implement ch. 102, L. 2012 changes to the Dignity Act, for reporting incidents of harassment, bullying and discrimination.

Text of proposed rule: Pursuant to Education Law sections 11, 15, 16, 101, 207, 215, 305 and 2854(1)(b) and Chapter 102 of the Laws of 2012.

Subdivision (kk) of section 100.2 of the Regulations of the Commissioner of Education is amended, effective July 1, 2013, as follows:

(kk) Dignity Act reporting requirements.

(1) Definitions. For purposes of this subdivision:

(i) ''School property'' means in or within any building, structure, athletic playing field, playground, parking lot, or land contained within the real property boundary line of a public elementary or secondary school, including a charter school; or in or on a school bus, as defined in Vehicle and Traffic Law section 142.

(ii) ''School function'' means a school-sponsored extracurricular event or activity.

(iii) ''Disability'' means disability as defined in Executive Law section 292(21).

(iv) ''Employee'' means employee as defined in Education Law section 1125(3), including an employee of a charter school.

(v) ''Sexual orientation'' means actual or perceived heterosexuality, homosexuality or bisexuality.

(vi) ''Gender'' means actual or perceived sex and shall include a person's gender identity or expression.

(vii) ''Discrimination'' means discrimination against any student by a student or students and/or an employee or employees on school property or at a school function including, but not limited to, discrimination based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender or sex.

(viii) ''Harassment *or bullying*'' means the creation of a hostile environment by conduct or by [verbal] threats, intimidation or abuse*, including cyberbullying as defined in Education Law section 11(8),* that *either*:

(a) has or would have the effect of unreasonably and substantially interfering with a student's educational performance, opportunities or benefits, or mental, emotional [or] *and/or* physical well-being [; or]*, including* conduct, [verbal] threats, intimidation or abuse that reasonably causes or would reasonably be expected to cause *emotional harm; or*

(b) reasonably causes or would reasonably be expected to cause physical injury to a student *or to cause a student* to fear for his or her physical safety. [; such conduct, verbal threats, intimidation or abuse includes but is not limited to conduct, verbal threats, intimidation or abuse]

(c) Such definition shall include acts of harassment or bullying that occur:

(i) on school property, as defined in section 100.2(kk)(1)(i) of this Part; and/or

(ii) at a school function, as defined in section 100.2(kk)(1) of this Part; or

(iii) off school property where such acts create or would foreseeably create a risk of substantial disruption within the school environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property.

(d) For purposes of this subdivision, the term "threats, intimidation or abuse" shall include verbal and non-verbal actions. Acts of harassment and bullying shall include, but not be limited to, acts based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender*,* or sex.

(e) ''Emotional harm'' that takes place in the context of "harassment or bullying" means harm to a student's emotional well-being through creation of a hostile school environment that is so severe or pervasive as to unreasonably and substantially interfere with a student's education.

(ix) ''Material Incident of [Discrimination and/or] Harassment*,*

Bullying, and/or Discrimination'' means a single *verified* incident or a series of related *verified* incidents where a student is subjected to [discrimination and/or] harassment*, bullying and/or discrimination* by a student and/or employee on school property or at a school function [that creates a hostile environment by conduct, with or without physical contact and/or by verbal threats, intimidation or abuse, of such severe or pervasive nature that:

(a) has or would have the effect of unreasonably and substantially interfering with a student's educational performance, opportunities or benefits, or mental, emotional and/or physical well-being; or

(b) reasonably causes or would reasonably be expected to cause a student to fear for his or her physical safety]. *In addition, such term shall include a verified incident or series of related incidents of harassment or bullying that occur off school property, meets the definition in subclause (1)(viii)(c)(iii) of this subdivision, and is the subject of a written or oral complaint to the superintendent, principal, or their designee, or other school employee.* Such conduct shall include, but is not limited to, threats, intimidation or abuse based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender*,* or sex; provided that nothing in this subdivision shall be construed to prohibit a denial of admission into, or exclusion from, a course of instruction based on a person's gender that would be permissible under Education Law sections 3201-a or 2854(2)(a) and Title IX of the Education Amendments of 1972 (20 U.S.C. section 1681, et seq.), or to prohibit, as discrimination based on disability, actions that would be permissible under section 504 of the Rehabilitation Act of 1973.

(2) *Reporting of incidents to the superintendent, principal, or designee.*

(i) School employees who witness harassment, bullying, and/or discrimination or receive an oral or written report of harassment, bullying, and/or discrimination shall promptly orally notify the principal, superintendent, or their designee not later than one school day after such employee witnesses or receives a report of harassment, bullying, and/or discrimination, and.

(ii) such school employee shall also file a written report in a manner prescribed by, as applicable, the school district, board of cooperative educational services (BOCES) or charter school with the principal, superintendent, or their designee no later than two school days after making an oral report.

(iii) the principal, superintendent or the principal's or superintendent's designee shall lead or supervise the thorough investigation of all reports of harassment, bullying and/or discrimination, and ensure that such investigation is completed promptly after receipt of any written reports made under Education Law section 13.

(iii) When an investigation verifies a material incident of harassment, bullying, and/or discrimination, the superintendent, principal, or designee shall take prompt action, consistent with the district's code of conduct including but not limited to the provisions of section 100.2(l)(2)(ii)(h), reasonably calculated to end the harassment, bullying, and/or discrimination, eliminate any hostile environment, create a more positive school culture and climate, prevent recurrence of the behavior, and ensure the safety of the student or students against whom such behavior was directed.

(iv) The principal, superintendent, or their designee shall notify promptly the appropriate local law enforcement agency when it is believed that any harassment, bullying or discrimination constitutes criminal conduct.

(v) The principal shall provide a regular report on data and trends related to harassment, bullying, and/or discrimination to the superintendent. For the purpose of this subdivision, the term "regular report" shall mean at least once during each school year, and in a manner prescribed by, as applicable, the school district, BOCES or charter school.

(3) Reporting of *material* incidents *to the commissioner*.

(i) For the [2012-2013] *2013-2014* school year and for each succeeding school year thereafter, each school district, board of cooperative educational services (BOCES) and charter school shall submit to the commissioner an annual report of material incidents of [discrimination and/or] harassment*, bullying, and/or discrimination,* that occurred in such school year, in accordance with Education Law section 15 and this subdivision. Such report shall be submitted in a manner prescribed by the commissioner, on or before the basic educational data system (BEDS) reporting deadline or such other date as determined by the commissioner.

(ii) For purposes of reporting pursuant to this subdivision, a school district, BOCES or charter school shall include in its annual report all material incidents of [discrimination and/or] harassment, bullying*, and/or discrimination* that:

(a) are the result of the investigation of a written or oral complaint made to the *superintendent,* [school] principal *or their designee,* [or other school administrator responsible for school discipline,] or to any other employee; or

(b) are otherwise directly observed by such *superintendent,* principal or [administrator,] *their designee,* or by any other employee regardless of whether a complaint is made.

(iii) Such report shall include information describing the specific nature of the incident, including, but not limited to:

(a) the type(s) of bias involved (actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender, sex, or other). Where multiple types of bias are involved, they shall all be reported;

(b) whether the incident resulted from student and/or employee conduct;

(c) whether the incident involved physical contact and/or verbal threats, intimidation or abuse*, including cyberbullying as defined in Education Law section 11(8)*;

(d) the location where the incident occurred (on school property or at a school function*, or off school property, where applicable*).

[(3)] *(4)* Protection of people who report discrimination and/or harassment.

(i) Pursuant to Education Law section 16, any person having reasonable cause to suspect that a student has been subjected to [discrimination and/or] harassment*, bullying, and/or discrimination* by an employee or student, on school grounds or at a school function, who acting reasonably and in good faith, either reports such information to school officials, to the commissioner, or to law enforcement authorities or otherwise initiates, testifies, participates or assists in any formal or informal proceedings under this subdivision, shall have immunity from any civil liability that may arise from the making of such report or from initiating, testifying, participating or assisting in such formal or informal proceedings.

(ii) No school district, BOCES or charter school, or an employee thereof, shall take, request or cause a retaliatory action against any such person who, acting reasonably and in good faith, either makes such a report or initiates, testifies, participates or assists in such formal or informal proceedings.

(iii) Pursuant to Education Law section 13, retaliation by any school employee or student shall be prohibited against any individual who, in good faith, reports or assists in the investigation of harassment, bullying, and/or discrimination.

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

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

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

Education Law section 11(7), as amended by Chapter 102 of the Laws of 2012, expands the definition of ''Harassment'' to include ''bullying'' and ''cyberbullying'' and to include certain acts occurring off school property, for purposes of the Dignity for All Students Act (''Dignity Act''). Education Law section 11(8), as added by Chapter 102, provides a definition of ''cyberbullying.''

Education Law section 13(1), as amended by Chapter 102 of the Laws of 2012(1) includes provisions specifying procedures for reporting incidents of harassment, bullying and discrimination to school authorities and local law enforcement agencies.

Education Law section 15, as amended by Chapter 102 of the Laws of 2012, requires the Commissioner to create a procedure under which material incidents of harassment, bullying and discrimination on school grounds or at a school function are reported to the State Education Department at least on an annual basis. The procedure shall provide that such reports shall, wherever possible, also delineate the specific nature of such incidents of harassment, bullying and discrimination.

Education Law section 16, as amended by Chapter 102 of the Laws of 2012, confers, under certain specified conditions, immunity from civil liability on persons reporting harassment, bullying or discrimination against students by a school employee or student. The statute further provides that no school district or employee shall take, request or cause a retaliatory action against a person, acting reasonably and in good faith, who makes such report or who initiates, testifies, participates or assists in any formal or informal proceeding under Education Law Article 2.

Education Law section 101 continues the existence of the Education Department, with the Board of Regents at its head and the Commissioner of Education as the chief administrative officer, and charges the Depart-

ment with the general management and supervision of public schools and the educational work of the State.

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

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

Education Law section 2854(1)(b) provides that charter schools shall meet the same health and safety, civil rights, and student assessment requirements applicable to other public schools, except as otherwise specifically provided in Article 56 of the Education Law.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the above statutory authority and is necessary to implement the reporting requirements of the Dignity Act, as amended by Chapter 102 of the Laws of 2012.

3. NEEDS AND BENEFITS:

The proposed amendment to section 100.2(kk) of the Commissioner's Regulations is necessary to conform the Commissioner's Regulations to, and otherwise implement, the reporting requirements of the Dignity Act, as amended by Chapter 102 of the Laws of 2012, to ensure that no student shall be subjected to harassment, bullying (including cyberbullying) and discrimination by employees or students.

4. COSTS:

(a) Costs to State government: None.

(b) Costs to local government: None.

(c) Costs to private regulated parties: None.

(d) Costs to regulating agency for implementation and continued administration of this rule: None.

The proposed amendment is necessary to implement Chapter 102 of the Laws of 2012 and will not impose any additional costs beyond those imposed by the statute.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment is necessary to conform the Commissioner's Regulations to, and to otherwise implement, Chapter 102 of the Laws of 2012, by establishing requirements for reporting incidents of harassment, bullying (including cyberbullying) and discrimination to school authorities and local law enforcement agencies, and for reporting material incidents of harassment, bullying/cyberbullying and discrimination to the Commissioner. The proposed amendment will not impose any additional program, service, duty or responsibility beyond those imposed by the statute.

Consistent with Chapter 102, the proposed amendment revises the regulation to add provisions for reporting of incidents of harassment, bullying/cyberbullying and discrimination to the superintendent, principal, or their designee, including requirements that:

(1) School employees who witness harassment, bullying, and/or discrimination or receive an oral or written report of such acts shall promptly orally notify the principal, superintendent, or their designee not later than one school day after such employee witnesses or receives a report of such acts, and shall also file a written report with the principal, superintendent, or their designee no later than two school days after making an oral report.

(2) The principal, superintendent or the principal's or superintendent's designee shall lead or supervise the thorough investigation of all reports of harassment, bullying and/or discrimination, and ensure that such investigation is completed promptly after receipt of any written reports.

(3) When an investigation verifies a material incident of harassment, bullying, and/or discrimination, the superintendent, principal, or designee shall take prompt action, reasonably calculated to end the harassment, bullying, and/or discrimination, eliminate any hostile environment, create a more positive school culture and climate, prevent recurrence of the behavior, and ensure the safety of the student or students against whom such behavior was directed.

(4) The principal, superintendent, or their designee shall notify promptly the appropriate local law enforcement agency when it is believed that any harassment, bullying or discrimination constitutes criminal conduct.

(5) The principal shall provide a regular report, at least once during each school year, on data and trends related to harassment, bullying, and/or discrimination to the superintendent.

(6) Pursuant to Education Law section 13, retaliation by any school employee or student shall be prohibited against any individual who, in good faith, reports or assists in the investigation of harassment, bullying, and/or discrimination.

6. PAPERWORK:

For the 2013-2014 school year and for each succeeding school year thereafter, each school district, board of cooperative educational services (BOCES) and charter school shall submit to the Commissioner an annual report of material incidents of harassment, bullying and discrimination that occurred in such school year.

A school district, BOCES or charter school shall include in its annual report all material incidents of harassment, bullying and discrimination that:

(a) are the result of the investigation of a written or oral complaint made to the superintendent, principal, or their designee, or to any other employee; or

(b) are otherwise directly observed by such superintendent, principal or their designee, or by any other employee regardless of whether a complaint is made.

The report shall include information describing the specific nature of the incident, including, but not limited to:

(a) the type(s) of bias involved (actual or perceived race, color, weight, national origin, ethnic group, religion, religious practices, disability, sexual orientation, gender, sex or other). Where multiple types of bias are involved, they shall all be reported;

(b) whether the incident resulted from student and/or employee conduct;

(c) whether the incident involved physical contact and/or verbal threats, intimidation or abuse, including cyberbullying, and

(d) the location where the incident occurred (on school property and/or at a school function, or off school property, where applicable).

No school district, BOCES or charter school, or an employee thereof, shall take, request or cause a retaliatory action against any such person who, acting reasonably and in good faith, either makes such a report or initiates, testifies, participates or assists in such formal or informal proceedings. Retaliation by any school employee or student shall be prohibited against any individual, who, in good faith reports or assists in the investigation of harassment, bullying and/or discrimination.

Each school district, BOCES and charter school shall annually submit its report on material incidents of harassment, bullying and discrimination in a manner prescribed by the commissioner, on or before the basic educational data system (BEDS) reporting deadline or such other date as determined by the Commissioner.

7. DUPLICATION:

The proposed amendment does not duplicate existing State or Federal regulations, and is necessary to implement Chapter 102 of the Laws of 2012.

8. ALTERNATIVES:

The proposed amendment is necessary to conform the Commissioner's Regulations to, and to otherwise implement, Chapter 102 of the Laws of 2012, by establishing requirements for reporting incidents of harassment, bullying (including cyberbullying) and discrimination to school authorities and local law enforcement agencies, and for reporting material incidents of harassment, bullying (including cyberbullying) and discrimination to the Commissioner. There are no viable alternatives and none were considered.

9. FEDERAL STANDARDS:

There are no related Federal standards.

10. COMPLIANCE SCHEDULE:

The proposed amendment is necessary to conform the Commissioner's Regulations to Chapter 102 of the Laws of 2012, and will not impose any additional compliance requirements or costs on regulated parties beyond those imposed by the statute. It is anticipated that regulated parties will be able to achieve compliance with proposed amendment by its effective date.

Regulatory Flexibility Analysis

Small Businesses:

The proposed amendment applies to school districts, boards of cooperative educational services (BOCES) and charter schools and relates to reporting requirements under the Dignity for All Students Act (''Dignity Act''), as amended by Chapter 102 of the Laws of 2012. The proposed rule does not impose any adverse economic impact, reporting, record keeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed rule that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local governments:

1. EFFECT OF RULE:

The proposed rule applies to each school district, BOCES and charter school in the State. At present, there are 695 school districts (including New York City), 37 BOCES and approximately 190 charter schools.

2. COMPLIANCE REQUIREMENTS:

The proposed amendment is necessary to conform the Commissioner's Regulations to, and to otherwise implement, Chapter 102 of the Laws of 2012, by establishing requirements for reporting incidents of harassment, bullying (including cyberbullying) and discrimination to school authori-

ties and local law enforcement agencies, and for reporting material incidents of harassment, bullying/cyberbullying and discrimination to the Commissioner. The proposed amendment will not impose any additional compliance requirements on school districts, BOCES or charter schools beyond those imposed by the statute.

Consistent with Chapter 102, the proposed amendment revises the regulation to add provisions for reporting of incidents of harassment, bullying/cyberbullying and discrimination to the superintendent, principal, or their designee, including requirements that:

(1) School employees who witness harassment, bullying, and/or discrimination or receive an oral or written report of such acts shall promptly orally notify the principal, superintendent, or their designee not later than one school day after such employee witnesses or receives a report of such acts, and shall also file a written report with the principal, superintendent, or their designee no later than two school days after making an oral report.

(2) The principal, superintendent or the principal's or superintendent's designee shall lead or supervise the thorough investigation of all reports of harassment, bullying and/or discrimination, and ensure that such investigation is completed promptly after receipt of any written reports.

(3) When an investigation verifies a material incident of harassment, bullying, and/or discrimination, the superintendent, principal, or designee shall take prompt action, reasonably calculated to end the harassment, bullying, and/or discrimination, eliminate any hostile environment, create a more positive school culture and climate, prevent recurrence of the behavior, and ensure the safety of the student or students against whom such behavior was directed.

(4) The principal, superintendent, or their designee shall notify promptly the appropriate local law enforcement agency when it is believed that any harassment, bullying or discrimination constitutes criminal conduct.

(5) The principal shall provide a regular report, at least once during each school year, on data and trends related to harassment, bullying, and/or discrimination to the superintendent.

(6) Pursuant to Education Law section 13, retaliation by any school employee or student shall be prohibited against any individual who, in good faith, reports or assists in the investigation of harassment, bullying, and/or discrimination.

For the 2013-2014 school year and for each succeeding school year thereafter, each school district, board of cooperative educational services (BOCES) and charter school shall submit to the Commissioner an annual report of material incidents of harassment, bullying and discrimination that occurred in such school year.

A school district, BOCES or charter school shall include in its annual report all material incidents of harassment, bullying and discrimination that:

(a) are the result of the investigation of a written or oral complaint made to the superintendent, principal, or their designee, or to any other employee; or

(b) are otherwise directly observed by such superintendent, principal or their designee, or by any other employee regardless of whether a complaint is made.

The report shall include information describing the specific nature of the incident, including, but not limited to:

(a) the type(s) of bias involved (actual or perceived race, color, weight, national origin, ethnic group, religion, religious practices, disability, sexual orientation, gender, sex or other). Where multiple types of bias are involved, they shall all be reported;

(b) whether the incident resulted from student and/or employee conduct;

(c) whether the incident involved physical contact and/or verbal threats, intimidation or abuse, including cyberbullying, and

(d) the location where the incident occurred (on school property and/or at a school function, or off school property, where applicable).

No school district, BOCES or charter school, or an employee thereof, shall take, request or cause a retaliatory action against any such person who, acting reasonably and in good faith, either makes such a report or initiates, testifies, participates or assists in such formal or informal proceedings. Retaliation by any school employee or student shall be prohibited against any individual, who, in good faith reports or assists in the investigation of harassment, bullying and/or discrimination.

Each school district, BOCES and charter school shall annually submit its report on material incidents of harassment, bullying and discrimination in a manner prescribed by the commissioner, on or before the basic educational data system (BEDS) reporting deadline or such other date as determined by the Commissioner.

3. PROFESSIONAL SERVICES:

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

4. COMPLIANCE COSTS:

The proposed amendment is necessary to implement Chapter 102 of the Laws of 2012 and will not impose any additional costs beyond those imposed by the statute.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

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

6. MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to implement, and otherwise conform the Commissioner's Regulations to, the reporting requirements of the Dignity Act, as amended by Chapter 102 of the Laws of 2012, and will not impose any additional compliance requirements or costs on school districts, BOCES and charter schools beyond those imposed by the statute. Because these statutory requirements specifically apply to school districts, BOCES and charter schools it is not possible to exempt them from the proposed rule's requirements or impose a lesser standard. The proposed amendment has been carefully drafted to meet statutory requirements and Regents policy while minimizing the impact on school districts, BOCES and charter schools.

7. LOCAL GOVERNMENT PARTICIPATION:

The proposed amendment was developed in cooperation with the Dignity Act Task Force State Policy Work Group which is comprised of other State agencies, the New York City Department of Education, and several not-for-profit organizations. Copies of the proposed amendment have been provided to District Superintendents with the request that they distribute them to school districts within their supervisory districts for review and comment. Copies were also provided for review and comment to the chief school officers of the five big city school districts and to charter schools.

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

Pursuant to State Administrative Procedure Act section 207(1)(b), the State Education Department proposes that the initial review of this rule shall occur in the fifth calendar year after the year in which the rule is adopted, instead of in the third calendar year. The justification for a five year review period is that the proposed amendment merely implements, and conforms the Commissioner's Regulations to, statutory requirements under Chapter 102 of the Laws of 2012 and therefore the substantive provisions of the proposed amendment cannot be repealed or modified unless there is a further statutory change. Accordingly, there is no need for a shorter review period. The Department invites public comment on the proposed five year review period for this rule. Comments should be sent to the agency contact listed in item 10. of the Notice of Proposed Rule Making published herewith, and must be received within 45 days of the State Register publication date of the Notice.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment applies to all school districts and boards of cooperative educational services (BOCES) in the State, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less. The proposed amendment also applies to charter schools. At present, there is one charter school in a rural area.

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

The proposed amendment is necessary to conform the Commissioner's Regulations to, and to otherwise implement, Chapter 102 of the Laws of 2012, by establishing requirements for reporting incidents of harassment, bullying (including cyberbullying) and discrimination to school authorities and local law enforcement agencies, and for reporting material incidents of harassment, bullying/cyberbullying and discrimination to the Commissioner. The proposed amendment will not impose any additional compliance requirements on school districts, BOCES or charter schools beyond those imposed by the statute.

Consistent with Chapter 102, the proposed amendment revises the regulation to add provisions for reporting of incidents of harassment, bullying/cyberbullying and discrimination to the superintendent, principal, or their designee, including requirements that:

(1) School employees who witness harassment, bullying, and/or discrimination or receive an oral or written report of such acts shall promptly orally notify the principal, superintendent, or their designee not later than one school day after such employee witnesses or receives a report of such acts, and shall also file a written report with the principal, superintendent, or their designee no later than two school days after making an oral report.

(2) The principal, superintendent or the principal's or superintendent's designee shall lead or supervise the thorough investigation of all reports of harassment, bullying and/or discrimination, and ensure that such investigation is completed promptly after receipt of any written reports.

(3) When an investigation verifies a material incident of harassment, bullying, and/or discrimination, the superintendent, principal, or designee shall take prompt action, reasonably calculated to end the harassment, bullying, and/or discrimination, eliminate any hostile environment, create a more positive school culture and climate, prevent recurrence of the behavior, and ensure the safety of the student or students against whom such behavior was directed.

(4) The principal, superintendent, or their designee shall notify promptly the appropriate local law enforcement agency when it is believed that any harassment, bullying or discrimination constitutes criminal conduct.

(5) The principal shall provide a regular report, at least once during each school year, on data and trends related to harassment, bullying, and/or discrimination to the superintendent.

(6) Pursuant to Education Law section 13, retaliation by any school employee or student shall be prohibited against any individual who, in good faith, reports or assists in the investigation of harassment, bullying, and/or discrimination.

For the 2013-2014 school year and for each succeeding school year thereafter, each school district, board of cooperative educational services (BOCES) and charter school shall submit to the Commissioner an annual report of material incidents of harassment, bullying and discrimination that occurred in such school year.

A school district, BOCES or charter school shall include in its annual report all material incidents of harassment, bullying and discrimination that:

(a) are the result of the investigation of a written or oral complaint made to the superintendent, principal, or their designee, or to any other employee; or

(b) are otherwise directly observed by such superintendent, principal or their designee, or by any other employee regardless of whether a complaint is made.

The report shall include information describing the specific nature of the incident, including, but not limited to:

(a) the type(s) of bias involved (actual or perceived race, color, weight, national origin, ethnic group, religion, religious practices, disability, sexual orientation, gender, sex or other). Where multiple types of bias are involved, they shall all be reported;

(b) whether the incident resulted from student and/or employee conduct;

(c) whether the incident involved physical contact and/or verbal threats, intimidation or abuse, including cyberbullying, and

(d) the location where the incident occurred (on school property and/or at a school function, or off school property, where applicable).

No school district, BOCES or charter school, or an employee thereof, shall take, request or cause a retaliatory action against any such person who, acting reasonably and in good faith, either makes such a report or initiates, testifies, participates or assists in such formal or informal proceedings. Retaliation by any school employee or student shall be prohibited against any individual, who, in good faith reports or assists in the investigation of harassment, bullying and/or discrimination.

Each school district, BOCES and charter school shall annually submit its report on material incidents of harassment, bullying and discrimination in a manner prescribed by the commissioner, on or before the basic educational data system (BEDS) reporting deadline or such other date as determined by the Commissioner.

3. COSTS:

The proposed amendment is necessary to implement Chapter 102 of the Laws of 2012 and will not impose any additional costs on school districts, BOCES and charter schools in rural areas beyond those imposed by the statute.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to implement, and otherwise conform the Commissioner's Regulations to, the reporting requirements of the Dignity Act, as amended by Chapter 102 of the Laws of 2012, and will not impose any additional compliance requirements or costs on school districts, BOCES and charter schools beyond those imposed by the statute. Because these statutory requirements specifically apply to school districts, BOCES and charter schools it is not possible to exempt them from the proposed rule's requirements or impose a lesser standard. The proposed amendment has been carefully drafted to meet statutory requirements and Regents policy while minimizing the impact on school districts, BOCES and charter schools.

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

5. RURAL AREA PARTICIPATION:

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

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

Pursuant to State Administrative Procedure Act section 207(1)(b), the State Education Department proposes that the initial review of this rule shall occur in the fifth calendar year after the year in which the rule is adopted, instead of in the third calendar year. The justification for a five year review period is that the proposed amendment merely implements, and conforms the Commissioner's Regulations to, statutory requirements under Chapter 102 of the Laws of 2012 and therefore the substantive provisions of the proposed amendment cannot be repealed or modified unless there is a further statutory change. Accordingly, there is no need for a shorter review period. The Department invites public comment on the proposed five year review period for this rule. Comments should be sent to the agency contact listed in item 10. of the Notice of Proposed Rule Making published herewith, and must be received within 45 days of the State Register publication date of the Notice.

Job Impact Statement

The proposed amendment relates to reporting requirements under the Dignity for All Students Act (L. 2010, Ch. 482) and is applicable to school districts, boards of cooperative educational services and charter schools. The proposed amendment will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the proposed amendment that it will have a positive impact, or no impact, on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Local High School Equivalency Diplomas Based Upon Experimental Programs

I.D. No. EDU-07-13-00015-P

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

Proposed Action: Amendment of section 100.8 of Title 8 NYCRR.

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

Subject: Local high school equivalency diplomas based upon experimental programs.

Purpose: To extend until 6/30/15 the provision for awarding local high school equivalency diplomas based upon experimental programs.

Text of proposed rule: Section 100.8 of the Regulations of the Commissioner of Education is amended, effective May 8, 2013, as follows:

100.8 Local high school equivalency diploma.

Boards of education specified by the commissioner may award a local high school equivalency diploma based upon experimental programs approved by the commissioner until [June 30, 2013] *June 30, 2015*, after which date such boards may no longer award a local high school equivalency diploma.

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

Data, views or arguments may be submitted to: Mark Leinung, Director Adult Education Programs and Policy, Office of Adult Career and Continuing Education Services, Room 1622, One Commerce Plaza, Albany, NY 12234, (518) 474-8892, email: mleinung@mail.nysed.gov

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

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

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

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

Education Law section 209 authorizes the Regents to establish second-

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

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

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

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

2. LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the above statutory authority and is necessary to implement Regents policy to extend for two years (to June 30, 2015) the existing provision in section 100.8 of the Commissioner's Regulations that allows boards of education and BOCES specified by the Commissioner to award a local high school equivalency diploma based upon experimental programs approved by the Commissioner. The existing provision will otherwise sunset on June 30, 2013.

3. NEEDS AND BENEFITS:

The proposed amendment is necessary to implement Regents policy to extend for two years the provision in section 100.8 of the Commissioner's Regulations that allows boards of education and BOCES to award local high school equivalency diplomas based upon experimental programs approved by the Commissioner.

The extension will allow the continuance in New York State of the National External Diploma Program (NEDP), which is a complete assessment program that allows adults over age 21 to demonstrate and document the lasting outcomes and transferable skills for which a high school diploma is awarded. The NEDP is a competency based, applied performance assessment system which capitalizes on an adult's life experiences and uses a practical application of learning for assessment through such methods as simulations, authentic demonstration, research projects, hands-on interviews and oral interviews. An NEDP candidate must demonstrate a job skill and the competencies that align with the skills needed to function effectively in the workplace. All competencies require a 100 percent mastery.

The two year extension will ensure that all current NEDP students in the approximately 18 program sites across the State are provided with an opportunity to complete their programs and earn a local high school equivalency diploma.

During this time, and depending on policy and direction from the Regents and the Department's ACCES Committee, staff intends to develop, through a separate rule making, a proposed amendment to the Commissioner's Regulations that will provide for multiple pathways to a New York State High School Equivalency Diploma. Under this new procedure, the National External Diploma Program could be established as a New York State High School Equivalency Diploma. These Equivalency Diplomas would be issued by the Department, as opposed to the local high school equivalency diploma which is issued by local school boards. This will create an additional option and pathway for adult students while phasing out the need and authority for school boards to issue the local high school equivalency diploma.

4. COSTS:

(a) Costs to State government: None.

(b) Costs to local government: None.

(c) Costs to private regulated parties: None.

(d) Costs to regulating agency for implementation and continued administration of this rule: None.

The proposed amendment will not impose any costs on the State, local governments, private regulated parties or the State Education Department. It merely extends for two years the existing provision in section 100.8 of the Commissioner's Regulations that allows boards of education and BOCES specified by the Commissioner to award a local high school equivalency diploma based upon experimental programs approved by the Commissioner.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any program, service, duty or responsibility upon any county, city, town, village, school district, fire district or other special district. It merely extends for two years an existing provision related to the issuance of a local high school equivalency diploma.

6. PAPERWORK:

The proposed amendment merely extends for two years an existing provision related to the issuance of a local high school equivalency diploma, and does not impose any additional paperwork requirements.

7. DUPLICATION:

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

8. ALTERNATIVES:

The proposed amendment is necessary to implement Regents policy to extend for two years the provision in section 100.8 of the Commissioner's Regulations that allows boards of education and BOCES to award local high school equivalency diplomas based upon experimental programs approved by the Commissioner. The existing provision will otherwise sunset on June 30, 2013. There are no significant alternatives to the proposed amendment and none were considered.

9. FEDERAL STANDARDS:

There are no related federal standards in this area.

10. COMPLIANCE SCHEDULE:

Because of the nature of the proposed amendment, which merely extends for two years (to June 30, 2015) the existing provision in section 100.8 of the Commissioner's Regulations, it is anticipated that school districts and boards of cooperative educational services will be able to achieve compliance with this rule by its effective date.

Regulatory Flexibility Analysis

Small Businesses:

The proposed amendment merely extends for two years the existing provision in section 100.8 of the Commissioner's Regulations that allows boards of education and boards of cooperative educational services (BOCES) specified by the Commissioner to award a local high school equivalency diploma for adults over age 21, based upon experimental programs approved by the Commissioner, and will not impose any adverse economic impact, reporting, record keeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local Governments:

1. EFFECT OF RULE:

The proposed amendment applies to boards of education and boards of cooperative educational services (BOCES) that are specified by the Commissioner to award a local high school equivalency diploma based upon experimental programs approved by the Commissioner. The proposed amendment will ensure that all current National External Degree Program (NEDP) students in the approximately 18 program sites across the State are provided with an opportunity to complete their programs and earn a local high school equivalency diploma.

2. COMPLIANCE REQUIREMENTS:

The proposed amendment does not impose any new compliance requirements but merely extends for two years (to June 30, 2015) the existing provision in section 100.8 of the Commissioner's Regulations that allows boards of education and BOCES specified by the Commissioner to award a local high school equivalency diploma based upon experimental programs approved by the Commissioner.

3. PROFESSIONAL SERVICES:

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

4. COMPLIANCE COSTS:

The proposed amendment will not impose any costs on local governments. It merely extends for two years the existing provision in section 100.8 of the Commissioner's Regulations that allows boards of education and BOCES specified by the Commissioner to award a local high school equivalency diploma based upon experimental programs approved by the Commissioner.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment will not impose any costs or new technological requirements on local governments.

6. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to implement policy enacted by the Board of Regents. The proposed amendment does not impose any new compliance requirements or costs on local governments, but merely extends for two years the existing provision in section 100.8 of the Commissioner's Regulations that allows boards of education and BOCES to award local high school equivalency diplomas based upon experimental programs approved by the Commissioner.

7. LOCAL GOVERNMENT PARTICIPATION:

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

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment applies to all school districts and boards of

cooperative educational services (BOCES) that are specified by the Commissioner to award a local high school equivalency diploma based upon experimental programs approved by the Commissioner, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less. The proposed amendment will ensure that all current National External Degree Program (NEDP) students in the approximately 18 program sites across the State are provided with an opportunity to complete their programs and earn a local high school equivalency diploma. Of these 18 sites, 10 are in rural areas.

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

The proposed amendment does not impose any new compliance requirements on rural areas but merely extends for two years (to June 30, 2015) the existing provision in section 100.8 of the Commissioner's Regulations that allows boards of education and BOCES specified by the Commissioner to award a local high school equivalency diploma based upon experimental programs approved by the Commissioner. The proposed amendment does not impose any additional professional services requirements.

COMPLIANCE COSTS:

The proposed amendment will not impose any costs on rural areas. It merely extends for two years the existing provision in section 100.8 of the Commissioner's Regulations that allows boards of education and BOCES specified by the Commissioner to award a local high school equivalency diploma based upon experimental programs approved by the Commissioner.

MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to implement policy enacted by the Board of Regents. The proposed amendment does not impose any new compliance requirements on rural areas, but merely extends for two years the existing provision in section 100.8 of the Commissioner's Regulations that allows boards of education and BOCES to award local high school equivalency diplomas based upon experimental programs approved by the Commissioner.

RURAL AREA PARTICIPATION:

Comments on the proposed amendment were solicited from the Department's Rural Advisory Committee, whose membership includes school districts located in rural areas.

Job Impact Statement

The proposed amendment merely extends for two years (to June 30, 2015) the existing provision in section 100.8 of the Commissioner's Regulations that allows boards of education specified by the Commissioner to award a local high school equivalency diploma based upon experimental programs approved by the Commissioner, and will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the proposed amendment that it will have no impact on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Department of Environmental Conservation

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Special Snow Goose Harvest Program

I.D. No. ENV-07-13-00003-EP

Filing No. 79

Filing Date: 2013-01-23

Effective Date: 2013-01-23

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

Proposed Action: Amendment of section 2.30 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 11-0303, 11-0307, 11-0903, 11-0909 and 11-0917

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

Specific reasons underlying the finding of necessity: This rulemaking is necessary to fully implement a special snow goose harvest program in upstate New York to help reduce environmental damage caused by an overabundance of these birds in eastern North America, in conformance with federal regulations and flyway guidelines for resource conservation. Regulations for the special snow goose harvest program were not published in the Federal Register as expected, resulting in conflicting information and confusion among the hunting public. Consequently, the expanded special program needs to be specifically adopted and retained in state regulations.

The promulgation of this regulation on an emergency basis is necessary because the normal rulemaking process would not be completed in time to cover an important time period (January 16-March 10) when snow geese may occur in New York and previously announced season dates were expected to be in effect as a result of federal action. This would result in lost opportunity to harvest these overabundant birds, public confusion, and complicate or undermine law enforcement activities by the department.

Subject: Special Snow Goose Harvest Program.

Purpose: Revise regulations governing hunting of Snow Geese in New York.

Text of emergency/proposed rule:

Title 6 of NYCRR, Section 2.30, entitled ''Migratory game birds,'' is amended as follows:

Amend existing paragraph 2.30(b)(2) to read:

(2) with a shotgun of any description capable of holding more than three shells, unless it is plugged with a one-piece filler, incapable of removal without disassembling the gun, so its total capacity does not exceed three shells, except that this prohibition shall not apply to the taking of crows or to the taking of snow geese or Ross' geese [during the special snow goose harvest program described in subparagraph 2.30 (e)(2)(vii)] *in any area or zone when all other waterfowl hunting seasons are closed*;

Amend existing paragraph 2.30(b)(7) to read:

(7) by the use or aid of recorded or electrically amplified bird calls or sounds, or recorded or electrically amplified imitations of bird calls or sounds, except that this prohibition shall not apply to the taking of crows or to the taking of snow geese or Ross' geese [during the special snow goose harvest program described in subparagraph 2.30 (e)(2)(vii)] *in any area or zone when all other waterfowl hunting seasons are closed*;

Amend existing subparagraph 2.30(e)(1)(ii) to read:

(ii) Special Snow Goose Harvest Program. Any person who has migratory game bird hunting privileges in New York, including a valid Harvest Information Program (HIP) confirmation number, may take ''light geese'' (snow geese and Ross' geese) in the Western, Northeastern, Southeastern, and Lake Champlain Zones from [March 11] *January 16* through April 15 annually, in addition to seasons published annually in the Federal Register. All migratory game bird hunting regulations and requirements shall apply to the taking of snow geese or Ross' geese during this period, except that use of recorded or electrically amplified calls or sounds is allowed and use of shotguns capable of holding more than three shells is allowed. Any person who participates in the special snow goose harvest program must provide accurate and timely information on their activity and harvest upon request from the department.

Adopt new paragraph 2.30(f)(2) to read:

(2) snow geese and Ross' geese may be taken from one-half hour before sunrise to one-half hour after sunset during the Special Snow Goose Harvest Program.

Amend subparagraph 2.30(g)(3)(ii) to read:

(ii) Daily bag and possession limits for ''light geese'' are aggregate daily bag and possession limits for snow geese and Ross' geese in all areas. *Daily bag and possession limits during the Special Snow Goose Harvest Program are the same as those published annually in the Federal Register by the U.S. Department of the Interior for regular snow goose hunting seasons.*

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 April 22, 2013.

Text of rule and any required statements and analyses may be obtained from: Bryan L. Swift, New York State Department of Environmental Conservation, 625 Broadway, Albany, NY 12233, (518) 402-8922, email: wildliferegs@gw.dec.state.ny.us

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

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

Additional matter required by statute: A programmatic environmental impact statement is on file with the Department of Environmental Conservation.

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

Regulatory Impact Statement

1. Statutory Authority

Section 11-0303 of the Environmental Conservation Law (ECL)

authorizes the Department of Environmental Conservation (DEC or department) to provide for the recreational harvest of wildlife giving due consideration to ecological factors, the natural maintenance of wildlife, public safety, and the protection of private property. Environmental Conservation Law sections 11-0303, 11-0307, 11-0903, 11-0905 and 11-0909 and 11-0917 authorize DEC to regulate the taking, possession, transportation and disposition of migratory game birds. ECL section 11-0307 was amended in May 2010 to specify that open seasons and bag limits for migratory game birds shall be those published annually in the Federal Register by the U.S. Department of the Interior, unless DEC adopts regulations pursuant to provisions of the ECL. However, the special snow goose harvest program regulations are not published annually in the Federal Register, so they must be maintained in 6 NYCRR.

2. Legislative Objectives

The legislative objective of the above-cited laws is to ensure adoption of State migratory game bird harvest regulations that conform with Federal regulations made under authority of the Migratory Bird Treaty Act (16 U.S.C. sections 703-711). Season dates and bag limits are used to achieve harvest objectives and equitably distribute hunting opportunity among as many hunters as possible. Regulations governing the manner of taking upgrade the quality of recreational activity, provide for a variety of harvest techniques, afford migratory game bird populations with additional protection, provide for public safety and protect private property.

3. Needs and Benefits

This rulemaking will modify regulations pertaining to the special snow goose harvest program in New York. This program was established here and in many other states in 2008, to increase harvest of snow geese (Chen caerulescens) and help reduce environmental damage caused by the overabundance of these birds in eastern North America.

Snow geese are an arctic breeding goose species that reached record high population levels in North America in recent years. The numbers of snow geese counted annually in eastern North America increased from approximately 25,400 birds in 1965 to 1,019,000 birds in 2007. The population growth rate during 1965–2007 was 8% per year, which if sustained would have resulted in a population over 2 million by 2015, and nearly 3 million by 2020. The Atlantic Flyway Council population objective, as well as the North American Waterfowl Management Plan (NAWMP) spring population goal, for greater snow geese is only 500,000 birds.

Wildlife agencies, ecologists and environmental organizations are all concerned about the impacts that overabundant snow geese are having on arctic ecosystems, coastal wetlands, and agricultural crops. Snow geese are voracious herbivores, and their feeding activities have damaged thousands of acres of coastal wetlands on both the breeding grounds and wintering areas used by these birds.

In response to these concerns, wildlife managers and scientists in the U.S. and Canada have recommended that the snow goose population in eastern North America be reduced to 500,000 birds. To accomplish this, regular season hunting regulations have been liberalized to the maximum extent allowed under the Migratory Bird Treaty Act. In addition, the U.S. Fish and Wildlife Service (USFWS) adopted a "conservation order" in 2008 allowing states in the Atlantic Flyway to implement special snow goose harvest programs in addition to regular hunting seasons. Wildlife agencies in New York, New Jersey, Pennsylvania, Vermont, Connecticut, Maryland, Delaware, and Virginia have all implemented such special snow goose harvest programs. Goals of the Conservation Order were to increase the interest and effectiveness of recreational snow goose hunters, and allow additional hunting periods and techniques distinct from traditional recreational hunting.

Regular season hunting regulations for snow geese have been liberalized to the maximum allowed under the Migratory Bird Treaty Act in both the U.S. and Canada. Seasons now run for 107 days with a daily bag limit of 25 birds per day, but those seasons must close on or before March 10 annually. Special snow goose harvest programs have been established in New York and many other states since 2008, and those seasons can allow harvest whenever the birds occur in an area (as determined by each state), and allow the use of special measures such as electronic calls, "unplugged" shotguns capable of holding more than 3 shells, and extended shooting hours (to one-half hour after sunset).

In New York, the special snow goose harvest program currently consists of a spring season, from March 11 through April 15, in addition to the 107-day regular hunting season that is allowed anytime between October 1 and March 10. The bag limit is 25 snow geese per day, and hunters are allowed to use electronic calls and "unplugged" guns (shotguns capable of holding more than 3 shells) during the special harvest program only.

Collectively, the special harvest programs implemented to date have stabilized, but not reduced, the snow goose population. The 2012 population estimate of 1,005,000 greater snow geese was similar to 2007, but still double the AFC and NAWMP goals. Additional harvest is needed to reduce the population, and all Atlantic Flyway states have been encouraged to expand their special harvest programs in any way possible.

The Department proposes to reconfigure its regular hunting season and special harvest program to maximize the opportunity for hunters to take snow geese in New York. Regular hunting seasons would occur from October 1 through January 15, which is the maximum 107 days allowed by federal regulations. With the proposed amendments, the special snow goose harvest program would begin immediately after, on January 16, and continue through April 15 (same closing date as before), after which few if any snow geese remain in New York. Throughout the regular and special seasons, bag limits would be the maximum allowed by the USFWS during the regular season (currently 25 per day, no possession limit), and hunters would be allowed to use electronic calls and unplugged guns in any area or zone whenever no other migratory bird hunting seasons are open. Extended shooting hours (until one-half hour after sunset) would be allowed for snow geese only during the special snow goose harvest program period. The specific regulations proposed herein conform to all applicable requirements and constraints established by the USFWS.

The collective benefit of these changes is to maximize hunter harvest of snow geese to help limit or reduce snow goose populations as quickly as possible. By allowing snow geese to be taken throughout upstate New York from October 1 through April 15, with a uniform bag limit of 25 snow geese per day, regulations will be simplified and hunters will have almost unlimited opportunity to harvest these birds. Any additional harvest, along with what occurs in other states and Canada, will help restore balance to snow geese and the ecosystems they occupy.

Special snow goose harvest programs in the Atlantic Flyway have resulted in additional harvest of nearly 40,000 snow geese per year during 2009-2012, with about 7,000 of that occurring in New York. Regular season harvests of snow geese in New York during the same period (2008-2011) averaged only 4,000 birds per year, so the additional harvest during the special season has been significant. This rulemaking proposal would expand the times when hunters could take snow geese in New York, which could increase harvest by 1,000 or more birds per year. Most of the harvest occurs in areas with extensive agricultural lands and large open water roosting areas, such as the Finger Lakes, St. Lawrence Valley, and Champlain Valley regions. The special program does not include Long Island because relatively few snow geese occur in that region of the state.

4. Costs

These revisions to 6 NYCRR 2.30 will not result in any increased expenditures by State or local governments or the general public.

5. Paperwork

The proposed revisions do not require any new or additional paperwork from any regulated party.

6. Local Government Mandates

These amendments do not impose any program, service, duty or responsibility upon any county, city, town, village, school district or fire district.

7. Duplication

The federal "Conservation Order" authorizes special snow goose harvest programs in New York and other states. Within constraints of that Conservation Order, New York prescribes harvest regulations that participants must comply with in order to participate in the special snow goose harvest program. Unlike traditional migratory game bird hunting regulations, the USFWS does not publish regulations selected by each state for its special snow goose harvest program. Therefore, this amendment is necessary to more fully implement the snow goose Conservation Order, and there is no duplication of federal and State regulations.

8. Alternatives

The principal alternative would be to not expand the special snow goose harvest program in New York. This would be contrary to the recommendations of federal agencies, flyway councils, and scientific panels that have documented the environmental impacts of snow geese and called for collective efforts to reduce the population. Recent evaluations suggest that the special programs implemented to date have increased harvest to some extent, but additional harvest is needed.

Another alternative would be to discontinue the special snow goose harvest program, which would reduce harvest of these birds in New York, and result in a higher population growth rate. This would undermine the collective efforts of waterfowl managers throughout the Atlantic Flyway, and increase the potential ecological and agricultural impacts of greater snow geese in eastern North America.

9. Federal Standards

There are no federal environmental standards or criteria relevant to the subject matter of this rule making. However, there are federal regulations for migratory game birds. This rule making will conform State regulations to federal regulations, but will not establish any environmental standards or criteria.

10. Compliance Schedule

All waterfowl hunters must comply with this rule making upon its effective date and during all subsequent hunting seasons.

Regulatory Flexibility Analysis

The purpose of this rule making is to amend migratory game bird hunting regulations. This rule will not impose any reporting, recordkeeping, or

other compliance requirements on small businesses or local government. Therefore, a Regulatory Flexibility Analysis is not required.

All reporting or record-keeping requirements associated with migratory game bird hunting are administered by the New York State Department of Environmental Conservation (department) or the U.S. Fish and Wildlife Service. No reporting or recordkeeping requirements are being imposed on small businesses or local governments.

The hunting activity resulting from this rule making will not require any new or additional reporting or recordkeeping by any small businesses or local governments. For these reasons, the department has concluded that this rule making does not require a Regulatory Flexibility Analysis.

Rural Area Flexibility Analysis

The purpose of this rule making is to amend migratory game bird hunting regulations. This rule will not impose any reporting, recordkeeping, or other compliance requirements on rural communities. Therefore, a Rural Area Flexibility Analysis is not required.

All reporting or record-keeping requirements associated with migratory game bird hunting are administered by the New York State Department of Environmental Conservation (department) or the U.S. Fish and Wildlife Service. No reporting or recordkeeping requirements are being imposed on rural areas.

The hunting activity associated with this rule making does not require any new or additional reporting or recordkeeping by entities in rural areas, and no professional services will be needed for people living in rural areas to comply with the proposed rule. Furthermore, this rule making is not expected to have any adverse impacts on any public or private interests in rural areas of New York State. For these reasons, the department has concluded that this rule making does not require a Rural Area Flexibility Analysis.

Job Impact Statement

The purpose of this rule making is to amend migratory game bird hunting regulations. Based on the department's experience in promulgating prior revisions to hunting regulations, the department has determined that this rule making will not have a substantial adverse impact on jobs and employment opportunities. Few, if any, persons actually hunt migratory game birds as a means of employment. Moreover, this rule making is not expected to significantly change the number of participants or the frequency of participation in the regulated activities.

For these reasons, the department anticipates that this rule making will have no impact on jobs and employment opportunities. Therefore, the department has concluded that a job impact statement is not required.

NOTICE OF ADOPTION

Air Pollution Control Permits and Registrations

I.D. No. ENV-31-12-00010-A

Filing No. 77

Filing Date: 2013-01-23

Effective Date: 30 days after filing

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 201 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101, 3-0301, 3-0303, 19-0103, 19-0105, 19-0301, 19-0302, 19-0303, 19-0305, 19-0306, 19-0311, 70-0109, 71-2103 and 71-2105; United States Code, 40 CFR 70, section 7661[b]; Federal Clean Air Act, sections 160-169 and 171-193 (42 USC sections 7470-7479; 7501-7515)

Subject: Air pollution control permits and registrations.

Purpose: To require owners and operators of sources air pollution to obtain an air permit or registration.

Substance of final rule: The New York State Department of Environmental Conservation (Department) is proposing to revise its Operating Permit Program found in Title 6 of Official Compilation of Codes, Rules and Regulation of the State of New York (6 NYCRR) Parts 200, General Provisions; and 201, Permits and Registrations (Part 201).

The Part 200 amendment replaces an outdated reference to the 1994 version of the National Toxicology Program's 'Report on Carcinogens' with the 2011 version of the report. In addition, several existing incorporations by reference will be added.

Section 201-1.4 is revised and reworded to more clearly state its requirements. A new Section 201-1.11 is added in order to establish regulatory requirements for temporary emission sources. General language allowing the Department to suspend, modify, revoke, reopen, or reissue air permits, consistent with 6 NYCRR Part 621, is relocated from other Subparts of Part 201 to a new Section 201-1.12. A new Section 201-1.13 is added to include a provision granting Department staff access to inspect any facility subject to the requirements of Part 201. A new section 201-1.14 is added to require owners and operators of facilities holding outdated certificates to operate to apply for a state facility permit or registration within 90 days of notification by the Department. Finally, a new Section 201-1.15 is added to require facility owners and operators to commence construction of permitted emission sources within 18 months of receiving a permit or registration from the Department.

The definition of major stationary source in Paragraph 201-2.1(b)(21) is revised to remove references to the "severe ozone nonattainment area" and include the specific affected areas. Paragraph 201-2.1(b)(24) is repealed. A new Paragraph 201-2.1(b)(24) is added to define a "portable emission source" as an emission source that can be carried or moved from one location (i.e. any single site at a building, structure, facility, or installation) to another. Paragraph 201-2.1(b)(29) is repealed. A new Paragraph 201-2.1(b)(29) is added to define a "temporary emission source" as an emission source that is transient in nature and will be operated at a facility for a single period less than 90 consecutive days from the date of first operation, or an emission source that will be constructed and operated for less than 30 days per calendar year.

Subpart 201-3, Exemptions and Trivial Activities, is renamed as "Permit Exempt and Trivial Activities". Subdivisions 201-3.1(b) through 201-3.1(e) are repealed and replaced with new language to clarify their requirements. Paragraph 201-3.2(c)(1) is revised to clarify the specific types of combustion equipment that are exempt from permitting requirements. Paragraph 201-3.2(c)(2) is repealed and replaced with an exemption for certain space heaters using waste oil as a fuel. Paragraph 201-3.2(c)(3) is revised to remove references to the "severe ozone nonattainment area" and to allow for stationary or portable internal combustion engines using fuels other than diesel or natural gas to qualify for exemption. Paragraph 201-3.2(c)(4) is repealed and the paragraph number reserved to preserve the numerical order of the Section. Paragraph 201-3.2(c)(6) is revised to exclude stationary internal combustion engines used for demand response and/or peak shaving from the exemption. Paragraph 201-3.2(c)(13) is revised to remove references to the "severe ozone nonattainment area". Paragraph 201-3.2(c)(16) is revised to exempt all gasoline dispensing sites that are registered with the Department pursuant to 6 NYCRR Part 612 from air pollution control permitting. Paragraph 201-3.2(c)(17) is revised to clarify which surface coating activities are intended to be exempt and to remove references to the "severe ozone nonattainment area". Paragraph 201-3.2(c)(20) is revised to clarify that only landfill gas ventilating systems at landfills with design capacities less than 2.5 million megagrams and 2.5 million cubic meters are exempt. Paragraph 201-3.2(c)(21) is revised to include liquid asphalt storage tanks. Paragraph 201-3.2(c)(27) is revised to exclude raw material, clinker, and finished product silos at Portland cement plants. Paragraphs 201-3.2(c)(28) and 201-3.2(c)(29) are revised to clarify which sand and gravel and stone crushing plants qualify for exemption. Paragraph 201-3.2(c)(30) is repealed and the paragraph number reserved to preserve the numerical order of the Section. New exempt activities are added as Paragraphs 201-3.2(c)(46) through 201-3.2(c)(48). The new activities cover operations including: hydrogen fuel cells, certain dry cleaning equipment, and manure handling and spreading equipment at farms, respectively.

Paragraph 201-3.3(c)(29) is revised to clarify when an air stripper or soil vent qualifies as a trivial activity. New language is added to Paragraph 201-3.3(c)(33) to exclude bypass stacks and vents on incinerators and bypass stacks and vents that operate on a routine or frequent basis from the trivial activity. New language is added to Paragraph 201-3.3(c)(41) to include several additional types of solid waste handling equipment. Paragraph 201-3.3(c)(50) is deleted and its number reserved to preserve the order of the Section. New language is added to Paragraph 201-3.3(c)(53) that includes hand held spray guns with capacity less than three ounces in the trivial activity. Paragraph 201-3.3(c)(81) is revised to clarify the office equipment and products that are considered trivial for permitting purposes. Paragraph 201-3.3(c)(94) is revised to remove carbon dioxide, methane and propane from the list of trivial emissions. In addition, the reference to the seventh edition of the United States Department of Health and Human Services' Annual Report on Carcinogens is updated to the twelfth version of that document. A new Paragraph is added at 201-3.3(c)(95) to include emissions of carbon dioxide and methane that are not specifically regulated by a federal or state law or regulation as a trivial activity. Lastly, a new Paragraph 210-3.3(c)(96) is added that describes solvent cleaning of parts and equipment exclusively by hand wiping as trivial for the purposes of Part 201.

Section 201-4.1 is revised to clarify the applicability of Subpart 201-4. Paragraphs 201-4.1(a)(1) through 201-4.1(a)(4) are repealed. Paragraph 201-4.1(a)(5) is renumbered as Paragraph 201-4.1(a)(1) and revised to correct the reference to the cap-by-rule provisions which will be relocated as part of this rulemaking. A new Paragraph is added as 201-4.1(a)(2) that requires facilities, except for stationary or portable combustion installa-

tions, with annual actual emissions of any persistent, bioaccumulative, or toxic (PBT) compound less than the threshold listed in Table 1 of Subpart 201-9 to register with the Department. Subdivision 201-4.1(b) is repealed and replaced with new language allowing the Department to require a facility owner or operator that would otherwise qualify for registration to apply for a state facility permit within six months of notification by the Department. Section 201-4.2 is renamed as "General Requirements". Subdivisions 201-4.2(e) and 201-4.2(f) are repealed. A new Subdivision 201-4.2(e) is added limiting the term of new and modified registrations to 10 years from the date of issuance. A new Subdivision 201-4.2(f) is added granting the Department the authority to withdraw or revoke a registration in situations where the registered activity poses the potential for a significant adverse impact to the public health, safety, welfare, or the environment. A new Subdivision 201-4.2(g) is added to require owners and operators of facilities with a registration issued prior to the effective date of the proposed revisions to submit a renewal application within ninety days of notification by the Department. Section 201-4.3 is repealed and subsequent sections are renumbered accordingly. Section 201-4.4 is renumbered as Section 201-4.3 and renamed to "Application Content". Renumbered Subdivision 201-4.3(a) and its subsequent paragraphs are revised to reflect the current information the Department expects on all registration applications. A new Subdivision 201-4.3(b) is also added to provide the acceptable time frame for the submission of registration renewal applications. Section 201-4.5 is renumbered as Section 201-4.4. A new Subdivision 201-4.4(b) is added requiring facility owners and operators to notify the Department of a change in ownership within 30 days. The cap-by-rule provisions previously located in Section 201-7.3 are relocated to a new Section 201-4.5. This Section describes the thresholds, methods, and compliance requirements for facility owners and operators that choose to cap-by-rule in order to avoid major facility permitting.

Section 201-5.1 is revised to clarify when a facility owner or operator is required to apply for a state facility permit. Subdivisions 201-5.1(a) and 201-5.1(b) are revised to clarify the existing applicability criteria. Paragraphs 201-5.1(a)(3) and 201-5.1(a)(4) are repealed and replaced. Paragraph 201-5.1(a)(3) establishes permitting requirements for facilities with annual actual emissions of a PBT compound greater than or equal to the threshold listed in Subpart 201-9. New language is added as Paragraph 201-5.1(a)(4) requiring facilities with emissions in excess of the registration thresholds to apply for a state facility permit. Subdivision 201-5.1(c) is repealed. Section 201-5.2 is revised to more clearly describe what is required as part of a state facility permit application. Paragraph 201-5.2(b)(3) is repealed. Paragraph 201-5.2(b)(4) is renumbered as 201-5.2(b)(3) and revised to more clearly state which emission sources must be included in the facility description provided by the applicant. Paragraph 201-5.2(b)(5) is repealed. New Paragraphs are added as 201-5.2(b)(4) through 201-5.2(b)(7) to describe additional requirements for state facility permit applications. Paragraph 201-5.2(b)(6) is renumbered as 201-5.2(b)(8). New Paragraphs are added as 201-5.2(b)(9) and 201-5.2(b)(10) to list additional state facility permit application requirements. A new Subdivision 201-5.2(c) is added to describe the procedure and timeframes for submitting a state facility permit renewal application. Subdivision 201-5.3(a) is revised to limit the term of issuance for a new or modified state facility permit to 10 years. A new Subdivision 201-5.3(b) is added to require the owner or operator of an existing facility holding a state facility permit to submit a renewal application to the Department within 90 days of notification. Existing Subdivision 201-5.3(b) is renumbered as 201-5.3(c) and reworded to improve its clarity. Subdivisions 201-5.3(c) and 201-5.3(d) are repealed. Section 201-5.4 is repealed, and a new Section 201-5.4 entitled, "Permit modifications" is added to describe the procedures and requirements for requesting a modification of a state facility permit.

Section 201-6.1 is revised to clarify the applicability of Title V permitting to major facilities. Subdivision 201-6.1(b) is repealed, and subsequent Subdivisions are renumbered accordingly. Subparagraph 201-6.1(b)(2)(i) is renumbered as Paragraph 201-6.1(b)(2). Renumbered Subparagraphs 201-6.1(b)(2)(ii) and 201-6.2(b)(2)(iii) are repealed. New language is added as Subparagraph 201-6.1(b)(3)(ii) relieving facilities that EPA has permanently exempted from the requirement to get a Title V permit, and subsequent Subparagraphs are renumbered accordingly. Section 201-6.2 is repealed and subsequent Sections are renumbered accordingly. Renumbered Subdivision 201-6.2(a) is revised to remove references to the outdated transition plan requirements removed with Section 201-6.2. Accordingly, renumbered Paragraph 201-6.2(a)(1) is repealed and subsequent Paragraphs are renumbered accordingly. Renumbered Paragraphs 201-6.2(a)(1) through 201-6.2(a)(4) are revised to clarify the acceptable time frame for the submittal of Title V permit applications. Paragraphs 201-6.2(a)(5) and 201-6.2(a)(6) are repealed, and subsequent paragraphs are renumbered accordingly. Paragraph 201-6.2(a)(9) is repealed. Paragraph 201-6.2(b)(1) is revised to be consistent with the requirements of 6 NYCRR Part 621. Paragraph 201-6.2(b)(4) is repealed. Subdivision 201-6.2(c) is revised to remove references to the repealed transition plan. Subdivision 201-6.2(d) is revised to more clearly state the purpose of the Subdivision. New language is added as Subparagraphs 201-6.2(d)(3)(x) and 201-6.2(d)(3)(xi) to require a detailed process flow diagram and the physical parameters of each emission point with Title V permit applications, respectively. Paragraph 201-6.2(d)(7) is repealed and subsequent Paragraphs are renumbered accordingly. A new Subdivision 201-6.2(f) is added to describe what information is required on a Title V permit renewal application. A new Subdivision 201-6.2(g) is added to prohibit a facility owner or operator from omitting information from a permit application that is needed to determine the applicability of any requirements. A new Subdivision 201-6.2(h) is added to clearly state that a facility owner or operator may choose to accept an emission cap in order to avoid the requirement to obtain a Title V permit. Renumbered Paragraph 201-6.4(d)(3) is repealed, and subsequent Paragraphs are renumbered accordingly. Subdivision 201-6.4(g) is separated into Paragraphs 201-6.4(g)(1) and 201-6.4(g)(2), and Paragraphs 201-6.4(g)(1) through 201-6.4(g)(4) are renumbered as Subparagraphs 201-6.4(g)(2)(i) through 201-6.4(g)(2)(iv) respectively. Paragraph 201-6.5(a)(1) is renumbered as Subdivision 201-6.5(a). Paragraph 201-6.5(a)(2) is repealed. Subdivisions 201-6.5(d) and 201-6.5(e) are repealed. Subparagraph 201-6.6(c)(1)(v) is revised to be consistent with 6 NYCRR Part 231. Paragraph 201-6.6(c)(9) is revised to allow the Department to process groups of minor permit modifications for a single facility simultaneously. Subparagraphs 201-6.6(c)(9)(i) through 201-6.6(c)(9)(vi) are repealed. Renumbered Section 201-6.7 is renamed to "Appendix A – Area Sources Regulated by National Emission Standards for Hazardous Air Pollutants Permanently Exempted from Title V Permitting". Referenced federal National Emission Standards for Hazardous Air Pollutants 40 CFR 63.541 and 40 CFR 63.1500 are removed. Section 201-6.9 is repealed.

Section 201-7.1 is renamed "Emission capping in facility permits" and the existing language is repealed. New language is added as Subdivisions 201-7.1(a) through 201-7.1(h) that establishes the requirements for emission capping in facility permits. Section 201-7.2 is repealed. Section 201-7.3 is repealed.

Subdivision 201-8.2(b) is revised to be consistent with 6 NYCRR Part 621. Subdivisions 201-8.2(c) and 201-8.2(d) are repealed. Subdivision 201-8.3(d) is repealed. A new Subdivision 201-8.3(d) is added to allow the Department to request that a facility that would otherwise qualify for a general permit apply for a state facility permit instead.

A new Subpart 201-9 entitled "Tables" is added. Table 1 is added to this Subpart to contain the emission thresholds for 62 Persistent, Bioaccumulative and Toxic compounds.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 201-1.4, 201-1.4(a), (b), (c), (e), 201-1.5, 201-1.11(a)(5), 201-1.15, 201-2.1(b)(29), 201-3.1(c), 201-3.2(c), 201-3.3(c), (10), (11), 201-4.3(a)(5), 201-4.5(f)(1), (h), 201-5.2(b)(8), 201-6.1(a)(2), 201-6.6(b)(3), 201-9 table.

Text of rule and any required statements and analyses may be obtained from: Mark Lanzafame, Department of Environmental Conservation, NYSDEC, Division of Air Resources, 625 Broadway, Albany, NY 12233-3254, (518) 402-8403, 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, a Negative Declaration 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 Revised Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement.

Assessment of Public Comment

The New York State Department of Environmental Conservation (Department) is adopting revisions to 6 NYCRR Parts 201, Permits and Registrations and 200, General Provisions (collectively Part 201). The Department proposed Part 201 on August 1, 2012. Public hearings were held in Avon on September 17, 2012, in Albany on September 19, 2012, and in New York City on September 20, 2012. The public comment period closed at 5:00 P.M. on September 27, 2012. The Department received written comments from 10 commenters, all of which have been reviewed, summarized, and responded to by the Department.

Overall, comments received by the Department expressed support for the proposal, or commented on specific portions of Part 201. The Department did not receive any comments objecting to the proposal in its entirety.

Several commenters raised issues with regard to the proposed record-keeping requirements during periods of start-up, shutdown, and malfunction contained in Section 201-1.4. In general, the commenters disagreed with some of the proposed changes to the existing language, arguing that

the revised terms had the potential to create a disproportionate burden during certain situations. The Department responded to these comments by reviewing the proposed language and reinstating several of the phrases that were to be deleted, thereby alleviating the commenter's concerns.

One commenter raised an issue with the emergency defense provisions in Section 201-1.5. Specifically, the commenter stated that the Clean Air Act (Act) does not allow for the assertion of an affirmative defense in all enforcement actions, particularly when the facility has violated a federally promulgated performance standard or emission limit. The Department responded by revising the language of Section 201-1.5 to make it clear that proving an emergency only constitutes an affirmative defense to enforcement actions brought by the Department.

Commenters raised two issues with Section 201-1.10. One commenter expressed concern that the proposed language would limit the public's access to only those records already requested by the Department. The Department disagreed with this comment because Subdivision 201-1.10(a) allows the Department to request records from a facility owner or operator pursuant to requests from the public. Another commenter expressed concern that Section 201-1.10 could allow the public to inundate regulated facilities with nuisance requests for records. The commenter suggested that the Department, not the regulated facility, should respond to such requests. The Department responded by pointing out that Section 201-1.10 clearly states that the Department will respond to a public request for records pursuant to 6 NYCRR Part 616 and the Freedom of Information Act.

Several comments were received on the proposed addition of requirements for temporary emission sources. Overall, the commenters expressed support for these new provisions. One commenter expressed concerns with the Departments proposed definition of a temporary emission source. Specifically, the commenter argued that the proposed language would potentially allow the owner or operator of a temporary emission source to operate for 90 days, stop operation for a day, and begin again with a new 90 day period. The Department agreed with the commenter's assertion, and revised the proposed definition to make it clear that the facility owner or operator is allowed only a single 90 day period before they must have a permit or registration.

Another comment expressed confusion over the phrase "transient in nature" as it is used in the definition of a temporary emission source. Specifically, the commenter requested that the department define "transient" in the proposed rule and provide clarification as to what makes an emission source transient in nature. The Department believes that the dictionary definition of transient is sufficient for the purposes of Part 201, and therefore disagreed with the commenter that a separate definition is necessary. The Department did provide clarification as to what makes an emission source transient in nature.

The Department also received a comment suggesting that the proposed definition of temporary emission source require that the temporary emission source have at least one change in location during the operating period. Further, the commenter suggested that the Department should require the owner or operator of a temporary emission source keep records of the source's location. The Department disagreed with both of these comments because the Department issues and monitors air permits and registrations on a facility wide basis. By requiring the owner or operator to change the location of a temporary emission source, the Department would simply be asking for the source to be moved around within the same facility. This would create a burdensome and unnecessary condition for compliance that has little effect emissions. In addition, facility owners and operators are required to maintain records indicating the dates of operation for a temporary emission source. By doing so, the location of that source is also documented as the physical address of the facility in question. Adding a separate record keeping requirement to track the location of the temporary emission source would be duplicative and of only minimal consequence.

Comments were received on the use of the term "portable emission source". Specifically, one commenter expressed confusion over the difference between a portable emission source and a temporary emission source. The Department responded to this comment by explaining that portable emission sources are not always temporary emission sources. It is common for portable emission sources to be operated for longer than 90 days at a time. The same commenter also requested that the Department retain the phrase "without a deterioration in the effectiveness of any air pollution control equipment" when revising the definition of portable emission source. The Department disagreed with this comment as the functionality of any associated control equipment has little bearing on whether or not the emission source is portable.

Another commenter objected to the proposed language that would prohibit facilities subject to regulation under Title IV of the Act from operating temporary emission sources. The commenter argued that the operation of a temporary emission source is often necessary at Title IV sources, and that such operation would have little impact on the facility's Title IV status. 40 CFR Part 70.6(e) states that a source subject to Title IV of the Act may not be considered as a temporary emission source, however it is silent on the operation of temporary emission sources at facilities that are subject to Title IV of the Act. Accordingly, the Department agreed with the commenter and modified the proposed language accordingly.

One commenter objected to the advance notification provisions for temporary emission sources. Specifically, the commenter stated that there are certain situations where the exact start date of a temporary emission source may not be known or may be subject to change. The Department disagreed with this comment, responding that advance notice is necessary in order to allow Department staff sufficient time to evaluate the potential temporary emission source for compliance with the operating limits given in Section 201-1.11.

The Department also received a comment regarding the proposed phase-out of Certificates to Operate (COs). The commenter stated that the Department must maintain the historical basis for the terms and conditions in Title V permits, including any information carried over from phased-out COs. The Department currently archives, and will continue to archive, all expired permits, including COs, for historical purposes.

Two commenters objected to the proposed requirement to commence construction within 18 months of permit or registration issuance. The commenters argued that the construction of large scale electric generating projects often takes longer than 18 months, and that the proposed requirement would result in premature permit termination for those projects. Further, the commenters argued that the proposed requirement undermines New York State's Article 10 process for large scale electric generating projects by prematurely terminating permits. The Department disagreed with these comments. Large scale electric generation projects are already required to comply with a similar 18-month requirement under the Prevention of Significant Deterioration program. Therefore, the proposed requirement does not represent an additional burden for these facilities.

The commenters further objected to this same requirement by claiming that the proposed language is unnecessary since the Department already has similar authority under 6 NYCRR Section 621.13(a)(4). The Department disagreed with this comment. There are several federal rules that apply to an emission source based on the date of construction or modification of that emission source. In a case where an emission source is subject to an applicable regulation with such an applicability date, it is possible for the facility owner or operator to avoid certain requirements by obtaining a permit or registration for that source prior to that date and constructing the source after the applicability date has passed. In this scenario, the applicable law or regulation has arguably not undergone a "material change", and therefore the Department may have limited authority under Part 621 to ensure that the appropriate regulatory requirements are included in the facility's permit once it is issued.

The commenters also suggested that the Department revisit its conclusion that costs for major facilities would not increase as a result of the proposed rulemaking. The commenters argued that the proposed requirement to commence construction would add risk and uncertainty to future construction projects due to the possibility that the permit would be revoked if the proposed deadline was not met. The Department disagreed with this comment. The purpose of Section 201-1.15 is to ensure that permits and registrations are issued for projects that will be constructed in a timely manner. Accordingly, the project proponent is directly responsible for any financial risk they assume when proposing projects of a speculative nature (e.g. dependent on projected future markets) or projects that are not intended to be constructed in a timely manner. The Department cannot speculate on, or quantify, the costs associated with these types of projects.

One commenter expressed confusion regarding the term "non-road vehicles" used in proposed Paragraph 201-3.3(c)(10). In order to eliminate this confusion, the Department revised the proposed language to refer to "vehicles powered by non-road engines", which more clearly states the intent of the Paragraph. The commenter further suggested that "military tactical vehicles and equipment" be explicitly included in Paragraphs 201-3.3(c)(10) and 201-3.3(c)(11). The Department believes that the existing language of these Paragraphs is sufficient to include military tactical vehicles and equipment. Accordingly, no changes were made to the existing language.

Another comment suggested that equipment used in military training exercises should not be subject to permitting requirements. The Department disagreed with this comment because the potential exists for emission sources that would otherwise be required to obtain a permit or registration to operate outside established regulatory requirements as a training exercise.

Comments were received on the proposed language of Paragraph 201-3.3(c)(95). The commenter questioned why the Department singled out emissions of carbon dioxide and methane as a trivial activity. Further, the commenter expressed concern that the use of the word "specifically" in that paragraph could be misinterpreted to exclude emission sources that

were otherwise intended to be regulated. These two compounds were singled out due to recent federal regulations that require certain facilities to monitor and report their greenhouse gas emissions. Since this requirement does not apply to all facilities, it is only necessary for those facilities that are subject to the regulation to demonstrate compliance with it. By using the phrase "specifically required", the proposed regulation makes it clear that emissions of carbon dioxide and methane are still considered to be trivial at facilities not subject to those regulations. Accordingly, the Department disagreed with this comment.

The Department received a comment requesting clarification on exempt and trivial activities. The commenter stated that it is difficult to determine when exempt and trivial activities need to be included in permit applications. In response, the Department provided an explanation of the proposed requirements, and made some minor changes to the proposed language to eliminate some of the confusion. The commenter also expressed concern with the proposed language of Subdivision 201-3.1(c). Specifically, the commenter felt that annual reporting for exempt and trivial sources operating at major facilities would create a significant burden on those facilities. The Department disagreed with the commenter because Subdivision 202-2.3(e) already requires major facilities to report emissions from exempt activities every three years. The Department is not changing this requirement, so no additional burden is created.

One commenter requested that the Department retain Paragraph 201-3.3(c)(50), stating that removing it would create a burden on the regulated community. The Department disagreed with the commenter, as the formerly trivial activity is still listed as an exempt activity in Subparagraph 201-3.2(c)(39)(ii). The language of Paragraph 201-3.3(c)(50) is essentially duplicative.

The Department received a comment expressing concern that by adding a finite term to air facility registrations and air state facility permits, the Department runs the risk that these permits will expire if they are not properly renewed. The Department disagreed with the commenter, stating that the proposed regulation also includes provisions establishing renewal procedures for these permits and registrations, thereby eliminating this risk.

The Department received comments objecting to some of the record-keeping requirements imposed on facility owners and operators that choose to cap-by-rule. Specifically, the commenters stated that the proposed requirements would be burdensome. The Department disagreed with the commenters as these requirements are not new. This rulemaking simply relocates the existing requirements from existing Section 201-7.3 to a new Section 201-4.5 to improve the continuity of the rule.

One commenter suggested that the proposed language of Paragraph 201-6.2(a)(2) was potentially confusing and that the phrase "specifically required" should be removed. The Department agreed with the commenter and redrafted the paragraph to eliminate any confusion.

Commenters pointed out two typographical errors in proposed Subpart 201-9. The Department corrected these errors.

One commenter expressed concern that the proposed mass emission thresholds for persistent, bioaccumulative, and toxic compounds could create a compliance burden for smaller facilities that exceed one of the listed thresholds by requiring them to apply for a state facility permit. The Department disagreed with the commenter because there is little difference between a state facility permit and a registration in terms of compliance requirements.

Another comment argued that titanium tetrachloride should not be included in the list of persistent, bioaccumulative, and toxic compounds. The Department disagreed with this comment because titanium tetrachloride has a median lethal dose significantly above the maximum threshold level established in the DAR-1 guidance document. Accordingly, the Department believes that it is appropriate to include titanium tetrachloride in the proposed list of persistent, bioaccumulative, and toxic compounds.

The Department received comments suggesting that some of the listed persistent, bioaccumulative, and toxic compounds are used in agriculture and common household products, and that by including them on the list the Department was inadvertently requiring otherwise exempt and trivial emission sources to obtain air permits or registrations. The Department responded by clarifying that exempt and trivial sources are still considered to be exempt or trivial despite these new thresholds.

Another commenter asked if the Department considered the impacts of the proposed regulations on hydrofracking operations. The Department has already addressed the regulatory issues related to hydrofracking in public documents relating to that topic.

Several comments were received that are beyond the scope of this rulemaking.

Department of Financial Services

EMERGENCY RULE MAKING

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

I.D. No. DFS-07-13-00008-E
Filing No. 87
Filing Date: 2013-01-28
Effective Date: 2013-01-29

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

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

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

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

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

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

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

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

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

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

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

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

Text of emergency rule: *Part 501*

BANKING DIVISION ASSESSMENTS

§ 501.1 Background.

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

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

Both Section 17 of the BL and Section 206 of the FSL provide that all expenses (including, but not limited to, compensation, lease costs and

other overhead costs) of the Department attributable to institutions subject to the BL are to be charged to, and paid by, such regulated institutions. These institutions ("Regulated Entities") are now regulated by the Banking Division of the Department. Under both Section 17 of the BL and Section 206 of the FSL, the Superintendent is authorized to assess Regulated Entities for its total costs in such proportions as the Superintendent shall deem just and reasonable.

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

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

§ 501.2 Definitions.

The following definitions apply in this Part:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 501.3 Billing and Assessment Process.

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

§ 501.4 Computation of Assessment.

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

§ 501.5 Penalties/Enforcement Actions.

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

§ 501.6 Effective Date.

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire April 27, 2013.

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

Regulatory Impact Statement

1. Statutory Authority.

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

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

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

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

2. Legislative Objectives.

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

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

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

3. Needs and Benefits.

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

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

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

4. Costs.

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

5. Local Government Mandates.

None.

6. Paperwork.

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

7. Duplication.

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

8. Alternatives.

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

9. Federal Standards.

Not applicable.

10. Compliance Schedule.

The emergency regulations are effective immediately. Regulated institutions will be expected to comply with the regulation for the fiscal year beginning on April 1, 2011 and thereafter.

Regulatory Flexibility Analysis

1. Effect of the Rule:

The regulation does not have any impact on local governments.

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

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

2. Compliance Requirements:

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

3. Professional Services:

None.

4. Compliance Costs:

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

5. Economic and Technological Feasibility:

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

6. Minimizing Adverse Impacts:

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

7. Small Business and Local Government Participation:

This regulation does not impact local governments.

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

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

Rural Area Flexibility Analysis

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

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

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

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

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

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

Job Impact Statement

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

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

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

EMERGENCY RULE MAKING

Public Retirement Systems

I.D. No. DFS-07-13-00009-E

Filing No. 88

Filing Date: 2013-01-28

Effective Date: 2013-01-28

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

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

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

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

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

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

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

Subject: Public Retirement Systems.

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

Text of emergency rule: Section 136-2.2 is amended to read as follows:

§ 136-2.2 Definitions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(j) Third party administrator shall mean any person or entity that

contractually provides administrative services to the Retirement System, including receiving and recording employer and employee contributions, maintaining eligibility rosters, verifying eligibility for benefits, paying benefits or maintaining any other Retirement System records. "Administrative services" do not include services provided to the Fund relating to Fund investments.

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

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

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

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

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

(g) The Comptroller shall:

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

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

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

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

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

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire April 27, 2013.

Text of rule and any required statements and analyses may be obtained from: Sally Geisel, New York State Department of Financial Services, 25 Beaver Street, New York, NY 10004, (212) 480-5287, email: sally.geisel@dfs.ny.gov

Regulatory Impact Statement

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

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

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

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

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

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

Insurance Law section 7402(n) provides that it is a ground for rehabilitation if an entity subject to Article 74 has failed or refused to take such steps as may be necessary to remove from office any officer or director whom the Superintendent has found, after appropriate notice and hearing, to be a dishonest or untrustworthy person.

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

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

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

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

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

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

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

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

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

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

to explore remedies most appropriate to the pension funds that they represent.

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

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

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

- A ban on political contributions by any employee of any placement agent seeking to do business with the Fund;
- A requirement that any placement agent seeking do to business with the Fund be registered as a broker dealer with the SEC and ensure that its professionals have passed the appropriate Series qualifications administered by Financial Industry Regulatory Authority ("FINRA");
- A requirement that any placement agent seeking to do business in New York register with the Department; and
- A requirement that any placement agent representing an investment manager before the Fund fully disclose the contractual arrangement between it and the manager, including the fee arrangement and the scope of services to be provided.

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

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

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

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

Regulatory Flexibility Analysis

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

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

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

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

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

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

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

2. Compliance requirements: None.

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

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

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

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

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

A public hearing was held on April 28, 2010. Comments were received from two entities recommending that the total ban on the use of placement

agents be modified. The Department will continue to assess the comments that have been received and any others that may be submitted.

Rural Area Flexibility Analysis

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

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

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

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

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

Job Impact Statement

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

Assessment of Public Comment

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

EMERGENCY RULE MAKING

Provider Requirements for Insurance Reimbursement of Applied Behavior Analysis

I.D. No. DFS-07-13-00010-E

Filing No. 89

Filing Date: 2013-01-28

Effective Date: 2013-01-28

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

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

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

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

Specific reasons underlying the finding of necessity: Chapters 595 and 596 of the Laws of 2011 require all policies and contracts subject to sections 3216(i)(25), 3221(l)(17) and 4303(ee) of the Insurance Law, which are issued, renewed, modified, altered or amended on or after November 1, 2012, to provide coverage for autism spectrum disorder, including behavioral health treatment in the form of applied behavior analysis ("ABA").

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

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

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

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

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

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

Text of emergency rule: *11 NYCRR 440*

INSURANCE REGULATION 201

PROVIDER REQUIREMENTS FOR INSURANCE REIMBURSEMENT OF APPLIED BEHAVIOR ANALYSIS

Section 440.0 Purpose.

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

Section 440.1 Definitions.

For purposes of this Part:

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

(b) Applied behavior analysis aide or ABA aide means an individual who has met the education and experience requirements of this Part or, with respect to ABA provided to children receiving early intervention program services pursuant to an individualized family services plan under Title II-A of Article 25 of the Public Health Law, an individual who meets the minimum qualifications set forth in 10 NYCRR 69-4.25(e).

(c) Applied behavior analysis provider or ABA provider means:

(1) an ABA aide who, under supervision of a certified behavior analyst, directly provides ABA pursuant to an ABA treatment plan to an individual diagnosed with ASD;

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

(3) a licensed provider; or

(4) a certified provider.

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

(e) Behavior analyst means an individual certified as a behavior analyst pursuant to a behavior analyst certification board.

(f) Behavior analyst certification board means:

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

(2) another nationally recognized association that has a certification process for ABA providers designated by the superintendent, in consultation with the Commissioners of Health and Education.

(g) Behavioral health treatment means, when prescribed or ordered for an individual diagnosed with autism spectrum disorder by a licensed physician or licensed psychologist, counseling and treatment programs when provided by a licensed provider, and ABA when provided or supervised by a certified behavior analyst, that are necessary to develop, maintain, or restore, to the maximum extent practicable, the functioning of an individual. Treatment programs include ABA treatment plans developed by a licensed provider and delivered by an ABA provider.

(h) Certified behavior analyst means a licensed provider who is certified as a behavior analyst pursuant to a behavior analyst certification board.

(i) Licensed provider means a psychiatrist, psychologist or licensed clinical social worker, or an individual licensed or otherwise authorized under Education Law Title VIII to practice a profession for which ABA is within the scope of that profession.

(j) Certified provider means a school psychologist or other individual certified by the Commissioner of Education pursuant to 8 NYCRR 80 to the extent that ABA is included within the scope of the individual's duties.

Section 440.2 Scope of professional practice.

(a) Pursuant to Education Law Title VIII, an ABA provider or supervisor is strictly prohibited from performing or delegating the performance of any service or intervention that is included in the scope of practice of any profession licensed or otherwise authorized by the State, unless the provider or supervisor has the appropriate license, certification or registration, or is otherwise authorized by law to provide the service or intervention.

(b) Nothing in this Part shall be deemed to expand or diminish the scope of practice of any profession licensed under Education Law Title VIII, or give authorization to provide services included within such scopes of practice to any individual not otherwise authorized to provide such services under Title VIII of the Education Law.

(c) An insurer may deny coverage for ABA provided pursuant to an individualized education plan under Education Law Article 89. Nothing in this Part shall be deemed to restrict or supersede any requirements prescribed by the Commissioner of Education pursuant to Education Law Article 89 relating to the qualifications of individuals providing special education or related services to children with disabilities, including ABA.

Section 440.3 Supervision of ABA aides.

(a) An ABA aide must be supervised by a certified behavior analyst.

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

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

(i) basic principles, processes, and concepts of behavior analysis;

(ii) clinical application of ABA, including behavior assessment, selecting intervention outcomes and strategies, behavior change procedures and systems support, data collection and analyses to measure and monitor progress, including measurement of behavior and displaying and interpreting data; and

(iii) ethical issues related to the delivery of behavior interventions using ABA techniques; and

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

(i) performing behavior assessments;

(ii) developing and evaluating individualized ABA services;

(iii) employing an array of scientifically validated, behavior analytic procedures, including discrete trial intervention, modeling, incidental teaching, and other naturalistic teaching methods, activity-embedded instruction, task analysis, and chaining;

(iv) using ABA methods in one-to-one intervention, small and large group intervention, and in transitions across those situations;

(v) using behavior change procedures and systems supports;

(vi) measuring behavior and displaying and interpreting behavior data;

(vii) conducting functional assessments (including functional analyses) of challenging behavior and selecting the specific assessment methods that are best suited to the behavior and the context; and

(viii) assessing, monitoring, documenting, evaluating, and modifying ABA techniques as necessary to promote the progress of the individual receiving ABA.

(3) The requirements set forth in this subdivision may be satisfied through coursework or experience submitted for professional licensure under Education Law Title VIII.

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

(1) developing individual ABA plans in collaboration with, as appropriate, the parents or caregivers of the individual receiving ABA, as well as psychiatrists, psychologists, licensed clinical social workers, behavior analysts and ABA aides;

(2) directing the implementation of the individual ABA plans and the ongoing monitoring, systematic measurement, data collection, and documentation of the progress of the individual receiving ABA;

(3) modifying the individual ABA plans as necessary to promote progress toward goals, generalization of learning, and where applicable, transitioning of the individual receiving ABA across service delivery environments and settings;

(4) providing assistance, training, and support as needed by the parents or caregivers of the individual receiving ABA, as applicable, to assist them in follow-through specified in the individual's ABA plan and to enhance development, behavior, and functioning;

(5) supervising ABA aides, including:

(i) a minimum of six hours per month in the first three months of employment of an ABA aide, and a minimum of four hours per month thereafter, of direct on-site observation of each ABA aide assigned to the individual receiving ABA; and

(ii) a minimum of two hours per month of indirect supervision of an ABA aide assigned to an individual receiving ABA, in a group or individual format, including:

(a) weekly review and signed approval of the record of the individual receiving ABA, progress notes and data, correspondence, and evaluation of written reports;

(b) participation in telephone conferences with the ABA aide and, as appropriate, the parent or caregiver of the individual receiving ABA;

(c) ensuring proper documentation of the intervention provided and the response of the individual receiving ABA;

(d) ensuring that the ABA aide follows the modifications in the plan of the individual receiving ABA; and

(e) other supervision and support that the ABA aide needs to successfully implement the ABA plan of the individual receiving ABA;

(6) ensuring that no responsibilities are delegated to the ABA aide that are included in the scope of any profession in Education Law Title VIII, for which the ABA aide is not licensed or otherwise authorized to perform pursuant to that Title; and

(7) convening a minimum of two team meetings per month with the ABA aide, as well as other providers, as appropriate, who are delivering services to the individual receiving ABA to review the progress, identify problems or concerns, and modify intervention strategies as necessary to enhance the development, behavior, and functioning of the individual receiving ABA.

Section 440.4 Qualifications for ABA aides.

An ABA aide shall meet the following minimum qualifications:

(a) A minimum level of education, as established by meeting at least one of the following requirements, except where Education Law Title VIII requires a higher level of education or authorization to provide ABA in the setting where the ABA aide will provide ABA:

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

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

(ii) current matriculation in a degree program that is an approved professional preparation program for licensure under Education Law Title VIII for a profession that includes ABA within its scope, or a teacher preparation program leading to teacher certification;

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

(3) certification as a teaching assistant; or

(4) certification as a behavior analyst or assistant behavior analyst pursuant to a behavior analyst certification board;

(b) Prior to the provision of any services to any individual without direct, on-site supervision, completion of a child abuse and neglect identification and reporting workshop and a minimum of 20 hours of training or in-service in behavior interventions using ABA techniques within the past five years, including at a minimum:

(1) basic principles of behavior analysis;

(2) the application of these principles in behavior intervention, including collection of data as needed for monitoring progress;

(3) ethical issues related to the delivery of applied behavior interventions; and

(4) overview of autism and pervasive developmental disorder;

(c) Completion of a minimum of ten hours of additional training or in-service annually in topics pertaining to ABA and ASD; and

(d) An ABA aide providing ABA to a child receiving early intervention program services pursuant to an individualized family services plan under Title II-A of Article 25 of the Public Health Law must meet the requirements set forth in 10 NYCRR 69-4.25(e).

Section 440.5 Duties of ABA aides.

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

(a) assist in the recording and collection of data needed to monitor progress;

(b) participate in required team meetings; and

(c) complete any other activities as directed by his or her supervisor and as necessary to assist in the implementation of an individual ABA plan.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire April 27, 2013.

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

Regulatory Impact Statement

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

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

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

Insurance Law section 3216 establishes requirements for individual accident and health insurance policies and sets forth the benefits that must be covered under such contracts.

Insurance Law section 3221 establishes requirements and standard provisions for group or blanket accident and health insurance policies and sets forth the benefits that must be covered under such contracts.

Insurance Law section 4303 governs accident and health insurance contracts written by not-for-profit corporations and sets forth the benefits that must be covered under such contracts.

Public Health Law section 4406 provides that the contract between an HMO and an enrollee is subject to regulation by the Superintendent as if it were a health insurance subscriber contract, and that it shall include, but not be limited to, all mandated benefits required by Article 43 of the Insurance Law.

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

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

4. Costs: This rule imposes no compliance costs upon state or local governments. Some private ABA providers may incur additional costs to fulfill the educational and training requirements of the rule in order to become eligible for reimbursement from health insurance coverage for providing ABA. However, many individuals currently providing ABA are not expected to incur such costs and will be able to continue providing ABA as they always have. In addition, any such costs are likely to be offset by the additional revenue obtained from being newly eligible for health insurance reimbursement. Nonetheless, the Department of Financial Services ("Department") is unable to estimate the specific cost of such compliance because the cost depends on the number of ABA providers who intend to provide treatment to individuals with ASD for reimbursement through health insurance, and ABA providers are not regulated by the Department.

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

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

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

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

8. Alternatives: The Department, in consultation with the Department of Health and the State Education Department, considered various ways to establish the necessary standards of this regulation, such as delegating credentialing responsibility to the Behavior Analyst Certification Board, Inc. (the "Board"). However, doing so would violate scope of practice requirements under the Education Law when ABA is not provided pursuant to an individualized family service plan, individualized education plan or an individualized service plan. Moreover, State Education Department license and certification requirements protect consumers, including vulnerable ASD patients, from negligent or fraudulent ABA providers. The Department previously promulgated on an emergency basis a different version of this rule, which required an ABA provider both to be certified by the Board and to hold a certain type of license issued pursuant to Education Law Title VIII, or to be supervised by a person with both a license and Board certification. A number of stakeholders, however, expressed concern that the prior rule would permit very few providers to be eligible for health insurance reimbursement for providing ABA – perhaps less than 100 statewide. This new rule eliminates the dual license/Board certification requirement (other than for those who supervise ABA aides) and permits certain individuals licensed or certified by the State Education Department to qualify for health insurance reimbursement for providing ABA. Licensed providers now eligible for insurance reimbursement – whether or not they are certified by the Board – include social workers, psychologists, occupational therapists, physical therapists and speech pathologists, among others. As such, this new rule is expected to expand the pool of eligible providers from as few as 100 or less to tens of thousands while still ensuring that only properly credentialed ABA providers treat individuals with ASD. In addition, some certified providers may now be eligible for insurance coverage – whether or not they are certified by the Board – including school psychologists, social workers and special education teachers.

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

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

Regulatory Flexibility Analysis

1. Effect of the rule: This rule will impact insurers and health maintenance organizations ("HMOs") in New York State, but none fall within the definition of "small business" set forth in section 102(8) of the State Administrative Procedure Act. However, this rule may affect providers of applied behavior analysis ("ABA") to treat autism spectrum disorder ("ASD"), some of which are small businesses, because some ABA providers may be required to obtain additional education, training and experience in order to become eligible for health insurance reimbursement for rendering ABA. However, many individuals currently providing ABA in the state will not need to do so and will be able to continue providing ABA as they always have. Moreover, any impact to current ABA providers who will need additional licensure or certification is more than offset by the tens of thousands of providers currently licensed or certified by the State Education Department who will now be able to immediately start providing ABA services covered by health insurance, regardless of whether they are credentialed by the Behavior Analyst Certification Board. These providers include licensed social workers, psychologists, physical therapists and speech pathologists, as well as certain certified school professionals.

The Department of Financial Services (the "Department") is unable to quantify the precise number of small businesses affected by this rule because ABA providers are not regulated by the Department, and the Department has established no reporting requirements with respect to these small businesses, nor does the Department maintain records of ABA providers in this state.

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

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

4. Compliance costs: This rule will not impose any compliance costs on local governments but may impose additional costs on small businesses that provide ABA to those with ASD, because some may incur costs of education, training and experience for their employees to become eligible for health insurance reimbursement for providing ABA. However, many small businesses will not incur such costs, and any such costs are likely to be more than offset by increased revenue as a result of health insurance reimbursement for these services. Nonetheless, the Department is unable to estimate the cost of such compliance because the cost depends, in part, on the number of ABA providers who intend to provide treatment to individuals with ASD for reimbursement through health insurance, and ABA providers are not regulated by the Department.

5. Economic and technological feasibility: Compliance with the rule should be economically and technologically feasible because it requires no action on the part of local governments and most small businesses. While some small businesses that provide ABA may incur some costs in education and/or training of their employees, many will not, and such costs are likely to be more than offset by increased revenue as a result of health insurance reimbursement for providing ABA services.

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

7. Small business and local government participation: This rule does not impact local government. In addition, the Department previously promulgated on an emergency basis a different version of this rule, which required an ABA provider both to be certified by the Board and to hold a certain type of license issued pursuant to Education Law Title VIII, or to be supervised by a person with both a license and Board certification. A number of stakeholders, including some representing small businesses, contacted both the Department and the Executive Chamber to comment on that earlier version. Most expressed concern that the prior rule would permit very few providers to be eligible for health insurance reimbursement for providing ABA – perhaps less than 100 statewide.

In response to these concerns, the Department made significant changes to this new version of the rule. The new rule eliminates the dual license/Board certification requirement (other than for those who supervise ABA aides) and permits certain individuals licensed or certified by the State Education Department to qualify for health insurance reimbursement for providing ABA. As such, this new rule is expected to expand the pool of eligible providers from as few as 100 or less to tens of thousands while still ensuring that only properly credentialed ABA providers treat individuals with ASD. Providers who would now be eligible for insurance coverage – whether or not they are certified by the Board – include licensed social workers, psychologists, physical therapists and speech pathologists, as well as certain certified school professionals. Further, the Department intends to subsequently file a notice of proposed rulemaking and public and private interested parties will also thereby have a formal opportunity to comment on the rule once it is published in the State Register.

Rural Area Flexibility Analysis

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

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

3. Costs: This rule may impose additional costs on some ABA providers located in rural areas, because some may need additional education, training and experience to become eligible for health insurance reimbursement for providing ABA. However, because this new rule eliminates the dual license/Board certification requirement (other than for those who supervise ABA aides), many licensed and certified professionals will be able to provide ABA immediately in rural areas without incurring the cost of pursuing Board certification. These providers include licensed social workers, psychologists, physical therapists and speech pathologists, among others. In addition, any such costs are likely to be more than offset by increased revenue as a result of health insurance reimbursement for ABA providers' services.

Insurers and HMOs submitted to the Department of Financial Services (the "Department") new health insurance policy forms and rates to add the new coverage for the screening, diagnosis and treatment of ASD. The requirement to make such submissions was imposed by the statutory mandate, not this rule. In addition, insurers and HMOs also may incur compliance costs from having to develop an ABA provider eligibility database, and may have to expand their networks if they do not include an adequate number of ABA providers. Those costs may be passed on to consumers in the form of higher premiums, but the long-term benefits of having properly credentialed ABA providers to treat individuals with ASD greatly outweigh the costs. Moreover, these costs, too, result from the legislation, not this rule.

4. Minimizing adverse impact: Although some ABA providers in rural areas may incur additional costs to fulfill the requirements of this rule, the majority will not, and those costs likely will be offset from the additional revenue that will be generated from health insurance reimbursement for their services. Moreover, any impact to current ABA providers who will need additional licensure or certification is more than offset by the tens of thousands of currently licensed and certified providers, whether or not they are credentialed by the Behavior Analyst Certification Board, who will now be able to immediately start providing ABA services covered by health insurance.

5. Rural area participation: The Department previously promulgated on an emergency basis a different version of this rule, which required an ABA provider both to be certified by the Board and to hold a certain type of license issued pursuant to Education Law Title VIII, or to be supervised by a person with both a license and Board certification. A number of stakeholders, including some representing rural areas, contacted both the Department and the Executive Chamber to comment on that earlier version. Most expressed concern that the prior rule would permit very few providers to be eligible for health insurance reimbursement for providing ABA – perhaps less than 100 statewide.

In response to these concerns, the Department made significant changes to this new version of the rule. The new rule eliminates the dual license/Board certification requirement (other than for those who supervise ABA aides) and permits certain individuals licensed or certified by the State Education Department to qualify for health insurance reimbursement for providing ABA. As such, this new rule is expected to expand the pool of eligible providers from as few as 100 or less to tens of thousands while still ensuring that only properly credentialed ABA providers treat individuals with ASD. Providers who would now be eligible for insurance coverage – whether or not they are certified by the Board – include licensed social workers, psychologists, physical therapists and speech pathologists, as well as certain certified school professionals.

Further, the Department intends to subsequently file a notice of proposed rulemaking, and public and private interested parties will also thereby have a formal opportunity to comment on the rule once it is published in the State Register.

Job Impact Statement

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

This rule should have no adverse impact on jobs and employment opportunities because it merely implements the statutory charge to establish standards of professionalism, supervision and relevant experience of individuals who provide behavioral health treatment in the form of ABA. These standards are designed to ensure that individuals with autism spectrum disorders receive treatment for those disorders only from qualified ABA providers.

2. Categories and numbers affected: This rule may impact some providers of ABA because some ABA providers may be required to obtain additional education, training and experience in order to become eligible for health insurance reimbursement for providing ABA. However, any costs will likely be offset by the increased revenue resulting from health insurance reimbursement for ABA services. Moreover, any impact to current ABA providers who will need additional licensure or certification is more than offset by the tens of thousands of providers currently licensed or certified by the State Education Department who will now be able to immediately start providing ABA services covered by health insurance, regardless of whether they are credentialed by the Behavior Analyst Certification Board. These professionals include licensed social workers, psychologists, physical therapists and speech pathologists, as well as certified school psychologists, social workers, and special education teachers.

The Department is unable to quantify the precise number of ABA providers affected by this rule because they are not regulated by the Department and the Department has established no reporting requirements with respect to these providers, nor does the Department maintain records of ABA providers in this state.

3. Regions of adverse impact: ABA providers operate in all regions of the state. Therefore, there are no regions of the state where the rule would have a disproportionate adverse impact on jobs or employment opportunities.

4. Minimizing adverse impact: Although some ABA providers may incur additional costs to fulfill the education, training and experience requirements of this rule, it is anticipated that many will not. In addition, any costs likely will be offset by the additional revenue that will be generated from health insurance reimbursement for ABA providers' services. Moreover, any impact to current ABA providers who will need additional licensure or certification is more than offset by the tens of thousands of currently licensed and certified providers, whether or not they are credentialed by the Behavior Analyst Certification Board, who will now be able to immediately start providing ABA services covered by health insurance.

5. Self-employment opportunities: This rule will have a positive impact on ABA providers who are self-employed because opportunities will be available to provide ABA services outside of an educational setting for reimbursement through health insurance, especially with the increasing number of individuals being diagnosed with ASD, and for whom ABA is critical.

Department of Health

EMERGENCY RULE MAKING

Reduction to Statewide Base Price

I.D. No. HLT-07-13-00004-E
Filing No. 80
Filing Date: 2013-01-24
Effective Date: 2013-01-24

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

Action taken: Amendment of section 86-1.16 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 2807-c(35)

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

Specific reasons underlying the finding of necessity: It is necessary to issue the proposed regulations on an emergency basis in order to achieve targeted savings.

Public Health Law section 2807-c(35)(b) specifically provides the Commissioner of Health with authority to issue hospital inpatient rate-setting regulations as emergency regulations.

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

Subject: Reduction to Statewide Base Price.

Purpose: Continues a reduction to the statewide base price for inpatient services.

Text of emergency rule: Pursuant to the authority vested in the Commissioner of Health by section 2807-c(35)(b) of the Public Health Law, Subdivision (c) of section 86-1.16 of Subpart 86-1 of Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended, to be effective May 1, 2012, to read as follows:

(c) *(1)* For the period effective July 1, 2011 through March 31, 2012, the statewide base price shall be adjusted such that total Medicaid payments are decreased by $24,200,000.

(2) For the period May 1, 2012 through March 31, 2013, the statewide base price shall be adjusted such that total Medicaid payments are decreased for such period by $19,200,000.

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 April 23, 2013.

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

Regulatory Impact Statement

Statutory Authority:

The requirement to implement a modernized Medicaid reimbursement system for hospital inpatient services based upon 2005 base year operating costs pursuant to regulations is set forth in Section 2807-c(35) of the Public Health Law, which states that the Commissioner has the authority to set emergency regulations for general hospital inpatient rates and such regulations shall include but not be limited to a case-mix neutral Statewide base price. Such Statewide base price will exclude certain items specified in the statute and any other factors as may be determined by the Commissioner.

Legislative Objectives:

The Legislature and Medicaid Redesign Team adopted a proposal to reduce unnecessary cesarean deliveries to promote quality care and reduce unnecessary expenditures. Due to industry concerns with the initial proposal, it was determined that a more clinically sound method needed to be developed. To generate immediate savings, however, a $24.2 million gross ($12.1 million State share) reduction in the statewide base price was implemented for 2011-12 while an obstetrical workgroup worked to develop a more clinically sound approach to meet Legislative objectives. Based on the results of workgroup meetings, a new proposal was developed which achieved less savings than required by the Financial Plan ($5 million gross/$2.5 million State share). Therefore, this emergency amendment continues the base price reduction at $19.2 million gross ($9.6 million State share) to account for the difference through March 31, 2013.

Needs and Benefits:

The proposed amendment appropriately implements the provisions of Public Health Law section 2807-c(35)(b)(xii), which authorizes the Commissioner to address the inappropriate use of cesarean deliveries. Cesarean deliveries are surgical procedures that inherently involve risks; however, elective cesarean deliveries increase the risks unnecessarily. Therefore, high rates of cesarean deliveries are increasingly viewed as indicative of quality of care issues.

Due to industry concerns with the initial proposal, it was determined that a more clinically sound approach to meeting Legislative objectives needed to be developed. To generate immediate savings, however, a $24.2 million gross ($12.1 million State share) reduction in the statewide base price was implemented for 2011-12 while an obstetrical workgroup worked to develop such an approach. Based on the results of those meetings, a new proposal was developed which achieved less savings than required by the Financial Plan ($5 million gross/$2.5 million State share). Therefore, this emergency amendment continues the base price reduction at $19.2 million gross ($9.6 million State share) to account for the difference through March 31, 2013.

COSTS:

Costs to State Government:

There are no additional costs to State government as a result of this amendment.

Costs of Local Government:

There will be no additional cost to local governments as a result of these amendments.

Costs to the Department of Health:

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

Local Government Mandates:

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

Paperwork:

There is no additional paperwork required of providers as a result of these amendments.

Duplication:

These regulations do not duplicate existing State and Federal regulations.

Alternatives:

No significant alternatives are available at this time. In collaboration with the hospital industry, the State developed a more clinically sound method to achieve savings. However, this amount was less than was required by the Financial Plan. Thus, there is no option to not act on this initiative since the Enacted Budget assumed savings that total $24.2 million.

Federal Standards:

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

Compliance Schedule:

Section 86-1.16 requires that the statewide base price be reduced by $19,200,000 for the period May 1, 2012, through March 31, 2013.

Regulatory Flexibility Analysis

Effect on Small Business and Local Governments:

For the purpose of this regulatory flexibility analysis, small businesses were considered to be general hospitals with 100 or fewer full time equivalents. Based on recent financial and statistical data extracted from the Institutional Cost Report, seven hospitals were identified as employing fewer than 100 employees.

Health care providers subject to the provisions of this regulation under section 2807-c(35) of the Public Health Law will see a minimal decrease in funding as a result of the reduction in the statewide base price.

This rule will have no direct effect on Local Governments.

Compliance Requirements:

No new reporting, record keeping or other compliance requirements are being imposed as a result of these rules. Affected health care providers will bill Medicaid using procedure codes and ICD-9 codes approved by the American Medical Association, as is currently required. The rule should have no direct effect on Local Governments.

Professional Services:

No new or additional professional services are required in order to comply with the proposed amendments.

Compliance Costs:

As a result of the new provision of 86-1.16, overall statewide aggregate hospital Medicaid revenues for hospital inpatient services will decrease in an amount corresponding to the total statewide base price reduction.

Economic and Technological Feasibility:

Small businesses will be able to comply with the economic and technological aspects of this rule. The proposed amendments are technologically feasible because it requires the use of existing technology. The overall economic impact to comply with the requirements of this regulation is expected to be minimal.

Minimizing Adverse Impact:

The proposed amendments reflect statutory intent and requirements.

Small Business and Local Government Participation:

Hospital associations participated in discussions and contributed comments through the State's Medicaid Redesign Team process regarding these changes.

Rural Area Flexibility Analysis

Types and Estimated Numbers of Rural Areas:

This rule applies uniformly throughout the state, including rural areas. Rural areas are defined as counties with a population less than 200,000 and counties with a population of 200,000 or greater that have towns with population densities of 150 persons or fewer per square mile. The following 43 counties have a population of less than 200,000 based upon the United States Census estimated county populations for 2010 (http://quickfacts.census.gov). Approximately 17% of small health care facilities are located in rural areas.

Allegany County	Greene County	Schoharie County
Cattaraugus County	Hamilton County	Schuyler County
Cayuga County	Herkimer County	Seneca County
Chautauqua County	Jefferson County	St. Lawrence County
Chemung County	Lewis County	Steuben County
Chenango County	Livingston County	Sullivan County
Clinton County	Madison County	Tioga County
Columbia County	Montgomery County	Tompkins County
Cortland County	Ontario County	Ulster County
Delaware County	Orleans County	Warren County
Essex County	Oswego County	Washington County
Franklin County	Otsego County	Wayne County
Fulton County	Putnam County	Wyoming County
Genesee County	Rensselaer County	Yates County
	Schenectady County	

The following counties have a population of 200,000 or greater and towns with population densities of 150 persons or fewer per square mile. Data is based upon the United States Census estimated county populations for 2010.

Albany County	Monroe County	Orange County
Broome County	Niagara County	Saratoga County
Dutchess County	Oneida County	Suffolk County
Erie County	Onondaga County	

Compliance Requirements:

No new reporting, record keeping, or other compliance requirements are being imposed as a result of this proposal.

Professional Services:

No new additional professional services are required in order for providers in rural areas to comply with the proposed amendments.

Compliance Costs:

No initial capital costs will be imposed as a result of this rule, nor is there an annual cost of compliance.

Minimizing Adverse Impact:

The proposed amendments reflect statutory intent and requirements.

Rural Area Participation:

This amendment is the result of discussions with industry associations as part of the Medicaid Redesign team process. These associations include members from rural areas. As well, the Medicaid Redesign Team held multiple regional hearings and solicited ideas through a public process.

Job Impact Statement

A Job Impact Statement is not required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent from the nature and purpose of the proposed rule that it will not have a substantial adverse impact on jobs or employment opportunities. The proposed emergency regulation revises the final statewide base price for the period beginning May 1, 2012, through March 31, 2013.

EMERGENCY RULE MAKING

Statewide Pricing Methodology for Nursing Homes

I.D. No. HLT-07-13-00005-E

Filing No. 81

Filing Date: 2013-01-24

Effective Date: 2013-01-24

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

Action taken: Addition of section 86-2.40 to Title 10 NYCRR.

Statutory authority: Public Health Law, section 2808(2-c)

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

Specific reasons underlying the finding of necessity: It is necessary to issue the proposed regulations on an emergency basis in order to implement, as expeditiously as possible, the new Medicaid reimbursement methodology for nursing homes, effective January 1, 2012. The new methodology will replace an overly complex and burdensome methodology with a transparent pricing methodology that will stabilize the nursing home industry by timely providing predictable rate setting information that can be effectively used by providers to plan and manage their operations. In addition, implementing the pricing methodology as soon as possible will also mitigate the retroactive cash flow impact of reconciling rates that are paid today to the new pricing rates effective on January 1, 2012.

Proceeding with the proposed regulations on an emergency basis is in accordance with the provisions of Public Health Law section 2808 (2-c) which provides the Commissioner of Health the explicit authority to issue these emergency regulations.

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

Subject: Statewide Pricing Methodology for Nursing Homes.

Purpose: To establish a new Medicaid reimbursement methodology for Nursing Homes.

Substance of emergency rule: This regulation establishes a new reimbursement methodology for the operating component of non-specialty residential health care facilities (nursing homes). The operating component of the price is based upon allowable costs and is the sum of the direct price, indirect price and a facility-specific non-comparable price. The direct and indirect prices are a blend of a statewide price and a peer group price. There are two peer groups: 1) all non-specialty hospital-based facilities and non-specialty freestanding facilities with certified beds capacities of 300 or more, and 2) non-specialty freestanding facilities with certified bed capacities of less than 300 beds. The direct price is subject to a case mix adjustment and a wage index adjustment. The new case mix adjustment methodology also contains mechanisms to safeguard the integrity of case mix data reporting. If reported case mix data indicates a change in the facility's case mix of more than five percent, the payment adjustment as-

sociated with the change over five percent may be held, pending an audit to verify the accuracy of the reported data. Also, facilities are required to formally certify to the accuracy of their case mix data reporting on an annual basis. The indirect price is subject to a wage index adjustment. Per-diem adjustments to the operating component of the rate include add-ons for bariatric, traumatic brain-injured (TBI) extended care, and dementia residents; adjustments for the reporting of quality data; and transition payments. Non-specialty facilities will transition to the price over a five-year period (2012-2016), with prices fully implemented beginning in 2017. The non-capital component of the rate for specialty facilities, which are not subject to the new reimbursement methodology, will be the rates in effect for such facilities on January 1, 2009.

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 April 23, 2013.

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

Regulatory Impact Statement

Statutory Authority:

The statutory authority for this regulation is contained in Section 2808(2-c) of the Public Health Law (PHL) as enacted by Section 95 of Part H of Chapter 59 of the Laws of 2011, which authorizes the Commissioner to promulgate emergency regulations, with regard to Medicaid reimbursement rates for residential health care facilities. Such rate regulations are set forth in Subpart 86-2 of Title 10 (Health) of the Official Compilation of Codes, Rules, and Regulation of the State of New York.

Legislative Objectives:

Subpart 86-2 of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulation of the State of New York, will be amended by adding a new section 2.40 to establish a new Medicaid reimbursement methodology for Nursing Homes. The reimbursement methodology is based on a blend of statewide prices and peer group prices, with adjustments for case mix, regional wage differences, add-ons for certain patients, and quality incentives and payments. To ensure a smooth transition to the new pricing methodology by mitigating significant fluctuations (increases or decreases) in the amount of Medicaid revenues received by nursing homes, per diem transition rate adjustments will be included to phase-in the new pricing methodology over a five-year period, with full implementation in the sixth year. The new and streamlined methodology will significantly reduce administrative burdens on both nursing homes and the Department and, by limiting the potential bases of subsequent administrative rate appeals and audit adjustments, enhance the stability and certainty of initial Medicaid payments and reduce the likelihood of litigation.

Needs and Benefits:

The new pricing reimbursement methodology reforms an outdated, complex, administratively burdensome (to both providers and the Department) rate-setting system with a stable, predictable and transparent methodology that rewards efficiencies and incentivizes quality outcomes. The new pricing system will also provide a good foundation for the transition of nursing home residents to Managed Care that will occur over the next several years. The new methodology will also, by limiting the potential bases of subsequent administrative rate appeals and audit adjustments, enhance the stability and certainty of initial Medicaid payments and reduce the likelihood of litigation. The new methodology also contains mechanisms to safeguard the integrity of case mix data reporting. If reported case mix data indicates a change in the facility's case mix of more than five percent, the payment adjustment associated with the change over five percent may be held, pending an audit to verify the accuracy of the reported data. Also, facilities are required to formally certify to the accuracy of their case mix data reporting on an annual basis.

Costs to Private Regulated Parties:

There will be no additional costs to private regulated parties. The only additional data requested from providers would be reporting quality measures in their annual cost report.

Costs to State Government:

There is no additional aggregate increase in Medicaid expenditures anticipated as a result of these regulations.

Costs to Local Government:

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

Costs to the Department of Health:

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

Local Government Mandates:

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

Paperwork:

The proposed regulation does not create new or additional paperwork responsibility of any kind.

Duplication:

These regulations do not duplicate existing state or federal regulations.

Alternatives:

The Department is required by the Public Health Law section 2808 2-c to implement the new pricing methodology. The department worked closely with the Nursing Home Industry Associations to develop the details of the pricing methodology to be implemented by the regulation.

Federal Standards:

The proposed regulation does not exceed any minimum standards of the federal government for the same or similar subject area.

Compliance Schedule:

The new prices will be published by the department and transmitted to the EMedNY system. There are no new compliance efforts required by the nursing homes.

Regulatory Flexibility Analysis

Effect of Rule:

For the purpose of this regulatory flexibility analysis, small businesses were considered to be residential health care facilities with 100 or fewer employees. Based on recent financial and statistical data extracted from Residential Health Care Facility Cost Reports, approximately 60 residential health care facilities were identified as employing fewer than 100 employees.

To ensure a smooth transition and mitigate significant swings in Medicaid revenues, the new Medicaid reimbursement methodology for nursing homes implemented by this regulation will be phased-in over a five year period (full implementation in the sixth year). Of the 60 nursing homes, 36 nursing homes that are subject to this regulation will experience a decrease in Medicaid revenues. The losses in Medicaid revenues will occur gradually – and will increase from.473% of total operating revenue in year to 5.4% of total operating revenue in year six. Twenty-four nursing homes that are subject to this regulation will experience an increase in Medicaid revenues. The gains in Medicaid revenues will occur gradually – and will increase from 1.2% of total operating revenue in year to 2% of total operating revenue in year six. In addition, the new methodology will also, by limiting the potential bases of subsequent administrative rate appeals and audit adjustments, enhance the stability and certainty of initial Medicaid payments and reduce the likelihood of litigation.

This rule will have no direct effect on local governments.

Compliance Requirements:

There are no new compliance requirements.

Professional Services:

No new or additional professional services are required in order to comply with the proposed amendments.

Compliance Costs:

No additional compliance costs are anticipated as a result of this rule.

Economic and Technological Feasibility:

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

Minimizing Adverse Impact:

To ensure a smooth transition to the new pricing methodology by mitigating significant fluctuations (increases or decreases) in the amount of Medicaid revenues received by nursing homes, per diem transition rate adjustments will be included to phase-in the new pricing methodology over a five-year period, with full implementation in the sixth year. The new methodology will also, by limiting the potential bases of subsequent administrative rate appeals and audit adjustments, enhance the stability and certainty of initial Medicaid payments and reduce the likelihood of litigation.

Small Business and Local Government Participation:

The State filed a Federal Public Notice, published in the State Register, prior to the effective date of the change. The Notice provided a summary of the action to be taken and instructions as to where the public, including small businesses and local governments, could locate copies of the corresponding proposed State Plan Amendment. The Notice further invited the public to review and comment on the related proposed State Plan Amendment. The Department worked closely with the Nursing Home Associations to develop the details of the pricing methodology to be implemented by the regulation. In addition, contact information for the Department was provided for anyone interested in further information.

Rural Area Flexibility Analysis

Effect on Rural Areas:

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

Allegany	Hamilton	Schenectady
Cattaraugus	Herkimer	Schoharie
Cayuga	Jefferson	Schuyler
Chautauqua	Lewis	Seneca
Chemung	Livingston	Steuben
Chenango	Madison	Sullivan
Clinton	Montgomery	Tioga
Columbia	Ontario	Tompkins
Cortland	Orleans	Ulster
Delaware	Oswego	Warren
Essex	Otsego	Washington
Franklin	Putnam	Wayne
Fulton	Rensselaer	Wyoming
Genesee	St. Lawrence	Yates
Greene		

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

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

Compliance Requirements:

There are no new compliance requirements as a result of the proposed rule.

Professional Services:

No new additional professional services are required in order for providers in rural areas to comply with the proposed amendments.

Compliance Costs:

No additional compliance costs are anticipated as a result of this rule.

Minimizing Adverse Impact:

To ensure a smooth transition to the new pricing methodology by mitigating significant fluctuations (increases or decreases) in the amount of Medicaid revenues received by nursing homes, per diem transition rate adjustments will be included to phase-in the new pricing methodology over a five-year period, with full implementation in the sixth year. The new methodology will also, by limiting the potential bases of subsequent administrative rate appeals and audit adjustments, enhance the stability and certainty of initial Medicaid payments and reduce the likelihood of litigation.

Rural Area Participation:

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

Job Impact Statement

A Job Impact Statement is not required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is not expected that the proposed rule to establish a new Medicaid reimbursement methodology for Nursing Homes will have a material impact on jobs or employment opportunities across the Nursing Home industry. To ensure a smooth transition to the new pricing methodology by mitigating significant fluctuations (increases or decreases) in the amount of Medicaid revenues received by nursing homes, per diem transition rate adjustments will be included in the proposed regulations to phase-in the new pricing methodology over a five-year period, with full implementation in the sixth year.

EMERGENCY RULE MAKING

Episodic Pricing for Certified Home Health Agencies (CHHAs)

I.D. No. HLT-07-13-00007-E

Filing No. 86

Filing Date: 2013-01-25

Effective Date: 2013-01-25

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

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

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

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

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

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

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

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

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

Text of emergency rule: Pursuant to the authority vested in the Commissioner of Health by section 3614(13) of the Public Health Law, subdivisions (a), (b) and (c) of section 86-1.44 of Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York, are amended, to be effective May 2, 2012, to read as follows:

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

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

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

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

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 April 24, 2013.

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

Regulatory Impact Statement

Statutory Authority:

The authority for implementation of an episodic payment system for Certified Home Health Agency services pursuant to regulations is set forth in section 3614(13) of the Public Health Law. This same statute also exempts the application of the episodic payment system to Medicaid reimbursement for "children under eighteen years of age and other discrete groups as may be determined by the commissioner pursuant to regulations".

Legislative Objectives:

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

Needs and Benefits:

The proposed amendment will exempt services provided to a special needs population of medically complex children, adolescents and young disabled adults by a CHHA operating under a pilot program approved by

the Department from the episodic payment system and will also provide for an adjustment of the case mix index for CHHAs serving primarily patients who are eligible for OPWDD services when such CHHAs have over 200 such patients. This amendment reflects a Health Department determination that the more stringent cost containment mechanism of episodic pricing, already deemed by the legislature to be an inappropriate reimbursement mechanism for CHHA services for children, is also not appropriate for special needs populations consisting of young adults as well as children and adolescents being cared for pursuant to an approved pilot program. This further amendment will thus help assure that agencies primarily serving certain special needs populations will receive a level of reimbursement from the Medicaid system to maintain both adequate access and quality of care for members of these populations.

Costs:

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

Local Government Mandates:

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

Paperwork:

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

Duplication:

These regulations do not duplicate existing state or federal regulations.

Alternatives:

No significant alternatives are available that will protect the special needs populations identified in this amendment.

Federal Standards:

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

Compliance Schedule:

There are no significant actions which are required by the affected providers to comply with the rule change.

Regulatory Flexibility Analysis

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

Rural Area Flexibility Analysis

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

NOTICE OF ADOPTION

Authority to Collect Pharmacy Acquisition Cost

I.D. No. HLT-40-12-00003-A

Filing No. 97

Filing Date: 2013-01-29

Effective Date: 2013-02-13

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

Action taken: Amendment of section 505.3 of Title 18 NYCRR.

Statutory authority: Public Health Law, sections 201(1)(v) and 206; and Social Services Law, sections 363-a(2) and 367-a(9)(b)

Subject: Authority to Collect Pharmacy Acquisition Cost.

Purpose: Establishes a requirement that each enrolled pharmacy report actual acquisition cost of a prescription drug to the Department.

Text or summary was published in the October 3, 2012 issue of the Register, I.D. No. HLT-40-12-00003-P.

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

Text of rule and any required statements and analyses may be obtained from: 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

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Orthodontic Screening

I.D. No. HLT-40-12-00005-A

Filing No. 96

Filing Date: 2013-01-29

Effective Date: 2013-02-13

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

Action taken: Repeal of section 85.45 of Title 10 NYCRR; and amendment of section 506.4 of Title 18 NYCRR.

Statutory authority: Public Health Law, sections 201 and 206; and Social Services Law, sections 363-a and 365-a(2)

Subject: Orthodontic Screening.

Purpose: Orthodontic Screening Provider Qualifications and Recipient Eligibility Criteria.

Text or summary was published in the October 3, 2012 issue of the Register, I.D. No. HLT-40-12-00005-P.

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

Text of rule and any required statements and analyses may be obtained from: 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

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Audits of Institutional Cost Reports (ICR)

I.D. No. HLT-41-12-00017-A

Filing No. 98

Filing Date: 2013-01-29

Effective Date: 2013-02-13

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

Action taken: Amendment of Subpart 86-1 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 2807-c(35)

Subject: Audits of Institutional Cost Reports (ICR).

Purpose: To impose a fee schedule on general hospitals related to the filing of ICRs sufficient to cover the costs of auditing the ICRs.

Text or summary was published in the October 10, 2012 issue of the Register, I.D. No. HLT-41-12-00017-P.

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

Text of rule and any required statements and analyses may be obtained from: 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

Assessment of Public Comment

The agency received no public comment.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Prevention of Influenza Transmission by Healthcare and Residential Facility and Agency Personnel

I.D. No. HLT-07-13-00020-P

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

Proposed Action: Amendment of sections 2.59, 405.3, 415.19, 751.6, 763.13, 766.11 and 793.5 of Title 10 NYCRR.

Statutory authority: Public Health Law, sections 225, 2800, 2803, 3612 and 4010

Subject: Prevention of Influenza Transmission by Healthcare and Residential Facility and Agency Personnel.

Purpose: Require hospital DT&Cs, nursing home, home care and hospice personnel to wear a surgical or procedure mask if not vaccinated for Influenza.

Text of proposed rule: Pursuant to the authority vested in the Public Health and Health Planning Council and the Commissioner of Health by Public Health Law Sections 225, 2800, 2803, 3612, and 4010, Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York, is amended, to be effective upon publication of a Notice of Adoption in the New York State Register, to read as follows:

Part 2 is amended to add a new section 2.59, as follows:

2.59 – Prevention of influenza transmission by healthcare and residential facility and agency personnel

(a) Definitions.

(1) "Personnel," for the purposes of this section, shall mean all persons employed or affiliated with a healthcare or residential facility or agency, whether paid or unpaid, including but not limited to employees, members of the medical and nursing staff, contract staff, students, and volunteers, who engage in activities such that if they were infected with influenza, they could potentially expose patients or residents to the disease.

(2) "Healthcare and residential facilities and agencies," for the purposes of this section, shall include:

(i) any facility or institution included in the definition of "hospital" in section 2801 of the Public Health Law, including but not limited to general hospitals, nursing homes, and diagnostic and treatment centers;

(ii) any agency established pursuant to Article 36 of the Public Health Law, including but not limited to certified home health agencies, long term home health care programs, acquired immune deficiency syndrome (AIDS) home care programs, licensed home care service agencies, and limited licensed home care service agencies; and

(iii) hospices as defined in section 4002 of the Public Health Law.

(3) "Influenza season," for the purposes of this section, shall mean the period of time during which influenza is prevalent as determined by the Commissioner.

(b) All healthcare and residential facilities and agencies shall determine and document which persons qualify as "personnel" under this section.

(c) All healthcare and residential facilities and agencies shall document the influenza vaccination status of all personnel for the current influenza season in each individual's personnel record or other appropriate record. Documentation of vaccination must include the name and address of the individual who ordered or administered the vaccine and the date of vaccination.

(d) During the influenza season, all healthcare and residential facilities and agencies shall ensure that all personnel not vaccinated against influenza for the current influenza season wear a surgical or procedure mask while in areas where patients or residents may be present. Healthcare and residential facilities and agencies shall supply such masks to personnel, free of charge.

(e) Upon the request of the Department, a healthcare or residential facility or agency must report the number and percentage of personnel that have been vaccinated against influenza for the current influenza season.

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

Subparagraph (v) of paragraph (10) of subdivision (b) of Section 405.3 of Part 405 is added to read as follows:

(v) documentation of vaccination against influenza, or wearing of a surgical or procedure mask during the influenza season, for personnel who have not received the influenza vaccine for the current influenza season, pursuant to section 2.59 of this Title.

Paragraph (4) of subdivision (a) of Section 415.19 of Part 415 is added to read as follows:

(4) Collects documentation of vaccination against influenza, or requires wearing of a surgical or procedure mask during the influenza season, for personnel who have not received the influenza vaccine for the current influenza season, pursuant to section 2.59 of this Title.

Paragraph (6) of subdivision (d) of Section 751.6 is added to read as follows:

(6) documentation of vaccination against influenza, or wearing of a surgical or procedure mask during the influenza season, for personnel who have not received the influenza vaccine for the current influenza season, pursuant to section 2.59 of this Title.

Paragraph (5) of subdivision (c) of Section 763.13 is added to read as follows:

(5) documentation of vaccination against influenza, or wearing of a surgical or procedure mask during the influenza season, for personnel who have not received the influenza vaccine for the current influenza season, pursuant to section 2.59 of this Title.

Paragraph (6) of subdivision (d) of Section 766.11 is added to read as follows:

(6) documentation of vaccination against influenza, or wearing of a surgical or procedure mask during the influenza season, for personnel who have not received the influenza vaccine for the current influenza season, pursuant to section 2.59 of this Title.

Paragraph (6) of subdivision (d) of Section 793.5 is added to read as follows:

(6) documentation of vaccination against influenza, or wearing of a surgical or procedure mask during the influenza season, for personnel who have not received the influenza vaccine for the current influenza season, pursuant to section 2.59 of this Title.

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

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

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

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

Regulatory Impact Statement

Statutory Authority:

The authority for the promulgation of these regulations is contained in Public Health Law (PHL) Sections 225 (5), 2800, 2803 (2), 3612 and 4010 (4). PHL 225 (5) authorizes the Public Health and Health Planning Council (PHHPC) to issue regulations in the State Sanitary Code pertaining to any matters affecting the security of life or health or the preservation and improvement of public health in the state of New York, including designation and control of communicable diseases and ensuring infection control at healthcare facilities and any other premises.

PHL Article 28 (Hospitals), Section 2800 specifies that "Hospital and related services including health-related service of the highest quality, efficiently provided and properly utilized at a reasonable cost, are of vital concern to the public health. In order to provide for the protection and promotion of the health of the inhabitants of the state, pursuant to section three of article seventeen of the constitution, the department of health shall have the central, comprehensive responsibility for the development and administration of the state's policy with respect to hospital and related services, and all public and private institutions, whether state, county, municipal, incorporated or not incorporated, serving principally as facilities for the prevention, diagnosis or treatment of human disease, pain, injury, deformity or physical condition or for the rendering of health-related service shall be subject to the provisions of this article."

PHL Section 2803 (2) authorizes PHHPC to adopt and amend rules and regulations, subject to the approval of the Commissioner, to implement the purposes and provisions of PHL Article 28, and to establish minimum standards governing the operation of health care facilities. PHL Section 3612 authorizes PHHPC to adopt and amend rules and regulations, subject to the approval of the Commissioner, with respect to certified home health agencies and providers of long term home health care programs. PHL Section 4010 (4) authorizes PHHPC to adopt and amend rules and regulations, subject to the approval of the Commissioner, with respect to hospice organizations.

Legislative Objectives:

The legislative objective of PHL 225 empowers PHHPC to address any issue affecting the security of life or health or the preservation and improvement of public health in the state of New York, including designation and control of communicable diseases and ensuring infection control at healthcare facilities and any other premises. PHL Article 28 specifically addresses the protection of the health of the residents of the State by assuring the efficient provision and proper utilization of health services of the highest quality at a reasonable cost. PHL Article 36 addresses the services rendered by certified home health agencies. PHL Article 40 declares that hospice is a socially and financially beneficial alternative to conventional curative care for the terminally ill. The requirement of surgical or procedure masks of unvaccinated healthcare and residential facility and agency personnel in these facilities will promote the health and safety of the patients and residents they serve and support efficient and continuous provision of services.

Needs and Benefits:

Transmission of influenza from healthcare and residential facility and agency personnel to patients and residents is a serious public health and patient safety issue. Influenza is a leading cause of morbidity and mortality among hospitalized patients as well as persons admitted to or residing

in other types of health care facilities. Healthcare and residential facility and agency personnel are at increased risk of acquiring influenza because of their contact with ill patients and residents, and personnel can transmit influenza to their patients and residents if they become ill. It is beyond dispute that vaccination is the most effective measure to prevent influenza, for health care facility personnel and their patients.

Accordingly, for the past two decades, the Centers for Disease Control (CDC) Advisory Committee on Immunization Practices (ACIP) has strongly recommended that all healthcare personnel be vaccinated against influenza. With the Department's encouragement, some healthcare and residential facilities and agencies have voluntarily implemented strategies to increase influenza vaccination rates among their personnel; however, these efforts have met with limited success.

Despite ACIP recommendations and national and State efforts to increase voluntary influenza vaccination rates, vaccination rates among healthcare and residential agency personnel in New York State have remained unacceptably low. In the 2011-2012 influenza season, hospitals in New York State reported healthcare personnel vaccination rates ranging from 11.1% - 97.8%, with an average of 48.4%. Thirty-four hospitals reported vaccination rates of 50% or lower, and nine of these hospitals reported vaccination rates lower than 25%. Nursing homes reported an average personnel vaccination rate of 45.0%.

Now, like much of the rest of the nation, New York State is experiencing the worst seasonal influenza season in a decade. Notably, the 2012-13 influenza season is worse than in any season since ACIP set the national standard of medical care for influenza vaccination by recommending that all persons be vaccinated each year. The intensity of this year's influenza season is a reminder that influenza is unpredictable and may cause serious illnesses, deaths and healthcare disruption during any year. Additional steps must be taken to prevent the toll of influenza in health care facilities to the extent possible.

In response to this increased public health threat, New York State has taken active steps to prevent and control transmission of seasonal influenza, in addition to its annual promotional campaign encouraging influenza vaccination. On January 12, 2013 Governor Cuomo issued an Executive Order declaring a disaster emergency and temporarily modifying sections of the State Education Law to permit children ages 6 months to 18 years to be vaccinated by pharmacists. Yet the seriousness of the continuing influenza threat, and the failure of healthcare and residential facilities and agencies to achieve acceptable vaccination rates through voluntary programs, necessitates 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 systems. It is also known that persons incubating influenza may shed the influenza virus before they have noticeable symptoms of influenza. According to the CDC, the use of surgical or procedure masks by infectious patients may help contain their respiratory secretions and limit exposure to others. The CDC also 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.

Accordingly, the Department is issuing these regulations to require all unvaccinated personnel in healthcare and residential facilities and agencies to wear surgical or procedure masks during the time when the Commissioner determines that influenza is prevalent. Requiring unvaccinated personnel to wear a mask is a reasonable step to lessen the risk of transmission to patients and residents, because unvaccinated personnel may be infectious before they are obviously ill, may contract a mild respiratory illness that is not recognized as influenza, and are at increased risk of becoming infected with influenza through patient or resident contact. All of these factors increase the risk of transmitting influenza to patients and residents.

The proposal has been discussed with a number of organizations representing the affected parties. These include the Healthcare Association of New York State, the Greater New York Hospital Association, 1199 SEIU New York City, the Medical Society of the State of New York, the American Academy of Pediatrics, the American Academy of Family Physicians, and the American College of Physicians. Other organizations that represent the affected parties are given notice of this proposal by its inclusion on the agenda of the Codes and Regulations Committee of the Public Health and Health Planning Council (PHHPC). This agenda and the proposal will be posted on the Department's website. The public, including any affected party, is invited to comment during the Codes and Regulations Committee meeting.

Costs for the Implementation of and Continuing Compliance with these Regulations to the Regulated Entity:

Healthcare and residential facilities and agencies must determine and document whether personnel have, or have not, been vaccinated against influenza for the current influenza season in each individual's personnel or other appropriate record. Those individuals who were not vaccinated for influenza must wear a surgical or procedure mask during the influenza season, as determined by the Commissioner. While there is a wide market of varying products and pricing, on average, the price of a surgical or procedure mask varies between approximately 10 to 25 cents per mask, subject to the quantity ordered. Thus, the cost of 1,000 masks could range from $100 to $250. This is a modest investment to protect the health and safety of patients, residents, 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.

Cost to State and Local Government:

The State operates several healthcare facilities subject to this regulation. Most county health departments are licensed under Article 28 or Article 36 of the Public Health Law and are therefore also subject to regulation. Similarly, certain counties and the City of New York operate facilities licensed under Article 28. These State and local public facilities would be required to document the influenza vaccination status of their personnel and, during the influenza season, provide surgical or procedure masks for those not vaccinated.

Although the costs to the State or local governments cannot be determined with precision, the Department does not expect these costs to be significant, for several reasons. State and local facilities should already be providing masks for personnel who may come into contact with patients with respiratory symptoms and for whom contact and droplet infection control precautions should be practiced.

Further, these entities are expected to realize savings as a result of the reduction in influenza in personnel and the attendant loss of productivity and available staff. Influenza creates an estimated health burden of $87 billion per year in the United States. Influenza vaccination of healthy adults is estimated to result in a savings of $47 annually per person in reduced physician visits and fewer sick days. There are also potential savings to Medicaid and other payors based on decreasing influenza cases with the concomitant reduction in healthcare costs.

If masks achieve even a fraction of these savings by reducing costs to the State and local governments, the savings will more than cover the cost of the program, and public health will be improved.

Cost to the Department of Health:

There are no additional costs to the State or local government, except as noted above. Existing staff will be utilized to conduct surveillance of regulated parties and to monitor compliance with these provisions.

Local Government Mandates:

There are no additional programs, services, duties or responsibilities imposed by this rule upon any county, city, town, village, school district, fire district or any other special district, except as they apply to facilities operated by local governments, except as noted above for local health departments.

Paperwork:

This measure will require healthcare and residential facilities and agencies to document whether personnel have, or have not, been vaccinated against influenza for the current influenza season. It will require these facilities and agencies to document the influenza vaccination status of all personnel for the current influenza season in each individual's personnel record or other appropriate record. Upon the request of the Department, a facility or agency must report the number and percentage of personnel that have been vaccinated against influenza for the current influenza season. Facilities and agencies must develop and implement a policy and procedure to ensure compliance with the provisions of this section.

Duplication:

This regulation will not conflict with any state or federal rules.

Alternative Approaches:

One alternative to requiring a surgical or procedure mask for personnel unvaccinated for influenza would be to require all personnel to be vaccinated for influenza. The Department weighed these two options and, in balancing various factors related to each, determined that promoting vaccination, but requiring unvaccinated personnel 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.

Federal Requirements:

There are no minimum standards established by the federal government for the same or similar subject areas.

Compliance Schedule:

This proposal will go into effect upon a Notice of Adoption in the New York State Register.

Regulatory Flexibility Analysis

Effect of Rule:

Any facility defined as a hospital pursuant to Article 28, a home services agency by PHL Article 36, or a hospice by PHL Article 40 will be required to comply. In New York State there are 228 general hospitals, 1198 hospital extension clinics, 1239 diagnostic and treatment centers,

and 635 nursing homes. There are also 139 certified home health agencies (CHHAs), 97 long term home health care programs (LTHHCP), 19 hospices and 1164 licensed home care services agencies (LHCSAs).

Of those, it is known that 3 general hospitals, approximately 237 diagnostic and treatment centers, 40 nursing homes, 69 CHHAs, 36 hospices and 860 LHCSAs are small businesses (defined as 100 employees or less), independently owned and operated, affected by this rule. Local governments operate 18 hospitals, 40 nursing homes, 42 CHHAs, at least 7 LHCSAs, and a number of diagnostic and treatment centers and hospices.

Compliance Requirements:

All facilities and agencies must document the vaccination status of each personnel member as defined in this regulation for influenza virus, in their personnel or other appropriate record. Each facility must develop a policy and procedure which requires all personnel who have not been vaccinated for influenza during the current influenza season to wear a surgical or procedure mask.

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.

Professional Services:

There are no additional professional services required as a result of this regulation.

Compliance Costs:

Facilities and agencies will need to provide surgical or procedure masks to those personnel not vaccinated for influenza during a current influenza season. While there is a wide market of varying products and pricing, on average, the price of a surgical or procedure mask varies between approximately 10 to 25 cents per mask, subject to the quantity ordered. Thus, the cost of 1,000 masks could range from $100 to $250. This is a modest investment to protect the health and safety of patients, residents, 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.

Although the cost to small businesses and local governments cannot be determined with precision, the Department does not expect this cost to be significant, for several reasons. Small businesses and local governments should already be providing masks for personnel who may come into contact with patients with respiratory symptoms and for whom contact and droplet infection control precautions should be practiced.

Further, small businesses and local governments are expected to realize savings as a result of the reduction in influenza in personnel and the attendant loss of productivity and available staff. Influenza creates an estimated health burden of $87 billion per year in the United States. Influenza vaccination of healthy adults is estimated to result in a savings of $47 annually per person in reduced physician visits and fewer sick days. There are also potential savings to Medicaid and other payors based on decreasing influenza cases with the concomitant reduction in healthcare costs.

If masks achieve even a fraction of these savings by reducing costs to small businesses and local governments, the savings will more than cover the cost of the compliance, and public health will be improved.

Economic and Technological Feasibility:

This proposal is economically and technically feasible.

Minimizing Adverse Impact:

The requirement to wear a surgical mask does not impose any physical limitations on the wearer, as would be the case with wearing a respirator which would provide a higher level of protection. Because healthcare and residential facility and agency personnel often wear surgical or procedure masks for a variety of reasons, including both protecting patients and residents and themselves from communicable disease risks, and because some healthcare facilities in the state already require unvaccinated personnel to wear masks during influenza season, this will not present an undue burden or stigma on healthcare and residential facilities and agencies, or their personnel.

Further, most of the healthcare facilities are already required by state law or soon will be required by federal law to maintain records of the influenza vaccination status of their personnel. Finally, the requirement is to be in effect only when influenza is prevalent as determined by the Commissioner. This enables the requirement to be tailored to the circumstances of any particular influenza season and to be in effect only when there is the greatest risk of influenza transmission.

For these reasons, these regulations do not impose an addition burden on the regulated parties.

Small Business and Local Government Participation:

The proposal has been discussed with a number of organizations representing the affected parties. These include the Healthcare Association of New York State, the Greater New York Hospital Association, 1199 SEIU New York City, the Medical Society of the State of New York, the American Academy of Pediatrics, the American Academy of Family Physicians, and the American College of Physicians. Other organizations that represent the affected parties are given notice of this proposal by its inclusion on the agenda of the Codes and Regulations Committee of the Public Health and Health Planning Council (PHHPC). The Department will be seeking local government input prior to proposing a permanent regulatory amendment.

This agenda and the proposal will be posted on the Department's website. The public, including any affected party, is invited to comment during the Codes and Regulations Committee meeting.

Rural Area Flexibility Analysis

Effect of Rule:

Any facility defined as a hospital pursuant to Article 28, a home services agency by PHL Article 36, or a hospice by PHL Article 40 will be required to comply. In New York State there are 228 general hospitals, 1198 hospital extension clinics, 1239 diagnostic and treatment centers, and 635 nursing homes. There are also 139 certified home health agencies (CHHAs), 97 long term home health care programs (LTHHCP), 19 hospices and 1164 licensed home care services agencies (LHCSAs). Of those, it is known that 47 general hospitals, approximately 90 diagnostic and treatment centers, 159 nursing homes, 92 certified home health agencies, 19 hospices, and 26 LHCSAs are in counties serving rural areas. These facilities and agencies will not be affected differently than those in non-rural areas.

Compliance Requirements:

All facilities and agencies must document the vaccination status of each personnel member as defined in this regulation for influenza virus, in their personnel or other appropriate record. Each facility must develop a policy and procedure which requires all personnel who have not been vaccinated for influenza during the current influenza season to wear a surgical or procedure mask.

Professional Services:

There are no additional professional services required as a result of this regulation.

Compliance Costs:

Facilities and agencies will need to provide surgical or procedure masks to those personnel not vaccinated for influenza during a current influenza season. While there is a wide market of varying products and pricing, on average, the price of a surgical or procedure mask varies between approximately 10 to 25 cents per mask, subject to the quantity ordered. Thus, the cost of 1,000 masks could range from $100 to $250. This is a modest investment to protect the health and safety of patients, residents, 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.

Although the cost to facilities and agencies in rural areas cannot be determined with precision, the Department does not expect this cost to be significant, for several reasons. Facilities and agencies in rural areas should already be providing masks for personnel who may come into contact with patients with respiratory symptoms and for whom contact and droplet infection control precautions should be practiced.

Further, facilities and agencies in rural areas are expected to realize savings as a result of the reduction in influenza in personnel and the attendant loss of productivity and available staff. Influenza creates an estimated health burden of $87 billion per year in the United States. Influenza vaccination of healthy adults is estimated to result in a savings of $47 annually per person in reduced physician visits and fewer sick days. There are also potential savings to Medicaid and other payors based on decreasing influenza cases with the concomitant reduction in healthcare costs.

If masks achieve even a fraction of these savings by reducing costs to facilities and agencies in rural areas, the savings will more than cover the cost of the compliance, and public health will be improved.

Economic and Technological Feasibility:

This proposal is economically and technically feasible.

Minimizing Adverse Impact:

The requirement to wear a surgical mask does not impose any physical limitations on the wearer, as would be the case with wearing a respirator which would provide a higher level of protection. Because healthcare and residential facility and agency personnel often wear surgical or procedure masks for a variety of reasons, including both protecting patients and residents and themselves from communicable disease risks, and because some healthcare facilities in the state already require unvaccinated personnel to wear masks during influenza season, this will not present an undue burden or stigma on healthcare and residential facilities and agencies, or their personnel.

Further, most of the healthcare facilities are already required by state law or soon will be required by federal law to maintain records of the influenza vaccination status of their personnel. Finally, the requirement is

to be in effect only when influenza is prevalent as determined by the Commissioner. This enables the requirement to be tailored to the circumstances of any particular influenza season and to be in effect only when there is the greatest risk of influenza transmission.

For these reasons, these regulations do not impose an addition burden on the regulated parties.

Public and Local Government Participation:

The proposal has been discussed with a number of organizations representing the affected parties. These include the Healthcare Association of New York State, the Greater New York Hospital Association, 1199 SEIU New York City, the Medical Society of the State of New York, the American Academy of Pediatrics, the American Academy of Family Physicians, and the American College of Physicians. Other organizations that represent the affected parties are given notice of this proposal by its inclusion on the agenda of the Codes and Regulations Committee of the Public Health and Health Planning Council (PHHPC). This agenda and the proposal will be posted on the Department's website. The public, including any affected party, is invited to comment during the Codes and Regulations Committee meeting.

Job Impact Statement

No Job Impact Statement is required pursuant to section 201-a(2)(a) of the State Administrative Procedure Act (SAPA). It is apparent, from the nature of the proposed amendment, that it will have no impact on jobs and employment opportunities.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Hospital Pediatric Care

I.D. No. HLT-07-13-00021-P

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

Proposed Action: Amendment of Part 405 of Title 10 NYCRR.

Statutory authority: Public Health Law, sections 2800 and 2803

Subject: Hospital Pediatric Care.

Purpose: To amend pediatric provisions and update various provisions to reflect current practice.

Substance of proposed rule (Full text is posted at the following State website:www.health.ny.gov): This proposal will amend Part 405 (Hospitals – Minimum Standards), primarily with respect to pediatric provisions and also to update various provisions to reflect current practice. Hospitals, for the purposes of Part 405, pertain to general hospitals.

Proposed amendments to Section 405.1 (Introduction) specify that the requirements of Part 405 relating to patient care and services will apply to patients of all ages, including newborns, pediatric and geriatric patients.

Proposed amendments to Section 405.3 (Administration), which currently requires hospitals to provide to the State Education Department ("SED") a written report whenever enumerated professionals licensed by SED lose hospital employment or privileges for certain reasons, will require similar reporting to the Department of Health for certain individuals licensed by such Department.

Proposed amendments to Section 405.6 (Quality Assurance Program) will require hospital quality assurance processes to include a determination that the hospital is admitting only those patients for whom it has appropriate staff, resources and equipment and transferring those patients for whom the hospital does not have the capability to provide care, except under conditions of disasters or emergency surge that may require admissions to provide care to those patients.

A new subdivision (d) is added to Section 405.7 to require hospitals to post a Parent's Bill of Rights, setting forth the rights of patients, parents, legal guardians or other persons with decision-making authority to certain minimum protections required under other provisions of these regulations. In particular, the Parent's Bill of Rights would advise that patients may not be discharged from the hospital or the emergency room until any tests that could reasonably be expected to yield "critical value" results – results that suggest a life-threatening or otherwise significant condition such that it requires immediate medical attention – are completed and reviewed by medical staff and communicated to the patient, his or her parents or other decision-makers, as appropriate.

Proposed amendments to Section 405.9 (Admission/Discharge) specify that a hospital will be required to admit pediatric patients consistent with its ability to provide qualified staff, space and size appropriate equipment necessary for the unique needs of pediatric patients. If the hospital cannot meet these requirements, it will be required to develop criteria and policies and procedures for transfer of pediatric patients. This section also requires hospitals to develop policies and procedures enabling parents/guardians to stay with pediatric patients, and to permit at least one parent/guardian to remain with the patient at all times. Proposed amendments will also require hospitals to develop and implement written policies and procedures pertaining to review and communication of laboratory and diagnostic test/service results to the patient and, if the patient is not legally capable of making decisions, the patient's parent, legal guardian, health care agent or health care surrogate, as appropriate and subject to all applicable confidentiality laws and regulations. Such policies and procedures must ensure that no discharge will occur while critical value tests are pending so as to assure appropriate care is provided to the patient. Further, all communication with the patient, parent, legal guardian, etc. must be clear and understandable to the recipient. In addition, the hospital must ask the patient or the patient's representative for the name of the patient's primary care provider, if any, and forward lab results to such provider.

This proposal also updates Section 405.12 (Surgical Services), which currently requires hospitals to develop and implement effective written policies and procedures, to provide that such policies and procedures include the performance of surgical procedures, the maintenance of safety controls and the integration of such services with other related services of the hospital to protect the health and safety of the patients in accordance with generally accepted standards of medical practice and patient care. The amendments will also require hospitals to assure that the privileges of each practitioner performing surgery are commensurate with his or her training and experience. Precautions must be clearly identified in written policies and procedures specific to the surgical service and post anesthesia care unit ("PACU") including appropriate resuscitation, airway and monitoring equipment including a resuscitation cart with age and size appropriate medications, equipment and supplies.

Updates to Section 405.13 (Anesthesia Services), which currently require hospitals to develop and implement effective written policies and procedures on matters such as the administration of anesthetics, the maintenance of safety controls and the integration of such services with other related services of the hospital. Under the amendments, such policies and procedures will have to be reviewed and updated at least biennially. In addition, hospitals will have to establish clinical competencies that are relevant to the care provided and, at a minimum, include instruction in safety precautions, equipment usage and inspections, infection control requirements and any patients' rights requirements pertaining to surgical/anesthesia consents. The amendments further provide that all equipment and services provided must be age and size appropriate.

Updates to Section 405.14 (Respiratory Care Services) will provide that orders for respiratory care services, in addition to specifying the type, frequency and duration of treatment, and as appropriate, the type and dose of medication, the type of diluent, and the oxygen concentration, must be consistent with generally accepted standards of care. The amendments further provide that all equipment and services provided must be age and size appropriate.

Updates to Section 405.15 (Radiologic and Nuclear Medicine Services) will specify that care must be provided in accordance with generally accepted standards of practice. The amendments will also require that policies and procedures regarding imaging studies for newborns and pediatric patients must include standards for clinical appropriateness, appropriate radiation dose and beam collimation, image quality and patient shielding. In addition, a policy and procedure must be developed to ensure that the practitioner's order for an imaging study is specific to the body part(s) that are to be imaged. Quality improvement audits must verify that these policies and procedures are being followed and must include a review of the adequacy of diagnostic images and interpretations. Radiation safety principles must be adequate to ensure compliance with all generally accepted standards of practice as well as pertinent laws, rules and regulations. The amendments also provide that the chief of radiology, in conjunction with the radiation safety officer, must ensure that all practitioners who utilize ionizing radiation equipment within the hospital are properly trained in radiation safety procedures for patients of all ages.

The amendments to Section 405.1 also will update the megavoltage ("MEV") requirements for therapeutic radiology or radiation oncology services to provide that they utilize six or more MEV unit with a source-axis distance of 100 or more centimeters as the primary unit in a multi-unit radiation oncology service. In addition, as amended, the regulations will require each therapeutic radiology service to have full time New York State licensed radiation therapists sufficient to meet the needs of the service and also a New York State licensed radiation therapy physicist who will be involved in treatment, planning and dosimetry as well as calibrating the equipment. The amendments will also change a reference to an MEV unit so that it instead refers to a linear accelerator. A computed tomography ("CT") scanner must be available within the radiation therapy program that is equipped for radiation oncology treatment planning or arrangements must be made for access to a CT scanner on an as needed basis. Provisions must be made for access to a magnetic resonance imag-

ing ("MRI") scanner for treatment planning purposes on an as needed basis.

Updates to Section 405.17 (Pharmaceutical Services) will require hospital pharmacy directors, in conjunction with designated members of the medical staff, to ensure that for patients of all ages, weight must be measured in kilograms and that resources relating to drug interactions, drug therapies, side effects, toxicology, dosage, indications for use, and routes of administration are available to the professional staff. Pediatric dosing resources must include age and size appropriate fluid and medication administration and dosing. Dosing must be weight based and not exceed adult maximum dosage, or in emergencies, length based, with appropriate references for pediatric dosing available. The amendments will further require the director to ensure that the pharmacy quality assurance program include monitoring and improvement activities to identify, measure, prevent and/or mitigate adverse drug events, adverse drug reactions and medication errors in accordance with generally accepted standards and practices in the field of medication safety and quality improvement. All drugs and biologicals must be controlled and distributed in accordance with written policies and procedures to maximize patient safety and quality of care.

Updates to Section 405.19 (Emergency Services) provisions will require at least one clinician on every shift to have the skills to assess and manage a critically ill or injured pediatric patient and be able to resuscitate a child. The director of the hospital's emergency service, attending physicians, supervising nurses, registered professional nurses ("RNs"), physician assistants ("PAs") and nurse practitioners ("NPs") must satisfactorily complete and be current in Pediatric Advanced Life Support ("PALS") or have current training equivalent to PALS. Hospitals with less than 15,000 unscheduled emergency visits per year do not need to have the supervising or attending physician present, but such supervising or attending physician must be available within 30 minutes of "patient presentation" provided that at least one physician, NP, or PA is on duty in the emergency service 24 hours a day, seven days a week.

In addition, the amendments will require hospitals to develop and implement protocols specifying when supervising or attending physicians must be present. In no event shall a patient be discharged or transferred to another hospital, unless evaluated, initially managed, and treated as necessary by an appropriately privileged physician, PA or NP. Specifically, no discharge should occur while critical value tests are pending so as to assure appropriate care is provided. The amendments will also require hospitals to develop and implement written policies and procedures pertaining to review and communication of laboratory and diagnostic test/service results ordered for a patient receiving emergency services to the patient and, if the patient is not legally capable of making decisions, the patient's parent, legal guardian, health care agent or health care surrogate, as appropriate and subject to all applicable confidentiality laws and regulations. Further, policies and procedures must ensure that all communication with the patient, parent, legal guardian, etc. must be clear and understandable to the recipient. In addition, the hospital must ask the patient or the patient's representative for the name of the patient's primary care provider, if there is one, and lab results must be forwarded to such provider.

Section 405.20 (Outpatient Services) requires outpatient services, including ambulatory care services and extension clinics to be provided in a manner which safely and effectively meets the needs of all patients. Written policies must be in place for admission of patients whose postoperative status prevents discharge and necessitates inpatient admission to a hospital capable of providing the appropriate level of care.

Section 405.22 (Critical Care and Special Care Services) adds new provisions regarding Pediatric Intensive Care Unit (PICU) Services. A "PICU" is defined as a physically separate unit that provides intensive care to pediatric patients (infants, children and adolescents) who are critically ill or injured. It must be staffed by qualified practitioners competent to care for critically ill or injured pediatric patients. "Qualified practitioners" are practitioners functioning within his or her scope of practice according to State Education Law and who meets the hospital's criteria for competence, credentialing and privileging practitioners in the management of critically ill or injured pediatric patients. PICUs must be approved by the Department and the governing body must develop written policies and procedures for operation of the PICU in accordance with generally accepted standards of medical care for critically ill or injured pediatric patients. The PICU must have a minimum average annual pediatric patient number of 200/year. It must provide medical oversight for interhospital transfers of critically ill or injured patients during transfer to the receiving PICU.

The PICU must be directed by a board certified pediatric medical, surgical, anesthesiology or critical care/intensivist physician who must be responsible for the organization and delivery of PICU care and has specialized training and demonstrated competence in pediatric critical care. Such physician in conjunction with the nursing leadership responsible for the PICU must participate in administrative aspects of the PICU. All hospitals with PICUs must have a physician, notwithstanding emergency department staffing, in-house 24 hours per day who is available to provide bedside care to patients in the PICU. PICU physician and nursing staff must successfully complete and be current in pediatric advanced life support (PALS) or have current training equivalent to PALS.

The hospital must have an organized quality performance improvement program for PICU services and include monitoring of volume and outcomes, morbidity and all case mortality review, regular multidisciplinary conferences including all health professionals involved in the care of PICU patients. Failure to meet one or more regulatory requirements or inactivity in a program for a period of 12 months or more may result in actions, including, but not limited to, withdrawal of approval to serve as a PICU. No PICU can discontinue operation without first obtaining written approval from the department and must give written notification, including a closure plan acceptable to other department at least 90 days prior to planned discontinuance of PICU services. A hospital must notify the department in writing within 7 days of any significant changes in its PICU services, including, but not limited to: (a) any temporary or permanent suspension of services or (b) difficulty meeting staffing or workload requirements.

Section 405.28 (Social Services) is updated to current standards that care be provided under the direction of a qualified social worker who is licensed and registered by the New York State Education Department to practice as a licensed master social worker (LMSW) or licensed clinical social worker (LCSW), with the scope of practice defined in Article 154 of the Education Law.

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

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

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

Regulatory Impact Statement

Statutory Authority:

The authority for the promulgation of these regulations is contained in Public Health Law ("PHL") Sections 2800 and 2803 (2). PHL Article 28 (Hospitals), Section 2800 specifies that "Hospital and related services including health-related service of the highest quality, efficiently provided and properly utilized at a reasonable cost, are of vital concern to the public health. In order to provide for the protection and promotion of the health of the inhabitants of the state. . . , the department of health shall have the central, comprehensive responsibility for the development and administration of the state's policy with respect to hospital and related services. . . ."

PHL Section 2803(2) authorizes the Public Health and Health Planning Council ("PHHPC") to adopt and amend rules and regulations, subject to the approval of the Commissioner, to implement the purposes and provisions of PHL Article 28, and to establish minimum standards governing the operation of health care facilities.

Legislative Objectives:

The legislative objective of PHL Article 28 includes the protection of the health of the residents of the State by assuring the efficient provision and proper utilization of health services, of the highest quality at a reasonable cost.

Needs and Benefits:

These amendments are promulgated to update various Part 405 pediatric and general hospital provisions including surgical, anesthesia, radiology and pharmacy services. Pediatrics is a unique, distinct part of medicine which is very different than adult medicine. Historically, children have often been seen as small adults. This has changed over time and it is now recognized that certain areas of pediatric care such as emergency, critical care and medication dosing require specialized knowledge, skills and equipment.

Part 405 of Title 10 NYCRR sets forth general hospital minimum standards. In 2010, the New York State Emergency Medical Services for Children ("EMS-C") Advisory Committee recommended and the Department determined that Part 405 needed to be updated to address the unique needs of children. A comprehensive approach was necessary to make sure that hospitals are admitting children for whom it has appropriate staff, resources and equipment and that policies and procedures are in place for transferring those patients for whom the hospital does not have the capability to provide care, except under conditions of disasters and emergency surge situations. Many facilities that once had dedicated pediatric units have closed or reduced their units, resulting in a reduced focus on pediatric care. Currently, the pediatric provisions need strengthening as they do not specifically address minimum standards for pediatric critical or emergency care. Pediatric care has become much more sophisticated and requires highly trained staff with expertise in the particular requirements

for caring for children. In addition, various Part 405 subdivisions have been updated for all patients including surgical, anesthesia, radiologic and nuclear medicine, pharmaceutical and emergency services to reflect current practice.

The Department, in conjunction with the EMS-C Advisory Committee, carefully reviewed Part 405 of Title 10 and propose numerous updates and amendments. In particular, significant changes have been made to the Emergency, Radiology and Pharmacy provisions and new provisions are added regarding standards for Pediatric Intensive Care Units (PICUs). New provisions will require age appropriate equipment and supplies. The new provisions assure that personnel in the emergency department and pediatric intensive care unit have the skills to access and manage a critically ill or injured pediatric patient, including resuscitation. Changes in technology and equipment for diagnostic medical imaging and appropriate use of such equipment are addressed. Policies and procedures regarding imaging studies for newborns and pediatric patients are updated to include standards for clinical appropriateness, appropriate radiation dosage and beam collimation, image quality and patient shielding. Pharmacy and equipment requirements for pediatric patients are revised to assure age and size appropriate dosing. The regulations clarify that pediatric dosing must be weight based and all patients must be weighed in kilograms. Current regulations require Advanced Cardiac Life Support ("ACLS") training or current training equivalent to ACLS for adults but do not require Pediatric Advanced Life Support ("PALS") or current training equivalent to PALS for appropriate staff that will be caring for children within the hospital. These regulations address this inequity. This regulatory proposal attempts to strengthen minimum standards for the care of children that are flexible enough to fit the large tertiary care facilities as well as rural and community hospitals. This measure also requires that if laboratory and other diagnostic tests/services are ordered for a patient while receiving emergency services, the hospital must develop and implement written policies and procedures pertaining to the review and communication of the laboratory and diagnostic test/service results to the patient, the patient's parent, legal guardian or health care agent, and the patient's primary provider.

These regulations, requiring hospitals provide patients and their parents or other medical decision makers with critical information about the patient's care and to post a Parent's Bill of Rights, and another set of regulations requiring hospitals to adopt protocols to identify and treat sepsis, were inspired by the case of Rory Staunton, a 12-year old boy who died of sepsis in April of 2012. Both sets of regulations, together known as "Rory's Regulations," will help New York State set a "gold standard" for patient care.

Costs for the Implementation of and Continuing Compliance with these Regulations to the Regulated Entity:

Costs that may be incurred by the regulated parties could include PALS training, accommodations for parent(s) to stay with their child at all times, review and update of various policies and procedures, pharmacy requirements regarding weight based dosing and the requirement of a board certified pediatric medical, surgical, or anesthesiology critical care/intensivist physician who has demonstrated competence in pediatric critical care to direct PICU services. Regulated parties must also ensure that their equipment is age and size appropriate.

PALS certification costs can range from $0-$300. Currently there are grant funded opportunities for PALS certification. Accommodations for parents may be able to be arranged with existing resources, but could also require additional furnishings. What accommodation costs would be incurred depends on the hospital involved. Review and update of the various policies and procedures and the pharmacy requirements could be accomplished with existing staff imposing little or no additional cost to the regulated parties. The "average" salary of a board certified medical, surgical, pediatric, or anesthesia intensivist to direct the PICU would be approximately $187,192. Hospitals will need to inventory their equipment and supplies to ensure that they are size and age appropriate and provide accordingly. Pediatric dosing resources must include age and size appropriate fluid and medication administration dosing information if not already currently provided.

Cost to State and Local Government:

There is no anticipated fiscal impact to State or local government as a result of these regulations, except that hospitals operated by the State or local governments will incur minimal costs as discussed above.

Cost to the Department of Health:

There will be no additional costs to the Department associated with the implementation of this regulation. Existing staff will be utilized to conduct surveillance of the regulated parties and monitor compliance with these provisions.

Local Government Mandates:

Hospitals operated by State or local governments will be affected and be subject to the same requirements as any other hospital licensed under PHL Article 28.

Paperwork:

This measure will require facilities to develop various written policies and procedures with respect to: transfers of pediatric patients when unable to appropriately and safely care for them, enabling parents/guardians to stay with pediatric patients, assurance that staff privileges are commensurate with training and experience, assurance that various equipment is age and size appropriate, imaging studies and orders. In addition, monitoring and improvement activities to identify, measure, prevent or mitigate adverse drug events, and for a hospital that provides PICU services policies and procedures for the operation of the PICU in accordance with generally accepted standards of medical care for critically ill or injured pediatric patients.

For hospitals with less than 15,000 unscheduled emergency visits per year, the hospital must develop and implement protocols specifying when supervising or attending physicians must be present. (Such facilities must have at least one physician, nurse practitioner, or registered physician assistant on duty in the emergency service 24 hours a day, seven days a week).

Duplication:

These regulations will not conflict with any state or federal rules.

Alternative Approaches:

There are no viable alternatives to this regulatory proposal. All general hospitals must be able to admit pediatric patients consistent with its ability to provide qualified staff, size and age appropriate equipment necessary for the unique needs of pediatric patients. If the hospital cannot meet these requirements, it will be required to develop criteria and policies and procedures for transfer of pediatric patients.

Consideration was made when developing the Pharmaceutical Services provisions in Section 405.17, that for pediatric patients only weight must be measured in kilograms. Upon further consideration it was determined that it was more appropriate to require that weight be measured in kilograms for patients of all ages.

When developing the Critical Care and Special Care Services for provisions for Pediatric Intensive Care Unit (PICU) services in Section 405.22 the Department initially considered a minimum bed standard of six beds. Upon further consideration it was determined that a minimum standard would not be a bed standard but instead require that a PICU must have a minimum average annual pediatric patient number of 200/per year.

Federal Requirements:

These regulations will not conflict with any state or federal rules.

Compliance Schedule:

These regulations will take effect upon publication of a Notice of Adoption in the New York State Register, but general hospitals will have 90 days from such date to comply with these provisions.

Regulatory Flexibility Analysis

Effect of Rule:

These regulations will apply to the 228 general hospitals in New York State. A recent survey conducted by the Department determined that 32 hospitals in New York State currently have a pediatric intensive care unit ("PICU"). The proposed amendments will apply Statewide, including 18 general hospitals operated by local governments. These hospitals will not be affected in any way different from any other hospital. The operation of a PICU is not mandated by the State but is at the option of the hospital.

Compliance Requirements:

The literature supports the regulatory changes made to general hospital minimum standards with respect to pediatric care. These provisions specify that general hospitals in New York State must ensure that at least one clinician on every shift in the emergency department has the skills to assess and manage a critically ill or injured pediatric patient and be able to resuscitate a child. This standard is supported by the American Academy of Pediatrics (see Pediatrics 1995; 96:526). This measure also states that policies and procedures regarding imaging studies for newborns and pediatric patients must include standards for clinical appropriateness, appropriate radiation dosage and beam collimation, image quality and patient shielding. Medical imaging policies must provide age and weight-appropriate dosing for children receiving studies involving ionizing radiation as supported by the American Academy of Pediatrics and the American College of Emergency Physicians (Pediatrics 2009; 124:1223). Pediatric pharmacy resources must include age and size appropriate fluid and medication administration and dosing. Dosing must be weight based and weight must be measured in kilograms as recommended by the American Academy of Pediatrics; (Pediatrics 2003;111:1120). Pediatric Advanced Life Support (PALS) or equivalent training will be required for appropriate staff that will be caring for children in the hospital, a practice supported by the American Academy of (Pediatrics 1995;96:526).

The PICU shall have a medical director who has received special training and has demonstrated competence in pediatric critical care as recommended by the American Academy of Pediatrics and Society of Critical Care Medicine (Pediatrics 2004; 114: 1114). PICU medical and nursing directors shall be responsible for promoting and verifying pediatric

qualifications of staff, overseeing pediatric quality assurance and developing and reviewing PICU care policies consistent with recommendations of the American Academy of Pediatrics, Society of Critical Care Medicine, Pediatrics 2004; 114: 1114. PICUs must have a minimum average annual patient number of 200/year. This is consistent with the recommendation made in the American College of Surgeons' Resources for Optimal Care of the Injured Patient, 2006.

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.

Professional Services:

The majority of facilities have in-house staff that could make any required changes to the policies and procedures. Small facilities may contract with outside professional staff from the various disciplines to assist them.

Compliance Costs:

A hospital that wants to provide PICU services must have an intensivist who has received special training and has demonstrated competence in pediatric care to direct the PICU. Currently, the majority of PICUs in New York State already have an intensivist in their employ. According to JobsSalary.com, the average pediatric intensivist salary is $187,712, with a range from $100,651 to $280,000. PALS training ranges from $0-300.

Economic and Technological Feasibility:

This proposal is economically and technically feasible.

Minimizing Adverse Impact:

General hospitals will have 90 days from the effective date of these regulations to implement these provisions. In addition, at present, grant funding is available for PALS certification.

Small Business and Local Government Participation:

This proposal has been discussed and reviewed by the EMS-C Advisory Committee, the Greater New York Hospital Association ("GNYHA"), the Healthcare Association of New York State ("HANYS"), the Iroquois Hospitals Association and the State Hospital Pharmacy Association.

Rural Area Flexibility Analysis

Effect of Rule:

The provisions of these regulations will apply to general hospitals in New York State, including the 47 general hospitals located in rural areas of the State. These hospitals will not be affected in any way different from any other hospital.

Compliance Requirements:

Compliance requirements are applicable to those hospitals located in rural areas. Compliance will require the admission of pediatric patients only if qualified staff and appropriate equipment are available. Further, compliance will require the adoption and implementation of policies and procedures tailored to the pediatric patient related to surgery, anesthesia, respiratory care, radiologic and nuclear medicine, pharmacy, emergency medicine, etc. ensuring the pediatric patient is appropriately cared for by skilled staff with the appropriate equipment in the appropriate location.

Professional Services:

Professional services for hospitals in rural areas are not expected to be impacted as a result of these regulations differently than other hospitals.

Compliance Costs:

Costs for general hospitals in rural areas will be the same as for general hospitals in nonrural areas. Cost that may be incurred by the regulated parties could include PALS training, accommodations for parent(s) to stay with their child at all times, review and update of various policies and procedures, pharmacy requirements regarding weight based dosing and the requirement of a board certified pediatric medical, surgical, or anesthesiology critical care/intensivist physician who has demonstrated competence in pediatric critical care to direct PICU services. Regulated parties must also ensure that their equipment is age and size appropriate.

PALS certification costs can range from $0-$300. Currently there are grant funded opportunities for PALS certification. Accommodations for parents may be able to be arranged with existing resources, but could also require additional furnishings. What accommodation costs would be incurred depends on the hospital involved. Review and update of the various policies and procedures and the pharmacy requirements could be accomplished with existing staff imposing little or no additional cost to the regulated parties. The "average" salary of a board certified medical, surgical, pediatric, or anesthesia intensivist to direct the PICU would be approximately $187,192. Hospitals will need to inventory their equipment and supplies to ensure that they are size and age appropriate and provide accordingly. Pediatric dosing resources must include age and size appropriate fluid and medication administration dosing information if not already currently provided.

Minimizing Adverse Impact:

Adverse impact will be minimized through the provision of time sufficient to comply with the regulations. Hospitals will have a minimum of 90 days following adoption of these regulations to adopt and implement sepsis protocols and at least six months before information to inform risk adjusted mortality measures will have to be reported to the Department.

Rural Area Participation:

These regulations have been discussed with hospital associations that represent hospitals throughout the state, including those that are located in rural areas. The associations are supportive of this initiative.

Job Impact Statement

Nature of Impact:

These provisions will not have a significant impact on jobs. A PICU in any New York State general hospital must be directed by a board certified pediatric medical, surgical, anesthesiology or critical care/intensivist physician who must be responsible for the organization and delivery of PICU care. Such intensivist must have specialized training and demonstrated competence in critical care. Hospitals that want to provide PICU services may already have an intensivist to direct their unit.

Categories and Numbers Affected:

There are 32 hospitals in New York State the report that they have a PICU.

Regions of Adverse Impact:

There are no regions of adverse impact.

Minimizing Adverse Impact:

Hospitals will have 90 days from the effective date of these regulations to implement these provisions. In addition, at present, there is grant funding available for PALS certification.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Hospital Sepsis Protocols

I.D. No. HLT-07-13-00022-P

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

Proposed Action: Amendment of sections 405.2 and 405.4 of Title 10 NYCRR.

Statutory authority: Public Health Law, sections 2800 and 2803

Subject: Hospital Sepsis Protocols.

Purpose: Hospitals to adopt, implement and periodically update protocols for the early recognition and treatment of patients with severe septic shock.

Text of proposed rule: Paragraphs (6) and (7) of subdivision (f) of section 405.2 are amended and a new paragraph (8) is added to read as follows:

(f) Care of patients. The governing body shall require that the following patient care practices are implemented, shall monitor the hospital's compliance with these patient care practices, and shall take corrective action as necessary to attain compliance:

* * *

(6) hospitals which conduct, or propose to conduct, or otherwise authorize human research on patients or other human subjects shall adopt and implement policies and procedures pursuant to the provisions of Public Health Law, article 24-A for the protection of human subjects; [and]

(7) hospitals shall have available at all times personnel sufficient to meet patient care needs[.]; *and*

(8) hospitals shall have in place evidence-based protocols for the early recognition and treatment of patients with severe sepsis/septic shock that are based on generally accepted standards of care as required by subdivision (a) of section 405.4 of this Part.

New paragraphs (4), (5), (6), (7) and (8) are added to subdivision (a) of section 405.4 to read as follows:

405.4 Medical staff.

(a) Medical staff accountability. The medical staff shall be organized and accountable to the governing body for the quality of medical care provided to all patients.

* * *

(4) The medical staff shall adopt, implement, periodically update and submit to the Department evidence-based protocols for the early recognition and treatment of patients with sepsis, severe sepsis and septic shock ("sepsis protocols") that are based on generally accepted standards of care. Sepsis protocols must include components specific to the identification, care and treatment of adults and of children, and must clearly identify where and when components will differ for adults and for children. These protocols must include the following components:

(i) a process for the screening and early recognition of patients with sepsis, severe sepsis and septic shock;

(ii) a process to identify and document individuals appropriate for treatment through severe sepsis protocols, including explicit criteria defining those patients who should be excluded from the protocols, such as patients with certain clinical conditions or who have elected palliative care;

(iii) guidelines for hemodynamic support with explicit physiologic and biomarker treatment goals, methodology for invasive or non-invasive hemodynamic monitoring, and timeframe goals;

(iv) for infants and children, guidelines for fluid resuscitation with explicit timeframes for vascular access and fluid delivery consistent with current, evidence-based guidelines for severe sepsis and septic shock with defined therapeutic goals for children;

(v) a procedure for identification of infectious source and delivery of early antibiotics with timeframe goals; and

(vi) criteria for use, where appropriate, of an invasive protocol and for use of vasoactive agents.

(5) The medical staff shall ensure that professional staff with direct patient care responsibilities and, as appropriate, staff with indirect patient care responsibilities, including, but not limited to laboratory and pharmacy staff, are periodically trained to implement sepsis protocols required pursuant to paragraph (4) of this subdivision. Medical staff shall ensure updated training when the hospital initiates substantive changes to the protocols.

(6) Hospitals shall submit sepsis protocols required pursuant to paragraph (4) of this subdivision to the Department for review on or before July 1, 2013. Hospitals must implement these protocols no later than 45 days after receipt of a letter from the Department indicating that the proposed protocols have been reviewed and determined to be consistent with the criteria established in this Part. Hospitals must update protocols based on newly emerging evidence-based standards. Protocols are to be resubmitted at the request of the Department, not more frequently than once every two years unless the Department identifies hospital-specific performance concerns.

(7) Collection and Reporting of Sepsis Measures.

(i) The medical staff shall be responsible for the collection, use, and reporting of quality measures related to the recognition and treatment of severe sepsis for purposes of internal quality improvement and hospital reporting to the Department. Such measures shall include, but not be limited to, data sufficient to evaluate each hospital's adherence rate to its own sepsis protocols, including adherence to timeframes and implementation of all protocol components for adults and children.

(ii) Hospitals shall submit data specified by the Department to permit the Department to develop risk-adjusted sepsis mortality rates in consultation with appropriate national, hospital and expert stakeholders.

(iii) Such data shall be reported annually, or more frequently at the request of the Department, and shall be subject to audit at the discretion of the Department.

(8) Definitions. For the purposes of this section, the following terms shall have the following meanings:

(i) sepsis shall mean a proven or suspected infection accompanied by a systemic inflammatory response;

(ii) severe sepsis shall mean sepsis plus at least one sign of hypoperfusion or organ dysfunction; and

(iii) septic shock shall mean severe sepsis with persistent hypotension or cardiovascular organ dysfunction despite adequate IV fluid resuscitation.

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

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

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

Regulatory Impact Statement

Statutory Authority:

Public Health Law ("PHL") Section 2800 provides that "[h]ospital and related services including health-related service of the highest quality, efficiently provided and properly utilized at a reasonable cost, are of vital concern to the public health. In order to provide for the protection and promotion of the health of the inhabitants of the state. . ., the department of health shall have the central, comprehensive responsibility for the development and administration of the state's policy with respect to hospital related services. . ."

PHL Section 2803 authorizes the Public Health and Health Planning Council ("PHHPC") to adopt rules and regulations to implement the purposes and provisions of PHL Article 28, and to establish minimum standards governing the operation of health care facilities.

Legislative Objectives:

The legislative objectives of PHL Article 28 include the protection of the health of the residents of the State by promoting the efficient provision and proper utilization of high quality health services at a reasonable cost.

Needs and Benefits:

Sepsis is a range of clinical conditions caused by the body's systemic response to an infection and affects about 750,000 people in the U.S. each year. The mortality rate is alarming – between 20 percent and 50 percent – and the rate largely depends on how quickly patients are diagnosed and treated with powerful antibiotics to battle the bacteria racing through their systems.

In New York State the number of severe sepsis cases increased from 26,001 in 2005 to 43,608 in 2011 - an increase of 68%. Similarly, the number of sepsis cases in New York State increased from 71,049 in 2005 to 100,073 in 2011, an increase of 41%. Sepsis mortality is significant and ranges widely from one hospital to another. In New York, sepsis mortality ranges between 15% and 37%. A patient may have a greater chance of dying from sepsis if care is provided by an institution ill-prepared to deal with this illness or from providers not thoroughly trained in identifying and treating sepsis.

The likelihood of death following initial diagnosis of sepsis is more than 20%, and the window for administering effective treatment is short. Mortality rates from severe sepsis are on a similar scale to lung, breast, and colon cancer, and it is one of the leading causes of death in the intensive care unit. Sepsis kills more people than HIV/AIDS, prostate cancer, and breast cancer combined.

The 28-day mortality rate in sepsis patients is comparable to the 1960s hospital mortality rate for patients of acute myocardial infarction ("AMI"). Over recent years, there has been an improvement in the awareness and management of AMI, resulting in a decline in mortality, while sepsis remains an unacknowledged killer.

The number of severe sepsis cases is expected to grow at a rate of 1.5% annually, adding an additional one million cases per year in the United States alone by 2020. This will increase total mortality and increase the burden on health care resources. The increase is mainly due to the growing use of invasive procedures, immune system modifying therapies and increasing numbers of elderly and high-risk individuals, such as those with diabetes, cancer and HIV. Older people are at an increased risk of sepsis as they are more vulnerable to infections due to aging, comorbidities, use of invasive procedures, and problems associated with institutionalization. Individuals with diabetes, cancer, and HIV are at increased risk due to immune system and other dysfunction caused by their disease or its treatment.

Sepsis places a significant burden on health care resources, accounting for 40% of total ICU expenditures. Sepsis costs our health care system an estimated $17 billion annually, and the average cost of treating the condition is $50,000. (See http://www.nigms.nih.gov/Education/factsheet_sepsis.htm.)

The rapid diagnosis and management of sepsis is critical to successful treatment. The sepsis patient is usually already critically ill and requires immediate attention to avoid rapid deterioration; therefore, it is necessary to treat the patient at the same time as confirming the diagnosis. Due to the challenges of diagnosing and treating this complex condition, approximately 10% of sepsis patients do not receive prompt appropriate antibiotic therapy, which increases mortality by 10 to 15%.

In the absence of adoption of protocols as required by these regulations, it is estimated that New York will see dramatic increases in cases of sepsis and sepsis mortality as the numbers of persons who are at risk continue to increase.

Hospitals can significantly impact sepsis morbidity and mortality by adopting standard protocols. For example, since the implementation of Kaiser Permanente's Northern California sepsis program mortality has been reduced for patients admitted to hospitals with sepsis, by more than 40 percent—and saved more than 1,400 lives. Similarly, Regions Hospital in Minnesota reports that initiatives launched in 2005 led to more than a 60 percent drop in sepsis mortality by 2011, and Intermountain Health Care reports a reduction in its sepsis mortality rate from 25% to 9%, saving 85 lives and $38 million annually. (See Needles in a Haystack: Seeking Knowledge with Clinical Informatics, PwC Health Research Institute, 2012.)

In particular, these regulations will promote the early identification and treatment of sepsis at general hospitals by focusing on the following areas:

- Recognition of risk factors, signs and symptoms of sepsis;
- Resuscitation with rapid intravenous fluids and administration of antibiotics upon diagnosis of sepsis;
- Referral to appropriate clinicians and teams as appropriate;
- Measurement and evaluation of current practices for purposes of informing future policy; and
- Quality Improvement measures that will permit development and dissemination of best practices through clinical and administrative information sharing.

The Department of Health ("the Department") will publish guidance to assist facilities in developing protocols that include an appropriate process for screening all patients to ensure early recognition of patients with possible sepsis and, once possible sepsis has been documented, establishing clear timeframes for administration of antibiotics and full protocol implementation. At a conference of stakeholders, including hospital systems, convened by the Department in 2012, it emerged that the current best practice is to pursue administration of antibiotics and fluid resuscitation within one hour of a diagnosis of sepsis, with full implementation of sepsis protocols within 3 hours for severe sepsis and six hours for septic shock. Given continual advancements in medical research and practice, these timeframes could change and accordingly will be set forth in guidance which will be updated as appropriate.

These regulations, requiring hospitals to adopt protocols to identify and treat sepsis, and another set of regulations requiring hospitals to provide patients and their parents or other medical decision-makers with critical information about the patient's care and to post a Parent's Bill of Rights, were inspired by the case of Rory Staunton, a 12-year-old boy who died of sepsis in April of 2012. Both sets of regulations, together known as ''Rory's Regulations,'' will help New York State set a "gold standard" for patient care.

COSTS:

Costs for the Implementation of and Continuing Compliance with these Regulations to the Regulated Entity:

Costs to the regulated entities are expected to be minimal and to be primarily associated with the following: (a) adoption of and compliance with evidence-based protocols; (b) reporting information to inform risk-adjusted sepsis mortality measures; and (c) training staff to implement the sepsis protocols. It is likely that hospitals will realize overall cost savings as a result of early identification and treatment (see below).

In fact, many hospitals throughout the State are currently implementing sepsis initiatives. The Greater New York Hospital Association ("GNYHA") and the United Hospital Fund ("UHF") have launched a joint program called the "Strengthening Treatment and Outcomes for Patients Sepsis Collaborative;" the North Shore-LIJ Health System recently launched an education program to train emergency and critical care nurses on how to identify sepsis at its earliest stages and provide treatment to improve patient outcomes; and the Healthcare Association of New York State ("HANYS") has organized a collaborative to improve the identification and management of sepsis and test the value of collaborative improvement projects versus traditional medical and clinical staff education. This regulation will build on and support these initiatives going forward.

Research conducted nationally suggests the possibility of a significant return on investment. As noted, Intermountain Health Care in Utah has reported savings of $38 million per year due to its sepsis program, and reports more favorable reimbursement from insurers for identifying potential septic patients faster and treating them in the intensive care unit earlier. (See Needles in a Haystack: Seeking Knowledge with Clinical Informatics, PwC Health Research Institute, 2012.)

In New York State, Stony Brook University Medical Center ("SBUMC") reports that a recent campaign to reduce sepsis mortality was extremely successful, resulting in a 49 percent reduction in mortality and a decrease in length of stay for patients with severe sepsis. This resulted in a cost savings of more than $740,000 for the 153 severe sepsis patients at SBUMC in 2010. (See http://www.naph.org/Homepage-Sections/Explore/Innovations/Preventing-Hospital-Acquired-Conditions/Stony-Brook-Reduces-Sepsis-Mortality.aspx.) Similarly, a recent sepsis initiative at South Nassau Communities Hospital resulted in a 44% reduction in sepsis mortality (See HANYS Quality Institute, Healthcare Association of New York State, Leading the Quest for Quality 2011 Profiles in Quality and Patient Safety.) Similar savings to those reported by SBUMC are likely.

Costs to Local and State Government:

There is no anticipated fiscal impact to State or local government as a result of this regulation, except that hospitals operated by the State or local governments will incur minimal costs, offset by savings, as discussed above.

Costs to the Department of Health:

There will be minimal additional costs to the Department of Health associated with the following: review of protocols submitted by hospitals to the Department; general programmatic oversight; development of measures to evaluate the impact of these regulations as they relate to the adoption of evidence-based sepsis protocols; and creation of a data system for purposes of analysis and reporting.

Local Government Mandates:

Hospitals operated by State or local government will be affected and be subject to the same requirements as any other hospital licensed under PHL Article 28.

Paperwork:

Consistent with these regulations all hospitals will be required to submit evidence of the following:

(a) adoption of an evidence-based sepsis protocol initially and then once every two years after that.

(b) information sufficient to evaluate each hospital's adherence to its own sepsis protocol, including adherence to timeframes and implementation of all protocol components for adults and children;

(c) data, as specified by the Department, to permit the evaluation of risk-adjusted severe sepsis mortality rates.

Duplication:

These regulations do not conflict with any State or Federal rules. Implementation of these regulations represents the first time New York State has required that facilities submit indication of adherence to evidence-based protocols for the early detection and treatment of sepsis and to report outcomes (risk-adjusted mortality). Thus, there is no duplication.

Alternative Approaches:

There are no viable alternatives. Implementation of these regulations is predicated on strong evidence indicating the effectiveness of implementing evidence-based protocols. In addition to requiring that all hospitals throughout the State develop and implement evidence–based sepsis protocols, the regulations will require submission of data to the Department. This will allow the Department to monitor adherence to protocols, measure the impact of the protocols through risk-adjusted mortality statistics, and use the data and information obtained to inform the development of quality improvement initiatives.

Federal Requirements:

Currently there are no federal requirements regarding the adoption of sepsis protocols or for reporting adherence to protocols or risk adjusted mortality.

In December 2012, the National Quality Forum included a proposed measure of adherence to treatment bundles for patients treated for sepsis. This measure, which is currently under consideration, would focus on patients 18 years of age and older who present with symptoms of severe sepsis or septic shock who are eligible for the 3 hour (severe sepsis) and/or 6 hour (septic shock) early management bundle. The regulations proposed by the Department to measure adherence with established sepsis protocols will seek to be in alignment with the NQF measure when adopted.

Compliance Schedule:

These regulations will take effect upon publication of a Notice of Adoption in the New York State Register.

Regulatory Flexibility Analysis

Effect of Rule:

The provisions of these regulations will apply to the 228 general hospitals in New York State, including 18 general hospitals operated by local governments. Three general hospitals in the State are considered small businesses. These hospitals will not be affected in any way different from any other hospital.

Compliance Requirements:

Compliance requirements are applicable to those three hospitals considered small businesses as well as the 18 hospitals operated by local governments. Compliance will require: (a) adoption of and compliance with the required sepsis protocols; (b) training staff to implement the sepsis protocols; and (c) reporting information to inform risk-adjusted sepsis mortality measures.

Professional Services:

Professional services are not anticipated to be impacted as a result of the following: (a) reporting the adoption of and compliance with the required sepsis protocols; (b) training staff to implement the sepsis protocols; and (c) reporting information to inform risk-adjusted sepsis mortality measure.

Compliance Costs:

Compliance costs associated with these regulations will be minimal and will arise as a result of: (a) adopting and complying with evidence-based protocols; (b) reporting information to inform risk-adjusted Sepsis mortality measures; and (c) training staff to implement the sepsis protocols. This will apply to those hospitals (three) defined as small businesses.

Economic and Technological Feasibility:

It is economically and technologically feasible for small businesses to comply with these regulations.

Minimizing Adverse Impact:

Adverse impact will be minimized through the provision of time sufficient to comply with the regulations. More specifically impacted entities will have a minimum of 90 days following adoption of these regulations to have sepsis protocols in place and at least six months before information to inform risk adjusted mortality measures will have to be reported to the Department.

Small Business and Local Government Participation:

These regulations have been discussed with hospital associations that represent hospitals throughout the state, including those that are small businesses and operated by local governments, who are supportive of this initiative.

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 required.

Rural Area Flexibility Analysis

Effect of Rule:

The provisions of these regulations will apply to general hospitals in New York State, including 47 general hospitals located in rural areas of the State. These hospitals will not be affected in any way different from any other hospital.

Compliance Requirements:

Compliance requirements are applicable to those hospitals located in rural areas. Compliance will require: (a) adoption of and compliance with the required sepsis protocols; (b) training staff to implement the sepsis protocols; and (c) reporting information to inform risk-adjusted sepsis mortality measures.

Professional Services:

Professional services will not be impacted as a result of these regulations.

Compliance Costs:

Compliance costs associated with these regulations will be minimal and will arise as a result of: (a) adopting and complying with evidence-based protocols; (b) reporting information to inform risk-adjusted Sepsis mortality measures; and (c) training staff to implement the sepsis protocols. This will apply to those hospitals located in rural areas of New York State.

Minimizing Adverse Impact:

Adverse impact will be minimized through the provision of time sufficient to comply with the regulations. More specifically impacted entities will have a minimum of 90 days following adoption of these regulations to have sepsis protocols in place and at least six months before information to inform risk adjusted mortality measures will have to be reported to the Department.

Rural Area Participation:

These regulations have been discussed with hospital associations that represent hospitals throughout the state, including those that are located in rural areas, who are supportive of this initiative.

Job Impact Statement

Pursuant to the State Administrative Procedure Act (SAPA) section 201-a(2)(a), a Job Impact Statement for this amendment is not required because it is apparent from the nature and purposes of the proposed rules that they will not have a substantial adverse impact on jobs and employment opportunities.

Higher Education Services Corporation

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Tuition Assistance Program Award Determinations

I.D. No. ESC-07-13-00006-P

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

Proposed Action: This is a consensus rule making to repeal section 2202.7 of Title 8 NYCRR.

Statutory authority: Education Law, sections 667 and 655(4)

Subject: Tuition Assistance Program award determinations.

Purpose: To repeal section 2202.7 of Title 8 NYCRR.

Text of proposed rule: Repeal of section 2202.7 of Title 8 NYCRR

[§ 2202.7 Award determinations.

(a) Eligible undergraduate students attending degree-granting institutions who (i) are not financially independent; (ii) are financially independent and married; or (iii) have a dependent for income tax purposes, will have their awards determined as set forth in this subdivision.

(1) Base amounts. Base amounts will be the lesser of:

(i) $3,575 for recipients who first received awards in the 1993-1994 academic year or earlier; $4,125 for recipients who first received awards in the 1994-1995 through 1999-2000 academic years; $5,000 for recipients first receiving awards in the 2000-2001 academic year and thereafter; or

(ii) for the 2000-2001 academic year, 95 percent of tuition and for the 2001-2002 academic year and thereafter, 100 percent of tuition.

(2) Reductions based on income. Recipients will receive awards equal to the amounts established in paragraph (1) of this subdivision reduced by:

(i) 7 percent of income exceeding $7,000 for recipients with incomes equal to or exceeding $7,000, but less than $11,000; or

(ii) $280 + 10 percent of income exceeding $11,000 for recipients with incomes equal to or exceeding $11,000, but less than $18,000; or

(iii) $980 + 12 percent of income exceeding $18,000 for recipients with incomes equal to or exceeding $18,000, but not more than $80,000.

(iv) There shall be no reduction based on income for recipients with income less than $7,000.

(3) Additional reductions. Recipients who have received four or more semester payments, or the equivalent, will have their base amount reduced by:

(i) $150 for the 2000-2001 academic year; or

(ii) $100 for the 2001-2002 academic year and thereafter.

(4) Minimum awards.

(i) For the 2000-2001 and 2001-2002 academic years, recipients will not have their awards reduced below:

(a) $425 for recipients with incomes equal to or less than $60,000; or

(b) $325 for recipients with incomes equal to or less than $70,000, but more than $60,000; or

(c) $275 for recipients with incomes equal to or less than $80,000, but more than $70,000.

(ii) For the 2002-2003 academic year and thereafter, recipients will not have their awards reduced below $500.

(5) Maximum awards. Awards will not exceed the base amounts established in paragraph (1) of this subdivision.

(6) Maximum income. Applicants are ineligible for awards if their income exceeds $80,000.

(b) Eligible undergraduate students attending non-degree-granting institutions who (i) are not financially independent; or (ii) are financially independent and married; or (iii) have a dependent for income tax purposes, will have their awards determined as set forth in this subdivision.

(1) Base amount. Base amounts will be the lesser of:

(i) $800; or

(ii) for the 2000 - 2001 academic year, 95 percent of tuition and for the 2001 - 2002 academic year and thereafter, 100 percent of tuition.

(2) Reductions based on income. Recipients will receive awards equal to the amounts established in paragraph (1) of this subdivision reduced by:

(i) 7 percent of income exceeding $7,000 for recipients with incomes equal to or exceeding $7,000, but less than $11,000; or

(ii) $280 + 10 percent of income exceeding $11,000 for recipients with incomes equal to or exceeding $11,000, but not more than:

(a) $34,250 for recipients who first received awards in the 1988-1989 academic year or earlier; or

(b) $42,500 for recipients who first received awards in the 1989-1990, 1992-1993 and 1993-1994 academic years; or

(c) $50,500 for recipients who first received awards in the 1990-1991, 1991-1992 and 1994-1995 academic years and thereafter.

(d) There shall be no reduction based on income for recipients with income less than $7,000.

(3) Additional reductions. Recipients who have received four or more semester payments, or the equivalent, will have their base amount reduced by:

(i) $150 for the 2000-2001 academic year; or

(ii) $100 for the 2001-2002 academic year and thereafter.

(4) Minimum awards. Recipients will not have their awards reduced below $100.

(5) Maximum awards. Awards will not exceed the base amount established in paragraph (1) of this subdivision.

(6) Maximum income. Applicants are ineligible for awards if their income exceeds:

(i) $34,250 for recipients who first received awards in the 1988 -1989 academic year or earlier; or

(ii) $42,500 for recipients who first received awards in the 1989 -1990, 1992-1993 and 1993-1994 academic years; or

(iii) $50,500 for recipients who first received awards in the 1990-1991, 1991-1992, 1994-1995 academic years and thereafter.

(c) Eligible undergraduate students attending degree-granting institutions who are financially independent and single without a dependent for income tax purposes will have their awards determined as set forth in this subdivision.

(1) Base amounts. Base amounts will be the lesser of:

(i) $2,450 for recipients who first received awards in the 1991-1992 academic year or earlier; $2,575 for recipients who first received awards in the 1992-1993 and 1993-1994 academic years; $3,025 for recipients who first received awards in the 1994-1995 academic year and thereafter; or

(ii) for the 2000-2001 academic year, 95 percent of tuition and for the 2001-2002 academic year and thereafter, 100 percent of tuition.

(2) Reduction based on income. Recipients will receive awards equal to the amounts established in paragraph (1) of this subdivision reduced by 31 percent of income exceeding $3,000 for recipients with incomes equal to or exceeding $3,000, but not more than $10,000. There shall be no reduction based on income for recipients with income less than $3,000.

(3) Additional reductions. Recipients who have received four or more semester payments will have their base amount reduced by:

(i) $150 for the 2000-2001 academic year.

(ii) $100 for the 2001-2002 academic years and thereafter.

(4) Minimum awards.

(i) For the 2000-2001 and 2001-2002 academic years, recipients will not have their awards reduced below $425.

(ii) For the 2002-2003 academic year and thereafter, recipients will not have their awards reduced below $500.

(5) Maximum awards. Awards will not exceed the base amounts established in paragraph (1) of this subdivision.

(6) Maximum income. Applicants are ineligible for awards if their income exceeds $10,000.

(d) Eligible undergraduate students attending non-degree-granting institutions who are financially independent and single without dependents for income tax purposes will have their awards determined as set forth in this section.

(1) Base amounts. Base amounts will be the lesser of:

(i) $640; or

(ii) for the 2000-2001 academic year, 95 percent of tuition and for the 2001-2002 academic year and thereafter, 100 percent of tuition.

(2) Reduction based on income. Recipients will receive awards equal to the amount established in paragraph (1) of this section reduced by 31 percent of income exceeding $3,000 for recipients with incomes equal to or exceeding $3000, but not more than $10,000. There shall be no reduction based on income for recipients with income less than $3,000.

(3) Additional reductions. Recipients who have received four or more semester payments will have their base amount reduced by:

(i) $150 for the 2000-2001 academic year.

(ii) $100 for the 2001-2002 academic year and thereafter.

(4) Minimum awards. Recipients will not have their awards reduced below $100.

(5) Maximum awards. Awards will not exceed the base amount established in paragraph (1) of this subdivision.

(6) Maximum income. Applicants are ineligible for awards if their income exceeds $10,000.

(e) Eligible graduate students will have their awards determined as set forth in this section.

(1) Base amounts. Base amounts will be the lesser of:

(i) $550; or

(ii) for the 2000 - 2001 academic year, 95 percent of tuition and for the 2001 - 2002 academic year and thereafter, 100 percent of tuition.

(2) Reductions. Recipients will receive awards equal to the amount established in paragraph (1) of this subdivision reduced by:

(i) 7.7 percent of the income exceeding $2,000 for recipients with incomes equal to or exceeding $2,000, but not more than $20,000 and who (i) are not financially independent; (ii) are financially independent and married; or (iii) have a dependent for income tax purposes.

(ii) 26 percent of income exceeding $1,000 for recipients with incomes equal to or exceeding $1,000, but not more than $5,666 and who are financially independent and single without a dependent for income tax purposes.

(3) Minimum awards. Recipients will not have their awards reduced below $75.

(4) Maximum awards. Awards will not exceed the base amounts established in paragraph (1) of this subdivision.

(5) Maximum income. Applicants are ineligible for awards if their incomes exceed:

(i) $20,000 if they are not financially independent, are financially independent and married, or have a dependent for income tax purposes.

(ii) $5,666 if they are financially independent and single without a dependent for income tax purposes.]

Text of proposed rule and any required statements and analyses may be obtained from: Cheryl B. Fisher, NYS Higher Education Services Corporation, 99 Washington Avenue, Room 1315, Albany, NY 12255, (518) 474-5592, email: regcomments@hesc.ny.gov

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

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

Consensus Rule Making Determination

This statement is being submitted pursuant to subparagraph (i) of paragraph (b) of subdivision (1) of section 202 of the State Administrative Procedure Act and in support of New York State Higher Education Services Corporation's (HESC) Notice of Proposed Rule Making seeking to repeal section 2202.7 of Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR).

It is apparent from the nature and purpose of this rule that no person is likely to object to the adoption of the rule as written. Education Law § 667(3) sets forth, in sufficient detail, the amount of a Tuition Assistance Program (TAP) award based on several factors including, but not limited to, the applicant's level of study, post-secondary institution, income and the academic year the applicant first received an award. Section 667(3) also requires certain reductions to be made to a TAP award. Section 2202.7 of Title 8 of the NYCRR restates outdated provisions of this section of Education Law. It is unnecessary to amend the regulation since the statute is clear and comprehensive. Consequently, this rule would eliminate inconsistencies between the state and regulation.

Consistent with the definition of "consensus rule", as set forth in section 102(11) of the State Administrative Procedure Act, HESC has determined that this proposal, which repeals an outdated rule inconsistent with existing statute, is non-controversial and, therefore, no person is likely to object to its adoption.

Job Impact Statement

This statement is being submitted pursuant to subdivision (2) of section 201-a of the State Administrative Procedure Act and in support of the New York State Higher Education Services Corporation's (Corporation) Notice of Proposed Rulemaking seeking to repeal section 2202.7 to Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

It is apparent from the nature and purpose of this rule that it has no impact on jobs and employment opportunities. The rule repeals an outdated section of HESC's regulations that is inconsistent with provisions of the Education Law, which are clear and comprehensive.

The Corporation has determined that this rule will have no substantial adverse impact on any private or public sector jobs or employment opportunities and therefore a full Job Impact Statement is not necessary.

Long Island Power Authority

NOTICE OF ADOPTION

Recharge New York Power Program Provisions of the Authority's Tariff

I.D. No. LPA-46-12-00006-A

Filing Date: 2013-01-24

Effective Date: 2013-01-24

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

Action taken: The Long Island Power Authority (''Authority'') adopted a proposal to modify its Tariff for Electric Service with regard to the Recharge New York Power Program.

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

Subject: Recharge New York Power Program provisions of the Authority's Tariff.

Purpose: To amend the Tariff with regard to the Recharge New York Power Program.

Text or summary was published in the November 14, 2012 issue of the Register, I.D. No. LPA-46-12-00006-EP.

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

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

Revised Regulatory Impact Statement

A revised regulatory impact statement is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

Revised Regulatory Flexibility Analysis

A revised regulatory flexibility analysis is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

Revised Rural Area Flexibility Analysis
A revised rural area flexibility analysis is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
Revised Job Impact Statement
A revised job impact statement is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
Assessment of Public Comment
An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

NOTICE OF ADOPTION

Authority's Tariff for Electric Service

I.D. No. LPA-46-12-00007-A
Filing Date: 2013-01-24
Effective Date: 2013-01-24

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:
Action taken: The Long Island Power Authority ("Authority") adopted a proposal to modify its Tariff for Electric Service to make miscellaneous changes.
Statutory authority: Public Authorities Law, section 1020-f(z) and (u)
Subject: Authority's Tariff for Electric Service.
Purpose: To make miscellaneous Tariff revisions.
Text or summary was published in the November 14, 2012 issue of the Register, I.D. No. LPA-46-12-00007-P.
Final rule as compared with last published rule: No changes.
Text of rule and any required statements and analyses may be obtained from: Andrew McCabe, Long Island Power Authority, 333 Earle Ovington Blvd., Suite 403, Uniondale, NY 11553, (516) 222-7700, email: amccabe@lipower.org
Revised Regulatory Impact Statement
A revised regulatory impact statement is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
Revised Regulatory Flexibility Analysis
A revised regulatory flexibility analysis is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
Revised Rural Area Flexibility Analysis
A revised rural area flexibility analysis is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
Revised Job Impact Statement
A revised job impact statement is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
Assessment of Public Comment
An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

Division of the Lottery

NOTICE OF ADOPTION

To Make a Technical Correction to Remove an Incorrect Provision Related to Licensing Agents

I.D. No. LTR-49-12-00009-A
Filing No. 76
Filing Date: 2013-01-23
Effective Date: 2013-02-13

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:
Action taken: Repeal of section 2836-4.7(a) of Title 21 NYCRR.
Statutory authority: New York State Lottery for Education Law, sections 1604 and 1617-a
Subject: To make a technical correction to remove an incorrect provision related to licensing agents.
Purpose: To conform with NYS Lottery for Education Law Section 1617-a.
Text or summary was published in the December 5, 2012 issue of the Register, I.D. No. LTR-49-12-00009-P.
Final rule as compared with last published rule: No changes.
Text of rule and any required statements and analyses may be obtained from: Julie B. Silverstein Barker, Associate Attorney, New York Lottery, One Broadway Center, Schenectady, NY 12301-7500, (518) 388-3408, email: nylrules@lottery.ny.gov
Assessment of Public Comment
The agency received no public comment.

Department of Motor Vehicles

NOTICE OF ADOPTION

A2 Restriction

I.D. No. MTV-41-12-00016-A
Filing No. 90
Filing Date: 2013-01-28
Effective Date: 2013-02-13

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:
Action taken: Amendment of section 3.2 of Title 15 NYCRR.
Statutory authority: Vehicle and Traffic Law, sections 215(a) and 501(2)(c)
Subject: A2 Restriction.
Purpose: Imposes an A2 restriction on problem drivers.
Text or summary was published in the October 10, 2012 issue of the Register, I.D. No. MTV-41-12-00016-EP.
Final rule as compared with last published rule: No changes.
Text of rule and any required statements and analyses may be obtained from: Heidi Bazicki, Department of Motor Vehicles, 6 Empire State Plaza, Rm. 522A, Albany, NY 12228, (518) 474-0871, email: heidi.bazicki@dmv.ny.gov
Initial Review of Rule
As a rule that does not require a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2018, which is no later than the 5th year after the year in which this rule is being adopted.
Assessment of Public Comment
Comment: Several commenters state that the regulations are unduly harsh and do not warrant an emergency rulemaking.

Response: Driving while intoxicated continues to be a serious highway safety concern that requires strong and immediate action. Every year, more than 300 people are killed and over 6,000 are injured on New York's highways as the direct result of alcohol-related crashes. In 2010, 29% of fatal crashes were alcohol-related. Most telling is the increase in the number of crashes involving individuals with three or more alcohol-related convictions. In 2010, 28% of the alcohol-related crashes that resulted in injuries involved a driver with three or more alcohol-related convictions. Approximately, 17,500 drivers who had three or more such convictions were involved in crashes resulting in death or injury.

The data is compelling that recidivist DWI offenders pose a significant risk to the motoring public. Immediate action was necessary to prevent additional deaths and injuries to innocent motorists. The Commissioner of Motor Vehicles, in a rational exercise of discretion, adopted emergency regulations that will deny relicensure to persistently dangerous offenders who pose the highest risk to the general population.

Comment: Three ignition interlock device companies, LifeSafer.com, Consumer Safety Technology, Inc., and SmartStart Inc. suggest there is an inconsistency between the amendments to Sections 3.2(c)(4) and Section 136.5(b)(3) and (4). Section 3.2 provides that the Commissioner may require a person assigned the A2 restriction to install an ignition interlock device, whereas Section 136.5(b)(3) mandates the installation of the device and Section 136.5(b)(4) prohibits such installation.

Response: There is no inconsistency among the regulatory amendments. The amendments to Section 3.2 simply authorize the Commissioner to impose the restriction when appropriate, while Section 136.5 sets forth specific instances where such restriction is or is not required.

NOTICE OF ADOPTION

Dangerous Repeat DWI Offenders

I.D. No. MTV-44-12-00002-A
Filing No. 91
Filing Date: 2013-01-28
Effective Date: 2013-02-13

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

Action taken: Amendment of sections 132.1, 132.2 and 132.3 of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a), 510(3)(a) and (d)

Subject: Dangerous Repeat DWI Offenders.

Purpose: Establish hearings for person with repeat alcohol related offenses and other serious traffic offenses.

Text of final rule: Pursuant to the authority contained in Sections 215(a), 510(3)(a) and 510(3)(d) of the Vehicle and Traffic Law, the Commissioner of Motor Vehicles hereby amends the Regulations of the Commissioner of Motor Vehicles by adding a new section to read as follows:

****

PART 132

Dangerous Repeat Alcohol or Drug Offenders

132.1. Definitions. For the purposes of this Part:

(a) "Alcohol- or drug-related driving conviction or incident" means any of the following, not arising out of the same incident: (i) a conviction of a violation of section 1192 of the Vehicle and Traffic Law; (ii) a finding of a violation of section 1192-a of the Vehicle and Traffic Law; provided, however, that no such finding shall be considered after the expiration of the retention period contained in paragraph (k) of subdivision 1 of section 201 of the Vehicle and Traffic Law; (iii) a conviction of an offense under the Penal Law for which a violation of section 1192 of the Vehicle and Traffic Law is an essential element: or (iv) a finding of refusal to submit to a chemical test under section 1194 of the Vehicle and Traffic Law.

(b) "Dangerous repeat alcohol or drug offender" means:

(1) any driver who, within his or her lifetime, has five or more alcohol- or drug-related driving convictions or incidents in any combination; or

(2) any driver who, during the 25 year look back period, has three or four alcohol- or drug-related driving convictions or incidents in any combination and, in addition, has one or more serious driving offenses during the 25 year look back period.

(c) "High-point driving violation" means any violation for which five or more points are assessed on a violator's driving record pursuant to Section 131.3 of this subchapter.

(d) "Serious driving offense" means (i) a fatal accident; (ii) a driving-related Penal Law conviction; (iii) conviction of two or more high-point driving violations, other than the violation that forms the basis for the record review under Section 132.2 of this Part; or (iv) 20 or more points from any violations, other than the violation that forms the basis for the record review under Section 132.2 of this Part.

(e) "25 year look back period" means the period commencing on the date that is 25 years before the date of the commission of a high-point driving violation and ending on and including the date of the commission of such high-point driving violation.

****

132.2. Lifetime record review.

Upon receipt of notice of a driver's conviction for a high-point driving violation, the Commissioner shall conduct a review of the lifetime driving record of the person convicted. If such review indicates that the person convicted is a dangerous repeat alcohol or drug offender, the Commissioner shall issue a proposed revocation of such person's driver license. Such person shall be advised of the right to request a hearing before an administrative law judge, prior to such proposed revocation taking effect. The provisions of Part 127 of this Chapter shall be applicable to any such hearing.

****

132.3. Hearings.

The sole purpose of a hearing scheduled pursuant to this Part is to determine whether there exist unusual, extenuating and compelling circumstances to warrant a finding that the revocation proposed by the Commissioner should not take effect. In making such a determination, the administrative law judge shall take into account a driver's entire driving record. Unless the administrative law judge finds that such unusual, extenuating and compelling circumstances exist, the judge shall issue an order confirming the revocation proposed by the Commissioner.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 132.1(a), (b)(2) and (e).

Text of rule and any required statements and analyses may be obtained from: Heidi Bazicki, Department of Motor Vehicles, 6 Empire State Plaza, Room 522A, Albany, NY 12228, (518) 474-0871, email: heidi.bazicki@dmv.ny

Revised Regulatory Impact Statement

1. Statutory authority: Vehicle and Traffic Law (VTL) section 215(a) provides that the Commissioner of Motor Vehicles may enact rules and regulations that regulate and control the exercise of the powers of the Department. VTL section 510(3)(a) authorizes the Commissioner to permissively suspend or revoke a driver license upon a conviction of any violation of the VTL. VTL section 510(3)(d) authorizes the Commissioner to suspend or revoke a license if the holder of such license commits habitual and persistent violations of the VTL or any local ordinance, rule or regulation made by local authorities in relation to traffic.

2. Legislative objectives: VTL section 510(3)(a) and section 510(3)(d) authorize the Commissioner to suspend or revoke a driver's license for, respectively, a conviction of any violation of such law or for persistent violations of such law. The purpose of these provisions is to protect the motoring public by authorizing the suspension or revocation of a driver's license where the holder's prior record of driving violations indicates that such person may pose an unacceptable highway safety risk.

In accordance with the legislative objective of enhancing highway safety, this regulation would set forth specific circumstances under which the Commissioner would exercise her existing authority, after an opportunity to be heard, to impose appropriate sanctions against dangerous repeat alcohol or drug offenders in the interest of public safety.

3. Needs and benefits: This regulation establishes the parameters under which the Department of Motor Vehicles would exercise its existing authority to remove dangerous repeat alcohol or drug offenders from our highways. This regulation defines a dangerous repeat alcohol or drug offender as a person who has multiple alcohol- or drug-related convictions on his or her lifetime driving record and/or a combination of serious driving offenses (reckless driving, passing a stopped school bus, for example) in combination with other serious offenses and/or fatal accidents. If a person is convicted of a high-point violation, the Commissioner will conduct a review of the motorist's lifetime record to assess if such person is a dangerous repeat alcohol or drug offender. If the review finds he or she is such an offender, his or her driver's license may be taken away after an opportunity to be heard before an Administrative Law Judge.

This regulation strikes an appropriate and necessary balance between the due process needs of the motorist and the protection of all highway users by clearly establishing the grounds under which the Commissioner may revoke the licenses of persons who have multiple serious alcohol- or drug-related offenses on their driving record. Importantly, this regulation puts motorists on notice of the potential consequences of the commission and/or conviction of the any of the offenses/incidents set forth in this proposed rule.

In response to comments on the proposed rule, the Commissioner has made three non-substantive changes to the final rule. First, section 132.1(a) has been revised to make clear that a zero tolerance finding (VTL section 1192-a) will not be considered after the expiration of the retention period contained in VTL section 201(1)(k). Second, a new subdivision (e) has been added to section 132.1 in order to define the term "25 year look back period." Third, the 25 year look back period is now used as the measuring period in section 132.1(b)(2) for identifying drivers who have a combination of alcohol- or drug-related driving convictions or incidents and serious driving offenses as "dangerous repeat alcohol or drug offenders." These changes do not represent a change in policy and are made solely to clarify the rule for the regulated parties.

4. Costs: There are no costs associated with this proposal to the State or local governments.

5. Local government mandates: The proposal does not impose any mandates on local governments.

6. Paperwork: The proposal does not impose any additional paper requirements on the Department.

7. Duplication: This proposal does not duplicate, overlap or conflict with any relevant rule or legal requirement of the State and federal governments.

8. Alternatives: A no action alternative was not considered.
9. Federal standards: The proposal does not exceed any minimum standards of the federal government for the same or similar subject areas.
10. Compliance schedule: Compliance is immediate.

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

Although changes were made to the proposal, the changes do not necessitate revision to the previously published Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement.

Assessment of Public Comment

Comment: The Department received comments from the New York State Defenders Association ("NYSDA") requesting clarification of certain terms used in Part 132.

Response: Fatal accident: This refers to an accident that results in a fatality. Although the Department does not assign fault for an accident, there are instances where an accident is not recorded on a motorist's record. For example, if the Department receives information that the motorist was parked on the side of the road with the motor off and was hit by another vehicle, it is clear that such motorist had no role in causing the accident. Therefore, such an accident would not be recorded on the driving record. The Department will consider only accidents that occur in this State.

Driving-related Penal Law offenses: These are Penal Law offenses where operation of a motor vehicle is essential to the offense but is not necessarily needed to be an essential element of the offense. Occasionally, a court will send a Penal Law conviction to the Department, where operation of a motor vehicle is not an essential element of the offense, but where the court makes clear that operation of the vehicle was essential to the crime and, consequently, requests that we revoke the license pursuant to Vehicle and Traffic Law section 510(2)(a), where the Department must revoke a license for a "homicide or assault arising out of the operation of a motor vehicle."

Calculation of points: In assessing whether two five-point violations or 20 or more points should be counted as serious driving offenses, the Department will not "reduce" points if a motorist has completed the Point Insurance Reduction Program. Completion of a PIRP course serves to reduce the number of points to determine whether someone is deemed a persistent violator (accumulates 11 or more points within 18 months) and, therefore, is subject to permissive administrative action by the Department.

High-point driving violation: The high-point driving violation is assessed for one violation of the law. Although such violations will generally involve New York State offenses, the Department has compacts with both Ontario and Quebec. As part of those compacts, the Department assigns points for certain violations committed by New York State licensees in those provinces, such as speeding, passing a stopped school bus, reckless operation, and proceeding through a red light or stop sign.

Comment: NYSDA asks about the length of the revocation period imposed pursuant to Part 132.

Response: Pursuant to Vehicle and Traffic Law section 510(6)(g), the license would be revoked for a minimum of 30 days, after which the person could reapply for relicensure pursuant to Part 136. Such person's application would be subject to the criteria set forth in Part 136.

As a rule that does not require a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2018, which is no later than the 5th year after the year in which this rule is being adopted.

Public Service Commission

NOTICE OF ADOPTION

Adopting a Standard Annual Report Format

I.D. No. PSC-15-12-00009-A
Filing Date: 2013-01-23
Effective Date: 2013-01-23

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

Action taken: On 1/17/13, the PSC adopted an order approving annual reporting requirements for companies subject to lightened ratemaking regulation.

Statutory authority: Public Service Law, sections 5(1)(b), 65(1), (2), (3), 66(6) and 80(5)

Subject: Adopting a standard annual report format.

Purpose: To approve the adoption of a standard annual report format.

Substance of final rule: The Public Service Commission, on January 17, 2013, adopted an order approving a standard annual report format for companies subject to lightened ratemaking regulation devised to accommodate their particular circumstances for annual reporting requirements, subject to the terms and conditions set forth in this order.

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

Text of rule may be obtained from: Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: deborah.swatling@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(11-M-0294SA1)

NOTICE OF ADOPTION

Budgets and Targets for EEPS Programs

I.D. No. PSC-19-12-00016-A
Filing Date: 2013-01-25
Effective Date: 2013-01-25

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

Action taken: On 1/17/13, the PSC adopted an order approving in part and denying in part, Central Hudson Gas & Electric Corp.'s April 2, 2012 petition to modify its EEPS Residential Gas HVAC, Small Business Electric & Mid-Size Business Programs.

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

Subject: Budgets and targets for EEPS Programs.

Purpose: To reallocate budgets and targets between electric Small Business and Mid-Size Commercial Business programs.

Substance of final rule: The Public Service Commission, on January 17, 2013, adopted an order approving in part and denying in part, Central Hudson Gas & Electric Corporation's (Central Hudson) petition to modify its Residential Gas HVAC, Small Commercial Electric and Mid-Size Electric Programs for the years 2012-2015, subject to the terms and conditions set forth in this order.

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

Text of rule may be obtained from: Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: deborah.swatling@dps.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(07-M-0548SA50)

NOTICE OF ADOPTION

Amendments to PSC No. 1 — Electricity Effective February 1, 2013, to Increase Its Annual Revenues by $141,430 or 4.7%

I.D. No. PSC-28-12-00008-A
Filing Date: 2013-01-24
Effective Date: 2013-01-24

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

Action taken: On 1/17/13, the PSC adopted an order approving, with modifications, the Hamilton Municipal Utilities Commission's amendments to PSC No. 1 — Electricity effective February 1, 2013, to increase its total annual electric revenues by $141,430 or 4.7%.

Statutory authority: Public Service Law, section 66(12)

Subject: Amendments to PSC No. 1 — Electricity effective February 1, 2013, to increase its annual revenues by $141,430 or 4.7%.

Purpose: To approve the amendments to PSC No. 1 — Electricity effective February 1, 2013, to increase its annual revenues by $141,430 or 4.7%.

Substance of final rule: The Public Service Commission, on January 17, 2013, adopted an order approving, with modifications, the Hamilton Municipal Utilities Commission's amendments to PSC No. 1 — Electricity, effective February 1, 2013, to increase its annual revenues by $141,430 or 4.7%, subject to the terms and conditions set forth in this order.

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

Text of rule may be obtained from: Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: deborah.swatling@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(12-E-0286SA1)

NOTICE OF ADOPTION

Approval to Eliminate the 350kW Cap

I.D. No. PSC-36-12-00008-A

Filing Date: 2013-01-25

Effective Date: 2013-01-25

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

Action taken: On 1/17/13, the PSC adopted an order approving Central Hudson Gas & Electric Corp.'s May 15, 2012 petition to remove the 350kW cap in its Mid-Size Commercial Electric program to provide energy efficiency measures.

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

Subject: Approval to eliminate the 350kW cap.

Purpose: To approve elimination of the 350kW cap from Commercial Electric programs.

Substance of final rule: The Public Service Commission, on January 17, 2013, adopted an order approving Central Hudson Gas & Electric Corporation's (Central Hudson) petition to eliminate the 350 kW eligibility cap from its Commercial Electric programs, subject to the terms and conditions set forth in this order.

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

Text of rule may be obtained from: Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: deborah.swatling@dps.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(07-M-0548SA72)

NOTICE OF ADOPTION

Adopting Emergency Rule As a Permanent Rule

I.D. No. PSC-47-12-00004-A

Filing Date: 2013-01-23

Effective Date: 2013-01-23

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

Action taken: On 1/17/13, the PSC adopted an order approving an emergency rule as a permanent rule for a temporary waiver and suspension of late payment charges due to payment barriers caused by Hurricane Sandy.

Statutory authority: Public Service Law, sections 30, 51, 65, 66, 78, 79 and 80

Subject: Adopting emergency rule as a permanent rule.

Purpose: To approve the adoption of the emergency rule as a permanent rule.

Substance of final rule: The Public Service Commission, on January 17, 2013, adopted an order approving an emergency rule as a permanent rule for the temporary waiver and suspension of late payment barriers through December 15, 2012 caused by Hurricane Sandy, subject to the terms and conditions in this order.

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

Text of rule may be obtained from: Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: deborah.swatling@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(12-M-0501EA1)

NOTICE OF ADOPTION

Adopting Emergency Rule As a Permanent Rule

I.D. No. PSC-47-12-00005-A

Filing Date: 2013-01-23

Effective Date: 2013-01-23

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

Action taken: On 1/17/13, the PSC adopted an order approving an emergency rule as a permanent rule for a waiver of 16 NYCRR, section 261.53 until November 15, 2012 to facilitate the restoration of gas service disruptions caused by Hurricane Sandy.

Statutory authority: Public Service Law, sections 4, 65 and 66

Subject: Adopting emergency rule as a permanent rule.

Purpose: To approve the adoption of the emergency rule as a permanent rule.

Substance of final rule: The Public Service Commission, on January 17, 2013, adopted an order approving an emergency rule as a permanent rule for the temporary waiver of 16 NYCRR Section 261.53 until November 15, 2012 to facilitate restoration of gas service related to disruptions caused by Hurricane Sandy, subject to the terms and conditions in this order.

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

Text of rule may be obtained from: Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: deborah.swatling@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(12-G-0500EA1)

NOTICE OF ADOPTION

Adopting Emergency Rule As a Permanent Rule

I.D. No. PSC-47-12-00006-A

Filing Date: 2013-01-23

Effective Date: 2013-01-23

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

Action taken: On 1/17/13, the PSC adopted an order approving an emergency rule as a permanent rule for the temporary waiver of certain requirements of 16 NYCRR, Section 255.604 concerning ''Operator Qualification''.

Statutory authority: Public Service Law, sections 5, 65 and 66

Subject: Adopting emergency rule as a permanent rule.

Purpose: To approve the adoption of emergency rule as a permanent rule.

Substance of final rule: The Public Service Commission, on January 17, 2013, adopted an order approving emergency rule as a permanent rule for

the temporary waiver, until November 15, 2012, of certain provisions of 16 NYCRR Section 255.604 concerning "Operator Qualification" to facilitate Hurricane Sandy utility restoration efforts, subject to the terms and conditions in this order.

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

Text of rule may be obtained from: Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: deborah.swatling@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(12-G-0504EA1)

NOTICE OF ADOPTION

Authorizing the Changes to the Renewable Portfolio Standard As it Relates to the Anaerobic Digester Generation Development

I.D. No. PSC-47-12-00008-A

Filing Date: 2013-01-23

Effective Date: 2013-01-23

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

Action taken: On 1/17/13, the PSC adopted an order authorizing New York State Energy Research and Development Authority the increase of maximum project incentive for the anaerobic digester gas-to-electricity program under the Renewable Portfolio Standard.

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

Subject: Authorizing the changes to the Renewable Portfolio Standard as it relates to the anaerobic digester generation development.

Purpose: To approve the authorization of changes to the RPS as it relates to the anaerobic digester generation development.

Substance of final rule: The Public Service Commission, on January 17, 2013, adopted an order authorizing New York State Energy Research and Development Authority (NYSERDA) to increase the maximum project incentive under the anaerobic digester gas-to-electricity program in the Renewable Portfolio Standard (RPS) from $1 million up to $2 million per installation, subject to the terms and conditions of this order.

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

Text of rule may be obtained from: Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: deborah.swatling@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(03-E-0188SP35)

NOTICE OF ADOPTION

Adopting Emergency Rule As a Permanent Rule

I.D. No. PSC-49-12-00001-A

Filing Date: 2013-01-23

Effective Date: 2013-01-23

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

Action taken: On 1/17/13, the PSC adopted an order approving an emergency rule as a permanent rule for a temporary waiver of certain other requirements of 16 NYCRR, Section 255.604 concerning ''Operator Qualification''.

Statutory authority: Public Service Law, sections 5, 65 and 66

Subject: Adopting emergency rule as a permanent rule.

Purpose: To approve the adoption of emergency rule as a permanent rule.

Substance of final rule: The Public Service Commission, on January 17, 2013, adopted an order approving emergency rule as a permanent rule for the temporary waiver of certain other requirements of 16 NYCRR Section 255.604 concerning "Operator Qualification" to facilitate Hurricane Sandy utility restoration efforts, subject to the terms and conditions in this order.

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

Text of rule may be obtained from: Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: deborah.swatling@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(12-G-0504EA2)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Approval of the Transfer, from Kodak to RED, of a Utility System at the Eastman Business Park, and Other Related Relief

I.D. No. PSC-07-13-00016-P

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

Proposed Action: The Commission is considering a petition from Eastman Kodak Company (Kodak) and RED-Rochester LLC (RED) requesting approval of the transfer, from Kodak to RED, of a utility system at the Eastman Business Park, and other related relief.

Statutory authority: Public Service Law, section 5(1)(b), (c) and (f), 64, 65, 66, 67, 68, 69, 69-a, 70, 71, 72, 72-a, 78, 79, 80, 81, 82, 82-a, 83, 84, 85, 89-a, 89-b, 89-c, 89-d, 89-e, 89-f, 89-g, 89-h, 89-i, 89-j, 105-114, 114-a, 115, 117, 118, 119-b, 119-c

Subject: Approval of the transfer, from Kodak to RED, of a utility system at the Eastman Business Park, and other related relief.

Purpose: Consideration of the transfer, from Kodak to RED, of a utility system at the Eastman Business Park, and other related relief.

Substance of proposed rule: The Public Service Commission is considering a petition filed on January 22, 2013 by Eastman Kodak Company (Kodak) and RED-Rochester LLC (RED) requesting approval of: the transfer, from Kodak to RED, of Kodak's electric, gas, steam and water utility system located at the Eastman Business Park in the City of Rochester and the Town of Greece; the transfer to RED of Kodak's Certificates of Public Convenience and Necessity authorizing the provision of regulated utility service; and, RED's proposals for financing the transfer transaction. Kodak and RED also ask that RED be granted continuation of lightened and incidental regulation upon completion of the transfers and that Kodak be authorized, to the extent necessary, to engage in the submetering of electricity and gas to certain of its tenants. The Commission may adopt, reject or modify, in whole or in part, the relief proposed and may resolve related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website http://www.dps.ny.gov/f96dir.htm. For questions, contact: Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: Deborah.Swatling@dps.ny.gov

Data, views or arguments may be submitted to: Jeffrey C. Cohen, Acting Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 408-1978, email: secretary@dps.ny.gov

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

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

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

(13-M-0028SP1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

The Modification of a Prior Order Concerning the Treatment of Funds Received from a Third Party

I.D. No. PSC-07-13-00017-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 modify a prior order requiring The Chaffee Water Works Company to turn over to ratepayers money received from an outside source to instead require the money to be used to reduce the principle of a loan from the EFC.

Statutory authority: Public Service Law, section 89-c

Subject: The modification of a prior order concerning the treatment of funds received from a third party.

Purpose: To decide whether to modify a prior order concerning the treatment of funds received from a third party.

Substance of proposed rule: On October 14, 2010, the Public Service Commission (Commission) issued an order establishing rates for The Chaffee Water Works Company (Chaffee). The order also addressed the treatment of funds Chaffee would be receiving from Gernatt Asphalt Products Inc. (Gernatt) as part of Gernatt's operation of a quarry near Chaffee's property. The order required Chaffee to use the funds to reimburse its ratepayers for a surcharge used to repay a loan from the Environmental Facilities Corporation (EFC), which was used to reconstruct Chaffee's water system. Chaffee was to collect the surcharge from ratepayers on a quarterly basis and then refund the surcharge amount at the end of the year.

EFC has informed Department of Public Service Staff that this arrangement violates the financing agreement between EFC and Chaffee. Under that agreement, Chaffee is required to turn over all third-party funds, such as the Gernatt money, to EFC to reduce the loan principal.

The Commission is considering whether to modify its 2010 order to require Chaffee to comply with its financing agreement with EFC.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website http://www.dps.ny.gov/f96dir.htm. For questions, contact: Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: Deborah.Swatling@dps.ny.gov

Data, views or arguments may be submitted to: Jeffrey C. Cohen, Acting Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 408-1978, email: secretary@dps.ny.gov

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

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

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

(08-W-1407SP2)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Whether to Permit the Use of the Rosemount 8800 Series Vortex Flowmeter

I.D. No. PSC-07-13-00018-P

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

Proposed Action: The PSC is considering a petition filed by Consolidated Edison Company of New York, Inc. for the approval to use the Rosemount 8800 Series Vortex Flowmeter manufactured by Rosemount, Eden Prairie, Minnesota.

Statutory authority: Public Service Law, section 80(10)

Subject: Whether to permit the use of the Rosemount 8800 Series Vortex Flowmeter.

Purpose: To permit steam utilities in New York State to use the Rosemount 8800 Series Vortex Flowmeter.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny, or modify, in whole or part, the petition filed by Consolidated Edison Company of New York, Inc., to use the Rosemount 8800 Series Vortex Flowmeter in steam meter applications.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website http://www.dps.ny.gov/f96dir.htm. For questions, contact: Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: deborah.swatling@dps.ny.gov

Data, views or arguments may be submitted to: Jeffrey C. Cohen, Acting Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 408-1978, email: secretary@dps.ny.gov

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

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

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

(13-S-0027SP1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Monthly Charge for Cellular Communications

I.D. No. PSC-07-13-00019-P

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

Proposed Action: The Commission is considering a filing by Central Hudson Gas & Electric Corporation proposing revisions to the Company's rates, charges, rules and regulations contained in P.S.C. No. 15- Electricity regarding the monthly charge for cellular communications.

Statutory authority: Public Service Law, section 66(12)

Subject: Monthly charge for cellular communications.

Purpose: To modify the monthly charge applicable to Service Classification Nos. 3 and 13 customers with cellular meters.

Substance of proposed rule:

The Commission is considering whether to approve, modify or reject, in whole or in part, a proposal filed by Central Hudson Gas & Electric Corporation to modify the incremental monthly charge applicable to Service Classifications No.3 – Large Power Primary Service and No. 13 – Large Power Substation and Transmission Service customers with cellular meters. The filing has a proposed effective date of May 1, 2013. The Commission may resolve related matters and may apply its decision here to other companies.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website http://www.dps.ny.gov/f96dir.htm. For questions, contact: Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: deborah.swatling@dps.ny.gov

Data, views or arguments may be submitted to: Jeffrey C. Cohen, Acting Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 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-0033SP1)

Racing and Wagering Board

NOTICE OF EXPIRATION

The following notice has expired and cannot be reconsidered unless the Racing and Wagering Board publishes a new notice of proposed rule making in the NYS *Register.*

Testing of Horses in a Claiming Race

I.D. No.	Proposed	Expiration Date
RWB-04-12-00001-P	January 25, 2012	January 24, 2013

Department of State

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Address Confidentiality Program

I.D. No. DOS-07-13-00002-EP
Filing No. 78
Filing Date: 2013-01-23
Effective Date: 2013-01-23

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

Proposed Action: Addition of Part 134 to Title 19 NYCRR.

Statutory authority: Executive Law, section 108

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

Specific reasons underlying the finding of necessity: This emergency rule is necessary to further implement the Address Confidentiality Program required by Executive Law § 108.

Subject: Address Confidentiality Program.

Purpose: To implement the Address Confidentiality Program required by Executive Law Section 108.

Substance of emergency/proposed rule (Full text is posted at the following State website:www.dos.ny.gov): The new 19 NYCRR part 134 sets forth the practices and procedures of the Secretary of State relative to Executive Law section 108, Address Confidentiality Program ("ACP"). The proposed regulations would implement the ACP statute by defining key terms and establishing rules for applications, cancellation appeals, certification and training of application assistants, handling of confidential information and waiver requests by state and local agencies, agency release of participant information and acceptance of service of process by the Secretary of State.

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 April 22, 2013.

Text of rule and any required statements and analyses may be obtained from: Gary M. Trechel, Department of State, One Commerce Plaza, 99 Washington Ave., Albany, NY 12231, (518) 473-2278, email: gary.trechel@dos.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.

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

Regulatory Impact Statement

1. Statutory authority:

Executive Law § 108 (L. 2011, ch. 502, as amended by S.7638, L. 2012, ch. 491) requires the Department of State to establish an "Address Confidentiality Program" ("ACP") and directs the Secretary of State to promulgate rules and regulations to implement the program consistent with the statute.

2. Legislative objectives:

The Legislature enacted legislation to establish the ACP in order to provide additional protections for victims of domestic violence. As required by Executive Law § 108, the ACP will provide a substitute address for victims of domestic violence, and their household members, who have left their homes due to safety concerns, with the ACP receiving mail for and forwarding it to program participants. The legislation requires state and local government agencies to accept the ACP substitute address (private entities may, but are not required to do so), and allows the Secretary of State to grant waivers to agencies under narrowly defined circumstances set forth in the statute. The legislative sponsors have indicated that they view the statute as authorizing waivers in only very limited circumstances in order to reduce the likelihood that a program participant's actual address would be disclosed.

The proposed regulations would implement the ACP statute by defining key terms and establishing rules for applications, cancellation appeals, certification and training of application assistants, handling of waiver requests by state and local agencies, releasing participant information and accepting of service of process by the Secretary of State.

3. Needs and benefits:

These proposed/emergency regulations implement Executive Law § 108.

4. Costs:

These proposed/emergency regulations do not impose any additional costs beyond the requirements of Executive Law § 108. The costs to comply with Executive Law § 108 will be minimal, and will fall primarily on state agencies.

5. Local government mandates:

Executive Law § 108 requires all local government agencies to accept the ACP substitute address unless they have received waivers from the Secretary of State that would allow them to confidentially maintain actual address information for program participants. These proposed/emergency regulations implement this statute, including defining a process for requesting waivers, but do not impose additional requirements.

6. Paperwork:

These proposed/emergency regulations do not impose any reporting requirements.

7. Duplication:

These proposed/emergency regulations do not duplicate any existing requirements of the state and federal governments.

8. Alternatives:

No significant alternatives were considered because the statute requires promulgation of rules and regulations.

9. Federal standards:

The federal government does not have any minimum standards for this or similar programs.

10. Compliance schedule:

State and local government agencies are required to accept an ACP substitute address only when ACP participants personally request that they do so. The ACP began accepting participant applications upon the approval of S.7638 of 2012 (L. 2012, ch. 491, amending Executive Law § 108).

Regulatory Flexibility Analysis

1. Effect of rule:

Executive Law § 108 requires all state and local government agencies to accept the Address Confidentiality Program ("ACP") substitute address provided to participating domestic violence victims and household members. This new 19 NYCRR Part 134 will further implement this statutorily-required program.

2. Compliance requirements:

Local governments, including those in rural areas, are required to accept the ACP substitute address unless they have received waivers from the Secretary of State. Acceptance of the substitute address may require modest changes to some recordkeeping processes, the extent of which will vary depending on the nature of the implicated government agency records. Government agencies that opt to seek waivers to confidentially maintain actual address information for ACP participants will be required to prepare and submit applications to the Secretary of State.

3. Professional services:

Compliance with 19 NYCRR Part 134 is not expected to require any local government to seek outside services.

4. Compliance costs:

These proposed/emergency regulations do not impose any additional costs beyond the requirements of Executive Law § 108. The costs to comply with Executive Law § 108 will be minimal, and will fall primarily on state agencies.

5. Economic and technological feasibility:

Compliance with Executive Law § 108 and 19 NYCRR Part 134 is expected to be economically and technologically feasible for all local governments.

6. Minimizing adverse impact:

Executive Law § 108 applies to all local governments in the state, and this new 19 NYCRR Part 134 will implement this statute. Any adverse impacts of this statutory program on local governments are statutorily required and cannot be minimized.

7. Small business and local government participation:

Local governments are invited to comment during the formal rulemaking process initiated by this Notice of Emergency Adoption and Proposed Rule Making.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

Executive Law § 108 requires all state and local government agencies to accept the Address Confidentiality Program ("ACP") substitute address provided to participating domestic violence victims and household members. This statutory requirement, to be implemented further by this new 19 NYCRR Part 134, will apply to local governments in all rural areas of the state.

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

Local governments, including those in rural areas, are required to accept the ACP substitute address unless they have received waivers from the Secretary of State. Acceptance of the substitute address may require modest changes to some record-keeping processes, the extent of which will vary depending on the nature of the implicated government agency records. Government agencies that opt to seek waivers to confidentially maintain actual address information for ACP participants will be required to prepare and submit applications to the Secretary of State. These functions are not expected to require any local governments to seek outside services.

3. Costs:

These proposed/emergency regulations do not impose any additional costs beyond the requirements of Executive Law § 108. The costs to comply with Executive Law § 108 will be minimal, and will fall primarily on state agencies.

4. Minimizing adverse impact:

Executive Law § 108 applies to all local governments in the state, including those in rural areas, and this new 19 NYCRR Part 134 will implement this statute. Any adverse impacts of this statutory program on local governments will not be confined to rural areas and cannot be minimized.

5. Rural area participation:

Local governments in rural areas are invited to comment during the formal rulemaking process initiated by this Notice of Emergency Adoption and Proposed Rule Making.

Job Impact Statement

1. Nature of Impact:

The addition of this new Part 134 further implements Executive Law § 108, which requires all state and local government agencies, including those in rural areas, to accept the Address Confidentiality Program (ACP) substitute address provided to participating domestic violence victims and household members unless such agencies have received waivers from the Secretary of State.

2. Categories and numbers affected:

The promulgation of this new Part 134 is not anticipated to have any long-term effects on the number of current jobs or future employment opportunities throughout New York State.

3. Regions of adverse impact:

The proposed/emergency Part 134 is a statewide regulation. This regulation is not expected to impose adverse economic impact, reporting, recordkeeping or other compliance requirements on small businesses in rural or urban areas nor on employment opportunities. It does not impact any region or area of the state disproportionately in terms of jobs or employment opportunities.

4. Minimizing adverse impacts:

The Department does not expect any adverse impacts on jobs in New York State based on the addition of Part 134. This is a statewide regulation. The requirements are the same for all participants, and will not impact job opportunities in the State.