

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.

Division of Criminal Justice Services

NOTICE OF ADOPTION

Equipment Maintenance Fee

I.D. No. CJS-49-12-00013-A
Filing No. 179
Filing Date: 2013-02-12
Effective Date: 2013-02-27

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

Action taken: Repeal of Part 6031 of Title 9 NYCRR.

Statutory authority: Executive Law, art. 35; and Executive Law, section 837(8-b) and (13)

Subject: Equipment Maintenance Fee.

Purpose: Allow the Division to respond to the financial and service and repair needs of law enforcement.

Text or summary was published in the December 5, 2012 issue of the Register, I.D. No. CJS-49-12-00013-P.

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

Text of rule and any required statements and analyses may be obtained from: Natasha M. Harvin, Esq., NYS Division of Criminal Justice Services, Alfred E. Smith Office Building, South Swan Street, Albany, NY 12210, (518) 457-8413, email: natasha.harvin@dcjs.ny.gov

Initial Review of Rule

As a rule that does not require a Regulatory Flexibility Analysis, Rural Area Flexibility Analysis or Job Impact Statement, 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

The agency received no public comment.

Department of Financial Services

EMERGENCY RULE MAKING

Unclaimed Life Insurance Benefits and Policy Identification

I.D. No. DFS-09-13-00001-E
Filing No. 172
Filing Date: 2013-02-06
Effective Date: 2013-02-06

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

Action taken: Addition of Part 226 (Regulation 200) to Title 11 NYCRR.

Statutory authority: Financial Services Law, sections 202 and 302; and Insurance Law, sections 301, 316, 1102, 1104, 2601, 4521 and 4525 and art. 24

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

Specific reasons underlying the finding of necessity: Many life insurance companies and fraternal benefit societies (“insurers”) have not adopted or implemented reasonable procedures and standards for investigating claims and locating beneficiaries with respect to death benefits payable under life insurance policies, annuity contracts and accounts (“policies and accounts”). The Department conducted an investigation into how such insurers track life insurance policy holders. The Department’s investigation found that many insurers regularly use lists of recent deaths from the U.S. Social Security Administration (“SSA”) to promptly cease making annuity payments. However, most insurers had not been using that list to determine whether death benefits were payable to beneficiaries or amounts under accounts appropriately distributed. While insurers were extremely diligent about terminating benefits, they were much less so in seeing that benefits were paid to beneficiaries and that monies held by them in accounts were properly distributed.

On July 5, 2011, the Department issued a letter to insurers, pursuant to New York Insurance Law section 308 (“308 Letter”), that required every insurer to submit a report that included a narrative summary of the SSA’s Death Master File (“SSA Master File”) cross-check procedures implemented by the insurer; the overall results of the SSA Master File cross-check; the current procedures utilized by the insurer to locate beneficiaries, and a seriatim listing of death benefits paid as a result of the SSA Master File cross-check. To date, over \$262 million has been paid to beneficiaries nationwide, including more than \$95 million paid to New York beneficiaries. The 308 Letter required a one-time cross-check of the SSA Master File. This rule requires insurers to continue to perform regular SSA Master File cross-checks and to request more detailed beneficiary information (e.g., social security number, address) when policies are issued to facilitate locating and making payments to beneficiaries.

The current system leads to many abuses, for example in situations where deaths occur but without claims being filed, with an insurer continuing to deduct premiums from the account value or cash value until policies lapse. In other instances, the policies or accounts may

simply remain dormant after death. In these instances, a valid death benefit is either not paid or distributed or is delayed. Insurers must take reasonable steps to ensure that policyowners and policy beneficiaries are provided with all of the benefits for which they have paid and to which they are entitled.

To ensure that policyowners and policy beneficiaries are provided with all such benefits, this Part requires insurers to implement reasonable procedures to identify unclaimed death benefits, locate beneficiaries, and make prompt payments. In addition, to further ensure payment of unclaimed benefits, this Part requires insurers to respond to requests from the Superintendent to search for policies insuring the life of, or owned by, decedents, and to initiate the claims process for any death benefits that are identified as a result of those requests. Any delay in implementing these requirements will result in beneficiaries not receiving benefits or having monies distributed to them to which they are entitled, and in insurers thereby undeservedly retaining such amounts.

For the reasons stated above, the promulgation of this regulation on an emergency basis is necessary for the general welfare.

Subject: Unclaimed Life Insurance Benefits and Policy Identification.

Purpose: To ensure payment of unclaimed benefits to policyowners and policy beneficiaries.

Text of emergency rule: UNCLAIMED LIFE INSURANCE BENEFITS AND POLICY IDENTIFICATION

Section 226.0 Purpose

(a) The Department has conducted an investigation into how life insurance companies and fraternal benefit societies track life insurance policyholders. The Department's investigation has found that many insurers have been regularly using lists of recent deaths from the Social Security Administration to promptly cease making annuity payments. However, most insurers had not been using the lists to determine whether death benefits were payable to beneficiaries.

(b) The public needs to know that insurers are taking reasonable steps to ensure that policyowners and policy beneficiaries are provided with all of the life insurance benefits for which they have paid and to which they are entitled. In particular, there may be instances where a death has occurred and no claim has been filed, but premiums continue to be deducted from the existing policy values until the policy lapses. In other instances, the policies or accounts may simply remain dormant after death. In these instances, a valid death benefit is either not paid or distributed or is delayed.

(c) To ensure that policyowners and policy beneficiaries are provided with all of the benefits for which they have paid and to which they are entitled, this Part requires insurers to implement reasonable procedures to identify unclaimed death benefits, locate beneficiaries, and make prompt payments. In addition, to further ensure payment of unclaimed benefits, this Part requires insurers to respond to requests from the superintendent to search for policies insuring the life of, or owned by, decedents and to initiate the claims process for any death benefits that are identified as a result of those requests.

Section 226.1 Definitions

(a) Account means:

(1) any mechanism, whether denoted as a retained asset account or otherwise, whereby the settlement of proceeds payable to a beneficiary under a policy is accomplished by the insurer or an entity acting on behalf of the insurer placing the proceeds into an account where the insurer retains those proceeds and the beneficiary has check or draft writing privileges; or

(2) any other settlement option relating to the manner of distribution of the proceeds payable under a policy.

(b) Death index means the death master file maintained by the United States social security administration or any other database or service that is at least as comprehensive as the death master file maintained by the United States social security administration and that is acceptable to the superintendent.

(c) Insured means an individual covered by a policy or an annuitant when the annuity contract provides for benefits to be paid or other monies to be distributed upon the death of the annuitant.

(d) Insurer means a life insurance company or fraternal benefit society.

(e) Lost policy finder means a service made available by the Department of Financial Services on its website or otherwise developed by the superintendent either on his or her own or in conjunction with other state regulators, to assist consumers with locating unclaimed life insurance benefits.

(f) Policy means a life insurance policy, an annuity contract, a certificate under a life insurance policy or annuity contract, or a certificate issued by a fraternal benefit society, under which benefits are to be paid

upon the death of the insured, including a policy that has lapsed or been terminated.

Section 226.2 Applicability

(a) This Part shall apply to a policy issued by a domestic insurer and any account established under or as a result of such policy; or

(2) delivered or issued for delivery in this state by an authorized foreign insurer and any account established under or as a result of such policy.

(b) Notwithstanding subdivision (a) of this section, with respect to a policy delivered or issued for delivery outside this state, a domestic insurer may, in lieu of the requirements of this Part, implement procedures that meet the minimum requirements of the state in which the insurer delivered or issued the policy, provided that the superintendent determines that such other requirements are no less favorable to the policyowner and beneficiary than those required by this Part.

Section 226.3 Multiple policy search procedures

(a) Upon receiving notification of the death of an insured or account holder or in the event of a match made by a death index cross-check pursuant to section 226.4 of this Part, an insurer shall search every policy or account subject to this Part to determine whether the insurer has any other policies or accounts for the insured or account holder.

(b) An insurer that receives a notification of death of an insured or account holder, or identifies a death index match, shall notify each United States affiliate, parent, or subsidiary, and any entity with which the insurer contracts that may maintain or control records relating to policies or accounts covered by this Part of the notification or verified death index match. An insurer shall take all steps necessary to have each affiliate, parent, subsidiary, or other entity perform the search required by subdivision (a) of this section.

Section 226.4 Standards for investigating claims and locating claimants under policies and accounts

(a)(1) Except as set forth in paragraph (2) of this subdivision, at no later than policy delivery or the establishment of an account and upon any change of insured, owner, account holder, or beneficiary, an insurer shall request information sufficient to ensure that all benefits or other monies are distributed to the appropriate persons upon the death of the insured or account holder, including, at a minimum, the name, address, date of birth, social security number, and telephone number of every owner, account holder, insured and beneficiary of such policy or account, as applicable.

(2) Where an insurer issues a policy or provides for an account based on information received directly from an insured's employer, the insurer may obtain the beneficiary information described in paragraph (1) of this subdivision by communicating with the insured after the insurer's receipt of the information from the insured's employer.

(b)(1) An insurer shall use the latest available updated version of the death index to cross-check every policy and account subject to this Part, except as specified in subdivision (h) of this section. The cross-checks shall be performed no less frequently than quarterly. An insurer may submit a request to the superintendent for the insurer to perform the cross-checks less frequently than quarterly, but in no event shall the cross-checks be performed less frequently than semi-annually. The superintendent may grant such a request upon the insurer's demonstration of hardship.

(2) The cross-checks shall be performed using:

(i) the insured or account holder's social security number; or

(ii) where the insurer does not know the insured or account holder's social security number, the name and date of birth of the insured or account holder.

(3) An insurer may comply with the requirements of this subdivision by using the full death index once annually and using the death index update files for the remaining cross-checks in that year.

(c) If an insurer uses a resource instead of or in addition to a death index in order to terminate benefits or close an account, the insurer shall also use that resource when cross-checking policies or accounts pursuant to subdivision (b) of this section.

(d) If an insurer uses a resource more frequently than quarterly in order to terminate benefits or close an account, the insurer shall use that resource with the same frequency when cross-checking policies or accounts pursuant to subdivision (b) of this section.

(e)(1) Every insurer shall implement reasonable procedures to account for common variations in data that would otherwise preclude an exact match with a death index, including:

(i) nicknames, initials used in lieu of a first or middle name, use of a middle name, compound first and middle names, and interchanged first and middle names;

(ii) compound last names, and blank spaces or apostrophes in last name;

(iii) incomplete date of birth data, and transposition of the "month" and "date" portions of the date of birth;

(iv) incomplete social security number; and

(v) common data entry errors in name, date of birth and social security data.

(2) An insurer that does not have in place on the effective date of this Part reasonable procedures to implement paragraph (1) of this subdivision shall do so as expeditiously as possible but no later than 150 days after such effective date.

(f) If an insurer only has a partial name, social security number, date of birth, or a combination thereof, of the insured or account holder under a policy or account, then the insurer shall use the available information to perform the cross-check pursuant to subdivision (b) of this section, which may be accomplished by using the procedures outlined in subdivision (e)(1) of this section.

(g) Every insurer shall establish reasonable procedures to locate beneficiaries and shall make prompt payments or distributions in accordance with Part 216 of this Title (Insurance Regulation 64).

(h) This section shall not apply to any policy or any account:

(1) where the insurer has fully satisfied all obligations under the policy or account prior to the date that the cross-check is performed;

(2) where the insurer has paid full death benefits on all insureds under the policy, or where the remaining obligations have been transferred to one or more new policies or accounts providing benefits of any kind in the event of the death of the insured or account holder;

(3) where the insurer has paid full surrender benefits on the policy, including a policy that is replaced after full surrender;

(4) where the policy has been rescinded and the insurer has returned all paid premiums;

(5) where the policy has been returned under a free-look provision and the insurer has returned all paid premiums;

(6) where the insurer has paid full maturity benefits under the policy;

(7) where the insurer does not maintain or control the records containing the information necessary to comply with the requirements of this section under a group policy administered by the group policyholder;

(8) where all monies due under the policy or account have escheated in accordance with state unclaimed property statutes;

(9) where the insurer has novated the policy;

(10) where the policy is a group annuity contract that funds employer-sponsored retirement plans and the insurer is not obligated by the terms of the contract to pay death benefits directly to the plan participant's beneficiary;

(11) where the insurer receives payroll deduction contributions for either a group or individual policy and a payment has been made in the 90 days prior to a cross-check;

(12) except as to retired employees, where premiums are wholly paid by an employer on an individual or group policy; or

(13) where a policy has lapsed or terminated with no benefits payable that was cross-checked with a death index within the 18 months preceding the effective date of this section or that was cross-checked with a death index more than 18 months prior to the most recent cross-check conducted by the insurer.

Section 226.5 Lost policy finder application procedures

(a) An insurer shall:

(1) upon receiving a request forwarded by the superintendent through a lost policy finder, search for policies, excluding group policies administered by group policyholders where the insurer does not maintain or control the records containing the information necessary to comply with the requirements of section 226.4 of this Part, and any accounts subject to this Part that insure the life of, or are owned by, an individual named as the decedent in the request forwarded by the superintendent;

(2) report to the superintendent through a lost policy finder:

(i) within 30 days of receiving the request, or within 45 days of receiving the request where the insurer contracts with another entity to maintain the insurer's records, the findings of the search; and

(ii) where the search reveals that benefits may be due, within 30 days of the final disposition of the request, the benefit paid and any other information requested by the superintendent; and

(3) within 30 days of receiving the request, or within 45 days of receiving the request where the insurer contracts with another entity to maintain the insurer's records, for each identified policy and account insuring the life of, or owned by, the named decedent, provide to:

(i) a requestor who is also the beneficiary of record on the identified policy or account all items, statements and forms that the insurer reasonably believes to be necessary in order to file a claim; or

(ii) a requestor who is not the beneficiary of record on the identified policy or account the requested information to the extent permissible to be disclosed in accordance with Part 420 (Insurance Regulation 169) of this Title and any other applicable privacy law, and to take such other steps necessary to facilitate the payment of any benefit that may be due under the identified policy or account.

(b)(1) An insurer shall establish procedures to electronically receive the lost policy finder request from, and make reports to, the superintendent as provided for in subdivision (a) of this section. When transmitted electronically, the date that the superintendent forwards the request shall

be deemed to be the date of receipt by the insurer; provided however that if the date is a Saturday, Sunday or a public holiday, as defined in General Construction Law section 24, then the date of receipt shall be as provided in General Construction Law section 25-a.

(2) An insurer required to electronically receive and submit pursuant to this Part may apply to the superintendent for an exemption from the requirement that the submission be electronic by submitting a written request to the superintendent for approval.

(3) The insurer's request for an exemption shall specify whether it is making the request for an exemption based upon undue hardship, impracticability, or good cause, and set forth a detailed explanation as to the reason that the superintendent should approve the request.

(4) The insurer requesting an exemption shall submit, upon the superintendent's request, any additional information necessary for the superintendent to evaluate the insurer's request for an exemption.

(5) The insurer shall be exempt from the electronic submission requirement upon the superintendent's written determination so exempting the insurer. The superintendent's determination will specify the basis upon which the superintendent is granting the request and for how long the exemption applies.

(6) If the superintendent approves an insurer's request for an exemption from the electronic submission requirement, then the insurer shall make a physical submission in a form and manner acceptable to the superintendent.

Section 226.6 Report to the comptroller

An insurer subject to this Part shall include in the report required under Abandoned Property Law section 703 any information on unclaimed benefits due pursuant to this Part and the number of policies and accounts that the insurer has identified pursuant to section 226.4 of this Part for the prior calendar year under which any outstanding monies have not been paid or distributed by December thirty-first of such year, except potential matches still being investigated pursuant to section 226.4 of this Part. A copy of the report also shall be filed with the superintendent.

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 May 6, 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 promulgation of this rule derives from sections 202 and 302 of the Financial Services Law ("FSL") and sections 301, 316, 1102, 1104, 2601, 4521 and 4525 and Article 24 of the Insurance Law.

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

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

Insurance Law section 316 authorizes the Superintendent to promulgate regulations to require an insurer or other person or entity that makes a filing or submission with the Superintendent, pursuant to the Insurance Law, to do so by electronic means.

Insurance Law section 1102 authorizes the Superintendent to refuse to issue or renew an insurer's license if such refusal will best promote the interests of the people of this state.

Insurance Law section 1104 authorizes the Superintendent to revoke the license of a foreign insurer if such revocation is reasonably necessary to protect the interests of the people of this state.

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

Insurance Law section 2601 prohibits insurers from engaging in unfair claim settlement practices, including the failure to adopt and implement reasonable standards for prompt investigation of claims.

Insurance Law section 4521 authorizes the Superintendent to revoke or suspend a fraternal benefit society's license if such society is not carrying out its contracts in good faith.

Insurance Law section 4525 applies Articles 3 and 24 of the Insurance Law to authorized fraternal benefit societies.

2. Legislative objectives: The Department has been investigating allegations of unfair claims and trade practices by authorized life insurers and fraternal benefit societies (collectively herein, "insurers"). The Department is concerned that many insurers have not adopted or implemented reasonable procedures and standards to investigate claims and locate ben-

eficiaries with respect to death benefits due under policies and accounts. In particular, there may be instances in which a death has occurred and no claim has been filed, but premiums continue to be deducted from the account value or cash value until the policy lapses. In other instances, the policies or accounts may simply remain dormant after death. In these instances, a valid death benefit is either not paid or distributed or is delayed.

The Department met with several insurers that have substantial writings in New York to discuss past and current claim and death benefit payment practices. Some insurers have used the U.S. Social Security Administration's Death Master File ("SSA Master File") to confirm the death of a contract holder so that it may cease making annuity payments, but have not used the SSA Master File to determine whether any death benefit payments are due under insurance policies or other accounts.

The Department sent a letter dated July 5, 2011, to every insurer requesting the submission of a special report, pursuant to Insurance Law section 308 (the "308 Letter"). The 308 Letter required the insurer to submit a report that included a narrative summary of the SSA Master File cross-check procedures implemented by the insurer; the overall results of the SSA Master File cross-check; the current procedures utilized by the insurer to locate beneficiaries, and a seriatim listing of death benefits paid as a result of the SSA Master File cross-check. After matches were identified, each insurer was directed to provide to the Superintendent a final report updating the actions it had taken to investigate the matches to determine whether a death benefit payment was due, and to describe the procedures it had implemented to locate the beneficiaries and make payments, where appropriate. To date, well over \$262 million has been paid nationwide to beneficiaries, including more than \$95 million that was paid to New York beneficiaries.

The 308 Letter was a one-time comparison of the SSA Master File. This rule is necessary to require insurers to continue to make the cross-checks on an ongoing basis. This rule requires insurers to continue to perform regular cross-checks using the SSA Master File, or other database or service acceptable to the Superintendent, and to request more detailed beneficiary information (e.g., social security number, address) to facilitate locating and making payments to beneficiaries.

The regulation also addresses another matter of concern. The Department regularly receives requests from family members and other potential beneficiaries requesting assistance in locating lost policies. Although certain fee-based services have been available to provide some assistance, there has not been an efficient, no-fee mechanism by which the Department could assist the public.

The Department has now developed a Lost Policy Finder application that offers a free-of-charge service to assist in locating unclaimed benefits on policies insuring the life of, or owned by, the deceased and accounts that are established under or as a result of such policies.

This rule requires insurers to establish procedures to respond within 30 days of the Department's notification of a request to identify coverage, which the Department received through its new Lost Policy Finder application, or within 45 days of receiving the request where the insurer contracts with another entity to maintain the insurer's records. The rule also requires the insurer to notify the beneficiary, within 30 days of the notification, or within 45 days of receiving the request where the insurer contracts with another entity to maintain the insurer's records, of all items necessary to file a claim, if the insurer determines that there are benefits to be paid or other monies to be distributed.

3. Needs and benefits: Many insurers have still not adopted or implemented reasonable procedures and standards to investigate claims and locate beneficiaries with respect to death benefits under policies and accounts. The Department conducted an investigation into how insurers track life insurance policy holders. The Department found that many insurers have been regularly using lists of recent deaths from the Social Security Administration to promptly cease making annuity payments. However, most had not been using it to determine whether death benefits were payable to beneficiaries.

This leads to many abuses. For example, in some instances, a death may occur and no claim filed, but premiums continue to be deducted from the account value or cash value until the policy lapses. In other cases, the policies or accounts may simply remain dormant after death. In these instances, a valid death benefit is either not paid or distributed or is delayed.

While insurers were extremely diligent about terminating benefits, they were much less so in seeing that benefits were paid to beneficiaries and monies held by them in accounts were properly distributed. Insurers must take reasonable steps to ensure that policyowners and policy beneficiaries are provided with all of the benefits for which they have paid and to which they are entitled.

To ensure that policyowners and policy beneficiaries are provided with all of the benefits for which they have paid and to which they are entitled, this Part requires insurers to implement reasonable procedures to identify unclaimed death benefits, locate beneficiaries, and make prompt payments. In addition, this Part requires insurers to respond to requests from the Su-

perintendent to search for policies insuring the life of, or owned by, decedents and to initiate the claims process for any death benefits that are identified as a result of those requests. It also establishes a filing requirement with the Office of the Comptroller regarding unpaid benefits.

4. Costs: Many insurers have already implemented procedures similar to those required by this rule to terminate annuity payments. In response to the 308 Letter sent by the Department to insurers in July 2011, a number of insurers confirmed that they have already established, or are in the process of establishing, the standards and procedures required by this rule. As a result, such insurers should incur minimal additional costs to comply with the requirements of this rule. The public benefit of ensuring that all policyowners and policy beneficiaries are provided with all of the benefits for which they have paid and to which they are entitled outweighs the incidental costs of complying with this rule.

The cost to the Department, and the Office of the Comptroller, will be minimal because existing personnel are available to verify and ensure compliance of this rule. There are no costs to any other state government agency or local government.

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: Section 226.5 of this rule requires every insurer to report to the Superintendent, within 30 days of receiving the Superintendent's request to search for policies and accounts, or within 45 days of receiving the request where the insurer contracts with another entity to maintain the insurer's records, the findings of that search. In addition, within 30 days of the final disposition of the request, every insurer is required to report the benefits or amounts paid, if any, as a result of the search, and any other information requested by the Superintendent. Section 226.6 of this rule requires every insurer to submit a report to the Office of the Comptroller specifying the number of policies and accounts that the insurer has identified through a death index match or notification of the death of an insured or account holder, for the prior calendar year, any outstanding monies that have not been paid or distributed by December thirty-first of such year.

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

8. Alternatives: There are no viable alternatives to this rule. As a result of the 308 Letter, to date, more than \$262 million has been paid to beneficiaries nationwide, including more than \$95 million paid to New York beneficiaries. The benefit to the public on an on-going basis is unquestionable. While some insurers may voluntarily implement these procedures, promulgation of this rule is necessary to require all insurers to do so. This rule addresses unfair claims and trade practices by insurers in a manner that protects the public while providing minimal burdens on insurers.

After considering comments received from insurers after the 308 Letter was issued, the Department issued guidance to supplement the 308 Letter. This rule incorporates those comments.

9. Federal standards: There are no minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule: Many insurers have already implemented procedures similar to those required by this rule to terminate annuity payments. In response to the 308 Letter, a number of insurers confirmed that they have already established, or are in the process of establishing, the standards and procedures required by this rule. Additionally, the standards included in this rule were previously adopted on an emergency basis, effective June 13, 2012. Thus, insurers have been required to comply with the requirements of the rule since that time. Therefore, this rule will take effect upon filing with the Secretary of State; however, under section 226.4(f)(2), an insurer that does not have in place on the effective date of this Part reasonable procedures to implement section 226.4(f)(1) shall do so as expeditiously as possible but no later than 150 days after such effective date.

Regulatory Flexibility Analysis

1. Small businesses: The Department of Financial Services finds that this rule will not impose any adverse economic impact or any reporting, recordkeeping or other compliance requirements on small businesses. The basis for this finding is that this rule is directed at life insurers and fraternal benefit societies (collectively, "insurers") authorized to do business in New York State, none of which fall within the definition of "small business" as found in section 102(8) of the State Administrative Procedure Act. The Department of Financial Services has reviewed filed reports on examination and annual statements of these authorized insurers and believes that none of them fall within the definition of "small business," because there are none which are both independently owned and have less than one hundred employees.

2. Local governments: This rule does not impose any adverse economic impact on local governments, including reporting, recordkeeping, or other compliance requirements.

Rural Area Flexibility Analysis

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

2. Reporting, recordkeeping and other compliance requirements, and professional services: This rule requires authorized life insurers and fraternal benefit societies (collectively, "insurers") to establish standards for investigating claims and locating claimants under policies and accounts providing benefits in the event of the death of an insured or account holder. It also requires insurers to establish procedures to search for policies and accounts upon receipt of a death notice or the Superintendent's notification of a request to identify coverage, which was received through the Lost Policy Finder application. It requires insurers to perform, no less than quarterly, a cross-check of the death index (i.e., the U.S. Social Security Administration's Death Master File ("SSA Master File") or any other database or service that is acceptable to the Superintendent). In addition, it requires insurers to establish procedures for lost policy searches, and establishes a filing requirement with the Office of the Comptroller regarding unpaid benefits.

Section 226.5 of this rule requires every insurer to report to the Superintendent, within 30 days of receiving the Superintendent's request to search for policies and accounts, the findings of that search. In addition, within 30 days of the final disposition of the request, every insurer is required to report the benefits or amounts paid, if any, as a result of the search, and any other information requested by the Superintendent. Additionally, section 226.6 of this rule requires every insurer to submit a report to the Office of the Comptroller specifying the number of policies and accounts that the insurer has identified through a death index match or notification of the death of an insured or account holder, for the prior calendar year, any outstanding monies that have not been paid or distributed by December thirty-first of such year.

3. Costs: Many insurers have already implemented procedures similar to those required by this rule to terminate annuity payments. In response to a letter sent by the Department to insurers in July 2011, pursuant to Insurance Law section 308, a number of insurers confirmed that they have already established, or are in the process of establishing, the standards and procedures required by this rule. As a result, such insurers should incur minimal additional costs to comply with the requirements of this rule. The public benefit of ensuring that all policyowners and policy beneficiaries are provided with all of the benefits for which they have paid and to which they are entitled outweighs the incidental costs of complying with this rule.

The cost to the Department, and the Office of the Comptroller, will be minimal because existing personnel are available to verify and ensure compliance with this rule. There are no costs to any other state government agency or local government.

4. Minimizing adverse impact: The public needs to know that insurers are taking reasonable steps to ensure that all policyowners and policy beneficiaries are provided with all of the benefits for which they have paid and to which they are entitled. In particular, there may be instances where a death has occurred and no claim has been filed, but premiums continue to be deducted from the account value or cash value until the policy lapses. In other instances, the policies or accounts may simply remain dormant after death. In these instances, a valid death benefit is either not paid or distributed or is delayed.

The Department sent a letter, dated July 5, 2011, to every insurer requesting the submission of a special report, pursuant to Insurance Law section 308 (the "308 Letter"). The 308 Letter required the insurer to submit a report that included a narrative summary of the SSA Master File cross-check procedures implemented by the insurer; the overall results of the SSA Master File cross-check; the current procedures utilized by the insurer to locate beneficiaries, and a seriatim listing of death benefits paid as a result of the SSA Master File cross-check. After matches were identified, each insurer was directed to provide to the Superintendent a final report updating the actions it had taken to investigate the matches to determine whether a death benefit payment was due, and to describe the procedures it had implemented to locate the beneficiaries and make payments, where appropriate. To date, well over \$262 million has been paid nationwide to beneficiaries, including more than \$95 million that was paid to New York beneficiaries.

The 308 Letter was a one-time comparison of the SSA Master File. This rule is necessary to require insurers to continue to make the cross-checks on an ongoing basis. This rule requires insurers to continue to perform regular cross-checks using the SSA Master File, or other database or service acceptable to the Superintendent, and to request more detailed beneficiary information (e.g., social security number, address) to facilitate locating and making payments to beneficiaries.

The regulation also addresses another matter of concern. The Department regularly receives requests from family members and other potential beneficiaries requesting assistance in locating lost policies. Although certain fee-based services have been available to provide some assistance, there has not been an efficient, no-fee mechanism by which the Department could assist the public.

The Department has now developed a Lost Policy Finder application

that offers a free-of-charge service to assist in locating unclaimed benefits on policies insuring the life of, or owned by, the deceased and accounts that are established under or as a result of such policies.

This rule requires insurers to establish procedures to respond within 30 days of the Department's notification of a request to identify coverage, which the Department received through its new Lost Policy Finder application. The rule also requires the insurer to notify the beneficiary, within 30 days of the notification, of all items necessary to file a claim, if the insurer determines that there are benefits to be paid or other monies to be distributed.

The rule thus ensures that insurers will continue to make death index cross-check efforts so that policyowners and policy beneficiaries will be provided with all of the benefits for which they have paid and to which they are entitled. This rule will result in the rightful payment of millions of dollars of additional benefits to beneficiaries. Therefore, it is necessary for all insurers to comply with the requirements of this rule.

5. Rural area participation: The Department received comments from insurers, including those doing business in rural areas of the State, regarding the 308 Letter. Those comments have been incorporated into this rule.

Job Impact Statement

The Department of Financial Services finds that this rule will have little or no impact on jobs and employment opportunities. This rule requires insurers to set forth standards for investigating claims and locating claimants under policies and accounts providing benefits in the event of an individual's death. It also requires insurers to set up procedures for lost policy searches, and establishes a filing requirement with the Office of the Comptroller regarding unpaid benefits.

The Department does not believe that this rule will have any adverse impact on jobs or employment opportunities, including self-employment opportunities.

NOTICE OF ADOPTION

Consolidation of the New York State Insurance and Banking Departments into a New Department of Financial Services

I.D. No. DFS-29-12-00004-A

Filing No. 173

Filing Date: 2013-02-06

Effective Date: 2013-03-01

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

Action taken: Amendment of Parts 9 (Regulation 46), 65-3 (Regulation 68-C), 216 (Regulation 64), 218 (Regulation 90) and 241 (Regulation 71) of Title 11 NYCRR.

Statutory authority: Financial Services Law, sections 202 and 302; and Insurance Law, section 301

Subject: Consolidation of the New York State Insurance and Banking Departments into a new Department of Financial Services.

Purpose: To revise hyperlinks and references that are outdated due to the consolidation of the Insurance and Banking Departments.

Text of final rule: Section 9.1 is amended as follows:

Section 9.1. Distribution and sale of publications of the [Insurance] Department of *Financial Services*

(a) Except as otherwise provided in subdivisions (b) and (c) of this section, a fee shall be charged in accordance with the itemized schedule attached hereto (see Appendix 6) for any blank, report, pamphlet, document or other publication of the [Insurance] Department furnished or distributed to the public. Many of the current year publications listed in Appendix 6 are also available electronically ([with] *at no charge*) through the [Insurance] Department's Web site located at [<http://www.ins.state.ny.us/mailing.htm>] http://www.dfs.ny.gov/reportpub/dfs_reportpub.htm.

(b) No fee shall be charged for furnishing a report or other document to the Governor, the Legislature, any of the State departments or representatives of the press. The Director of the Budget may prescribe other cases in which no fee shall be charged.

(c) No charge shall be made for blank forms, reports, pamphlets and other printed documents necessary or proper in the conduct of the official business of the [Insurance] Department.

Section 65-3 is amended as follows:

NYS Form NF-10 to Appendix 13 is repealed and a new NYS Form NF-10 to Appendix 13 is added.

Section 216.6(h) is amended as follows:

(h) Any notice rejecting any element of a claim involving personal property insurance shall contain the identity and the claims processing address of the insurer, the insured's policy number, the claim number, and the following statement prominently set [out] *forth*:

“Should you wish to take this matter up with the New York State [Insurance] Department of *Financial Services*, you may file with the Department either on its website at [www.ins.state.ny.us/complhow.htm] <http://www.dfs.ny.gov/consumer/fileacomplaint.htm> or you may write to or visit the Consumer [Services Bureau] *Assistance Unit, Financial Frauds and Consumer Protection Division*, New York State [Insurance] Department of *Financial Services*, at: 25 Beaver Street, New York, NY 10004; One Commerce Plaza, Albany, NY 12257; [200 Old Country Road, Suite 340] *163B Mineola Boulevard*, Mineola, NY 11501; or Walter J. Mahoney Office Building, 65 Court Street, Buffalo, NY 14202.”

Section 216.7(d) is amended as follows:

(d) Unreasonable delay.

(1) Unless clear justification exists, no more than 20 percent of a representative sample of the physical damage claims selected by [Insurance] Department of *Financial Services* examiners at any office or offices of the insurer shall have a payment period in excess of 30 calendar days. A payment period is the period between the date of receipt of notice of loss by the insurer and:

(i) the date the settlement check is mailed; or

(ii) the date on which the damaged motor vehicle is replaced by the insurer.

If an insurer is in violation of this overall standard, then each such claim in excess of 30 calendar days may be treated as a separate violation.

(2) If any element of a physical damage claim remains unresolved more than 30 calendar days from the date of receipt of notice by the insurer, the insurer shall provide the insured with a written explanation of the specific reasons for delay in the claim settlement. Unless the matter is in litigation, an updated letter of explanation shall be sent every 30 calendar days thereafter until all elements of the claim are either honored or rejected.

(3) Any letter of explanation or rejection of any element of a claim shall contain the identity and claims processing address of the insurer, the insured's policy number, the claim number and the following statement, prominently set [out] forth:

“Should you wish to take this matter up with the New York State [Insurance] Department of *Financial Services*, you may file with the Department either on its website at [www.ins.state.ny.us/complhow.htm] <http://www.dfs.ny.gov/consumer/fileacomplaint.htm> or you may write to or visit the Consumer [Services Bureau] *Assistance Unit, Financial Frauds and Consumer Protection Division*, New York State [Insurance] Department of *Financial Services*, at: 25 Beaver Street, New York, NY 10004; One Commerce Plaza, Albany, NY 12257; [200 Old Country Road, Suite 340] *163B Mineola Boulevard*, Mineola, NY 11501; or Walter J. Mahoney Office Building, 65 Court Street, Buffalo, NY 14202.”

Section 218.5(a) is amended as follows:

(a) The following notice shall be clearly and prominently set out in boldface type on the front (except that the company name, company representative, company address and company phone number may be stamped, or typed in the appropriate place in the notice), so that it draws the reader's attention on all notices of refusal to issue, cancellation or nonrenewal, except where the cancellation is for nonpayment of premium; and on all notices of termination of agents' and brokers' contracts or accounts, which are subject to this Part:

If you have any questions in regard to this termination, please contact this company's representative at (company phone number, name of company representative, company address). The New York Insurance Law prohibits insurers from engaging in redlining practices based upon geographic location of the risk or the producer. If you have reason to believe that we have acted in violation of such law, you may file your complaint with the Department either on its website at [www.ins.state.ny.us/complhow.htm] <http://www.dfs.ny.gov/consumer/fileacomplaint.htm> or by writing to the State of New York [Insurance] Department of *Financial Services*, Consumer [Services Bureau] *Assistance Unit, Financial Frauds and Consumer Protection Division*, at either 25 Beaver Street, New York, NY 10004 or One Commerce Plaza, Albany, NY 12257.

Section 241.2(a) is amended as follows:

(a) Requests for access to records available to the public under the Insurance Law and the Freedom of Information Law shall be made to the records access officers in the office of general counsel in the Albany or New York City office of the department. Such request for access shall be made on a form prescribed by the department for such purpose, which may be obtained from the department's *Public Affairs Bureau* [of Public Affairs and Research] in Albany or in New York City, or from the department's web site at [www.ins.state.ny.us] <http://www.dfs.ny.gov/legal/foil.htm>.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 216.6(h), 216.7(d) and NF-10 form.

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

Revised Job Impact Statement

Amendment of the regulations and one form should not adversely impact job or employment opportunities in New York. This rulemaking merely corrects out-of-date hyperlinks and references as a result of the consolidation of the New York State Insurance and Banking Departments into a new Department of Financial Services.

There is no evidence that these rules would have any adverse impact on self-employment opportunities.

The Department of Financial Services has no reason to believe that the rules will result in any adverse impacts.

Assessment of Public Comment

The agency received no public comment.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Financial Statement Filings and Accounting Practices and Procedures

I.D. No. DFS-09-13-00003-P

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

Proposed Action: This is a consensus rule making to amend Part 83 (Regulation 172) of Title 11 NYCRR.

Statutory authority: Financial Services Law, sections 202 and 302; Insurance Law, sections 107(a)(2), 301, 307, 308, 1109, 1301, 1302, 1308, 1404, 1405, 1407, 1411, 1414, 1501, 1505, 3233, 4117, 4233, 4239, 4301, 4310, 4321-a, 4322-a, 4327 and 6404; Public Health Law, sections 4403, 4403-a, 4403-(c)(12) and 4408-a; and L. 2002, ch. 599 and L. 2008, ch. 311

Subject: Financial Statement Filings and Accounting Practices and Procedures.

Purpose: To update citations in Part 83 to the Accounting Practices and Procedures Manual as of March 2012 (instead of 2011).

Text of proposed rule: Subdivision (c) of section 83.2 is amended to read as follows:

(c) To assist in the completion of the financial statements, the NAIC also adopts and publishes from time to time certain policy, procedures and instruction manuals. The latest of these manuals, the Accounting Practices and Procedures Manual as of March [2011] 2012 * (accounting manual) includes a body of accounting guidelines referred to as statements of statutory accounting principles (SSAPs). The accounting manual shall be used in the preparation of quarterly statements and the annual statement for [2011] 2012, which will be filed in [2012] 2013.

* ACCOUNTING PRACTICES AND PROCEDURES MANUAL AS OF MARCH [2006] 2012. © Copyright 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012 by National Association of Insurance Commissioners, in Kansas City, Missouri.

Text of proposed 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 10002, (212) 480-5287, email: sally.geisel@dfs.ny.gov

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

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

Consensus Rule Making Determination

No person is likely to object to the rule because the action is a technical amendment that merely updates a reference from Accounting Practices and Procedures Manual As of March 2011 (“Accounting Manual”), which is incorporated by reference into this regulation, to Accounting Practices and Procedures Manual As of March 2012. The latest edition was adopted by the National Association of Insurance Commissioners in March 2012.

This rule is determined by the agency to be a consensus rule, as defined in State Administrative Procedure Act § 102(11) (SAPA), and is proposed pursuant to subparagraph (i) of paragraph (b) of subdivision one of section two hundred two of SAPA. Accordingly, it is exempt from the requirement to file a Regulatory Impact Statement, Regulatory Flexibility Analysis for Small Businesses and Local Governments or a Rural Area Flexibility Analysis.

Job Impact Statement

The Department has no reason to believe that this rule will have any impact on jobs and employment opportunities. The rule codifies numerous accounting practices and procedures that had not previously been organized in such a unified and coherent manner. The current amendment only changes a reference to a publication incorporated by reference in the regulation.

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

Higher Education Services Corporation

NOTICE OF ADOPTION

New York Higher Education Loan Program (NYHELPS)

I.D. No. ESC-52-12-00004-A

Filing No. 178

Filing Date: 2013-02-12

Effective Date: 2013-02-27

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

Action taken: Amendment of Part 2213 of Title 8 NYCRR.

Statutory authority: Education Law, sections 691(10) and 655(4)

Subject: New York Higher Education Loan Program (NYHELPS).

Purpose: Amend several provisions of the regulation.

Text or summary was published in the December 26, 2012 issue of the Register, I.D. No. ESC-52-12-00004-P.

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

Text of 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

Assessment of Public Comment

The agency received no public comment.

Department of Motor Vehicles

NOTICE OF ADOPTION

Ulster County Motor Vehicle Use Tax

I.D. No. MTV-52-12-00007-A

Filing No. 177

Filing Date: 2013-02-12

Effective Date: 2013-02-27

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

Action taken: Amendment of section 29.12 of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a) and 401(6)(d)(ii); and Tax Law, section 202(c)

Subject: Ulster County Motor Vehicle use tax.

Purpose: To impose a motor vehicle use tax.

Text or summary was published in the December 26, 2012 issue of the Register, I.D. No. MTV-52-12-00007-P.

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

Text of rule and any required statements and analyses may be obtained from: Heidi Bazicki, Department of Motor Vehicles, 6 Empire State Plaza, Rm. 522A, Albany, NY 12228, (518) 474-0871, email: heidi.bazicki@dmv.ny.gov

Assessment of Public Comment

The agency received no public comment.

Office of Parks, Recreation and Historic Preservation

NOTICE OF ADOPTION

Outdoor No-Smoking Areas in Parks, Recreational Facilities and Historic Sites Under ORPHP Jurisdiction

I.D. No. PKR-49-12-00011-A

Filing No. 180

Filing Date: 2013-02-12

Effective Date: 2013-02-27

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

Action taken: Addition of Part 386 to Title 9 NYCRR.

Statutory authority: Parks, Recreation and Historic Preservation Law, section 3.09(2), (5) and (8)

Subject: Outdoor no-smoking areas in parks, recreational facilities and historic sites under ORPHP jurisdiction.

Purpose: To allow designation of outdoor no-smoking areas in OPRHP's parks, recreational facilities and historic sites.

Text or summary was published in the December 5, 2012 issue of the Register, I.D. No. PKR-49-12-00011-P.

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

Text of rule and any required statements and analyses may be obtained from: Kathleen L. Martens, Associate Counsel, Office of Parks, Recreation and Historic Preservation, 625 Broadway, Albany, NY 12207 (physical location); Albany, NY 12238 (USPS postal mail), (518) 486-2921, email: rule.making@parks.ny.gov

Assessment of Public Comment

During the public comment period the Office of Parks, Recreation and Historic Preservation (OPRHP) received 404 written comments regarding its proposed new rule (9 NYCRR Part 386) to allow the Commissioner to designate no-smoking areas outdoors within parks, historic sites and recreational facilities, and to designate the seven state parks located in New York City as smoke free with limited areas for smoking. The large majority of comments favored the creation of no-smoking areas in outdoor park settings: 369 comments (91%) supported the proposed regulation, while 35 comments (9%) opposed the measure. Many comments simply expressed general support or opposition to the proposed rule and most comments raised similar points. Of those in support, many thought the rule should be expanded to ban smoking completely in every part of every park and campground. Conversely, many of those opposed thought the rule was too restrictive. The following summarizes the substantive comments and provides a response where appropriate.

Comment: The Administrative Regulations Review Commission (ARRC) of the New York State Legislature, established in 1978 under Section 87(1) of the Legislative Law, oversees the rulemaking process and examines rules with respect to statutory authority, legislative intent and impact on the economy, government operations and affected parties. Previously it provided support for the Court of Appeals opinion in *Boreali v. Axelrod*, 71 NY2d 1, 1987 that overturned the Public Health Council's rule on indoor smoking. In contrast, here ARRC commented that the facts in *Boreali* and that Court's decision do not preclude OPRHP from managing facilities used by the public, and delineating where smoking should be permitted and where it should not.

According to ARRC:

It is evident that many members of the public in general – and possibly more who use the playgrounds and recreational facilities in state parks – are interested in a healthy lifestyle and would object to a lax policy allowing indiscriminate smoking in OPRHP facilities. The regulatory impact statement also points out the significant cost of cleaning up after smokers. Beyond the issues of customer service and cost, we also note that New York State experienced a substantial number of wildfires last year due to hot and dry weather. The proposed rules would enhance OPRHP's ability to protect its parks from fires similar to the one in 2008 that burned 3100 acres in Minnewaska State Park (which was likely started by a discarded cigarette).

We believed that OPRHP has crafted reasonable rules that are in the public's best interest, and we urge their adoption.

Response: None required.

Comment: The New York State Department of Health (DOH) expressed

strong support for the rule and acknowledged OPRHP's general authority to adopt it under Parks, Recreation and Historic Preservation Law (PRHPL) Section 3.09 and Section 1399-r of the Public Health Law which states, in part, that "[s]moking may not be permitted where prohibited by any other law, rule or regulation of any state agency or political subdivision or political subdivision of the state."

Additionally, DOH commented on the public health benefits of the rule and stated the scientific evidence is clear, convincing and overwhelming that there is no risk-free level of exposure to secondhand smoke citing the Surgeon General's 2006 Report "The Health Consequences of Involuntary Exposure to Tobacco Smoke" and other studies. According to DOH, other health benefits from the rule include reducing nicotine poisoning in children (because incidences of ingesting cigarette butts will be reduced) and reducing the perception by young children that tobacco use is a common and desirable adult behavior. More than 300 municipalities in New York State have restricted tobacco use at outdoor recreational areas and more than 60% of New York residents and 30% of smokers favor restrictions like those proposed in the rule. Because DOH's mission is to protect, improve and promote the health, productivity and well-being of all New Yorkers that agency strongly supports the rule.

Response: None required.

Comment: The American Cancer Society Action Network of New York and New Jersey (ACS) indicated OPRHP was following in the steps of cities including Chicago, Los Angeles, New York City, Santa Monica and Seattle that have established smoke-free parks. ACS also focused on the Surgeon General's report indicating there is no safe level for secondhand smoke, and further cited the number of toxic and cancer causing chemicals it contains. Non-smoking adults die of lung cancer caused by secondhand smoke and there is a potential causation between secondhand smoke and breast cancer. A Stamford University study showed even brief exposure to secondhand smoke outdoors could be harmful. There is also a cumulative effect from ingestion of secondhand smoke over time. No-smoking policies decrease the prevalence of adult and youth smoking. ACS would like to see the rule broadened to establish smoke-free areas within 25 feet of playgrounds and bathrooms at campgrounds.

Response: OPRHP will review campground usage, after this rule is adopted, to determine whether it should be broadened later in a separate rulemaking to allow designation of no-smoking areas within portions of campgrounds. Otherwise, OPRHP believes the rule takes a reasonable approach to managing user conflicts on this issue.

Comment: The New York State Association of County Health Officials stated the rule continues the successful model of keeping enforcement powers within the entity that owns or operates the park or other outdoor area.

Response: None required.

Comment: The New York State Public Health Association stated secondhand smoke is a Class A carcinogen that is in the same category as asbestos and benzene. Exposure produces cumulative negative effects. According to the Environmental Protection Agency children breathe 50% more pollution per pound of body weight than adults and are more susceptible to the effects of secondhand smoke even outdoors. Smoke-free policies decrease the prevalence of adult and youth smoking. Communities with strong tobacco control policies have lower smoking rates. Cigarette butts take years to decompose and are costly to clean up. The rule should be broadened to include areas adjacent to bathrooms and other adjacent areas at campgrounds so that 80% of these areas would be smoke free.

Response: OPRHP will review campground usage after this rule is adopted, to determine whether it should be broadened later in a separate rulemaking to allow designation of no-smoking areas within portions of campgrounds. Otherwise, OPRHP believes the rule takes a reasonable approach to managing user conflicts on this issue.

Comment: Coalition for a Smoke-Free City is a New York City-based entity that promotes awareness of tobacco control to complement the Clean Indoor Air Act (CIAA) and supports the rule citing to New York City's example with respect to its facilities.

Response: None required.

Comment: The New York City Department of Health and Mental Hygiene opined that smoking should be banned completely in all parks, recreation areas and historic sites.

Response: OPRHP believes the rule's focus on establishing no-smoking areas where large numbers of people congregate is rational given the large size of many of its parks outside of New York City (most state parks are larger than 100 acres, and the largest exceed 10,000 acres in size).

Comment: New York City Citizens Lobbying Against Smoker Harassment (CLASH) is a smokers' rights organization dedicated to advancing and promoting the interests of smokers and protecting legal rights of smokers. It advocates for smokers' rights by exhausting democratic avenues and the administrative process to achieve results in the best interests of its organization and members, and if it feels its grounds are

strong and that the party it has appealed to is acting unlawfully then it turns to the judicial system for relief as a last resort. CLASH states that OPRHP lacks authority to adopt the rule and that authority to designate no-smoking areas must be granted to OPRHP directly by the State Legislature through specific legislation under the holding of *Boreali v. Axelrod*, 71 NY2d 1, 1987 and *Justiana v. Niagara County Dep't of Health*, 45 F.Supp.2d W.D.N.Y 1999.

According to CLASH:

With the proposed rule, OPRHP improperly usurps a legislative function insofar as Section 386.1 contemplates prohibition of outdoor smoking because the State Legislature has repeatedly declined to prohibit or restrict outdoor smoking. The New York State Constitution, Article III, § 1 provides: "The legislative power of this state shall be vested in the senate and assembly."

In amending the CIAA in 2003, the State Legislature had an opportunity to prohibit or restrict outdoor smoking, but specifically declined that opportunity, with the exception of smoking on railroad platforms. Moreover, the railroad platform smoking ban was only a recent addition to the Chapter 13 Amendments, not signed into law until August 5, 2011 and not effective until November 13, 2011.

As the *Boreali* and *Justiana* Courts realized, smoking bans have historically been legislated – with agency or non-legislative involvement limited to narrow implementation of legislative dictate. Most recently, following the enactment of the Chapter 13 amendments to the CIAA, the Metropolitan Transportation Authority (MTA) conformed its rules of conduct for Long Island Railroad and Metro North Railroad in accordance with N.Y. Pub. Health Law § 1399-o to incorporate the prohibition on smoking at ticketing, boarding or platform areas of railroad stations. N.Y.S. Register, November 30, 2011 at p.14. Similarly, on June 12, 2012, the State University of New York ("SUNY") board of trustees passed a resolution to support legislation for an outdoor smoking ban on all SUNY campuses, but stopped short of imposing a ban. (See, SUNY Press Release, June 12, 2012, "Board of Trustees, Chancellor Zimpher Call for 'Tobacco-Free SUNY' " available at suny.edu/sunynews/New.cfm?filename=Tobacco-FreeSUNY2012.htm).

Clearly, two state agencies, MTA and SUNY, each recognized that it is beyond their authority to create smoking prohibitions unless authorized by the State Legislature. In contrast, OPRHP, a State agency, has incorrectly decided that it has the prerogative to create its own smoking rules even without legislative authorization, and thus without legal basis. There, it is the position of CLASH that OPRHP's proposed rule-making, insofar as it seeks to add section 386.1 to 9 NYCRR, is impermissible under the New York State Constitution, the CIAA, *Boreali* and *Justiana*.

Response: OPRHP and the State Legislature's Administrative Regulations Review Commission disagree with CLASH. Unlike the MTA and SUNY, OPRHP has independent general authority delegated from the State Legislature under PRHPL § 3.09 to manage its facilities and manage use conflicts at its facilities for the benefit of the public's health, safety and general welfare. Managing use conflicts from exposure to secondhand smoke at its facilities by designating no-smoking areas where large numbers of people congregate outdoors is authorized by the PRHPL.

Comment: Comments were received from some individuals generally supporting CLASH's position that OPRHP has exceeded its delegated regulatory authority in proposing the rule without direct and specific authority from the State Legislature. In addition, the following comments were received from individuals opposed to the rule:

- Smokers generally respect others and do not smoke in their vicinity;
- People with lower incomes smoke more than affluent people and depend on parks for free recreation and enjoyment, and this will make visiting parks a less attractive option for them;
- This regulation goes too far and does not recognize that some people need to smoke to relax and want to do that at parks;
- Parks are funded by all taxpayers including smokers who visit them and they should not be excluded;
- Many smokers will stop visiting parks if they are not allowed to smoke and will also stop visiting New York City;
- The science on effects of secondhand smoke is inexact because usually a smoker is at least six feet away from another person (not 18 inches), there is no measurable exposure to secondhand smoke, and no evidence that smoke moves downward or horizontally;
- One study revealed non-smokers whose KRAS-mutant lung adenocarcinomas containing the KRASG12D mutation did not develop the disease from secondhand smoke;
- Better enforcement of no-littering rules would address the problem of

cigarette butts which is the same problem you have with coffee cups, water bottles, newspaper and other types of litter;

- It would be reasonable to designate no-smoking areas only at stadiums and playgrounds and other areas during special events but not everywhere else;
- Traditionally, public parks welcomed all people, common courtesy prevailed and few restrictions were imposed; these public places should continue to be managed that way;
- OPRHP is a municipal corporation or an agent of a municipal corporation that does not have authority to legislate;
- This represents intrusive government attempting regulating behavior and imposing ideology;
- This represents bullying and a form of discrimination because it excludes people from parks because they smoke and is similar to excluding homosexuals, people of a certain race or creed, people with a certain nationality;
- The effects from secondhand smoke are similar to the effects from car exhaust, standing near a stove, grilling over a barbecue pit, roasting marshmallows, being exposed to a campfire or burning candles;
- Smokers are engaging in a legal act and people offended should look away;
- State and federal governments benefit from taxes on the sale of tobacco products so people using these products should be able to do so on State property;
- As a youth one person visited Jones Beach with friends and they swam, drank beer, smoked cigarettes, cleaned up litter and did not bother anyone: the ban in parks and beaches will drive residents and tourists from New York State venues;
- It is arbitrary for the State to decide what is right or wrong on this issue;
- There is evidence that children of smokers have not developed diseases related to secondhand smoke; and
- The ban on smoking is similar to the ban on alcohol during Prohibition which did not work and had to be repealed.

Response: The intent of the rule is not to dissuade people from visiting parks, historic sites and recreational facilities. OPRHP strives to welcome all visitors to its parks, historic sites and recreational facilities and attempts to accommodate all of its patrons. Individuals who smoke will continue to have full access and enjoyment of state parks and historic sites. The rule accommodates smoking in a manner that minimizes negative impacts on non-smokers.

With the exception of seven parks located in New York City, OPRHP is not proposing to ban smoking in entire state parks or historic sites. Rather, the rule would allow targeted designation of no-smoking areas in places where and at times when large numbers of people (especially children) congregate. The rule accommodates non-smoking patrons who are affected and/or annoyed by secondhand smoke and cigarette butt litter, but will minimally impact smokers who will continue to have areas available to them for smoking.

While the rule prohibits smoking in all of the seven (relatively small) State Parks in New York City, designated areas for smokers will be established in those parks as well. This provision relating to State-owned parks located in NYC is consistent and compatible with the rule prohibiting smoking in parks there under NYC's jurisdiction.

Comment: The following comments were received from American Lung Association members or individuals who consider secondhand smoke or cigarette butt litter a nuisance at OPRHP facilities:

- Individuals with asthma are affected when walking through secondhand smoke and may have to visit a hospital Emergency Room or leave to go home to obtain their medication;
- Secondhand smoke was encountered by a group with small children and a pregnant woman and the group had to move to two different places at a beach picnic area;
- If smoking is permitted in parking areas there should also be appropriate signage there so non smokers can avoid exposure to secondhand smoke in those locations as well;
- All OPRHP beaches, parks, historic sites and campgrounds should be smoke-free and there is support for the provision allowing no-smoking areas to be established within 50 feet of public buildings;
- Secondhand smoke is an annoyance similar to being squirted with water from a water gun;
- Dangers from potential forest fires from burning cigarettes supports the rule;
- Secondhand smoke is especially a problem on holiday weekends when facilities are crowded and you can't get away from it - if you can smell it you are breathing it;

- Runners in parks would appreciate the cleaner air provided by the rule;
 - A California native stated a complete ban on smoking is preferable because it would help end the disease, deaths and enormous costs associated with smoking, more than 70% of smokers wish they didn't smoke, more than 50% of smokers support control measures to help them quit, a ban is simpler, cleaner and consistent with the science, there is no justification for saying it would be difficult to enforce in large parks and there would be cost savings from lower health care costs and more productivity;
 - The State of Maine has completely banned smoking in all its parks;
 - Secondhand smoke has negatively affected experiences at events held at Jones Beach Bandshell, Jones Beach Theatre and Saratoga Performing Arts Center which should all be designated no-smoking areas;
 - Families with children have difficulty avoiding secondhand cigarette and cigar smoke at Robert Moses State Park due to the wind patterns;
 - Secondhand smoke required a family with children to move several times to different picnic tables at Midway Park to avoid it, secondhand smoke also got into their vehicle in the parking lot where smokers were congregating and cigarette butts littered the parking lot;
 - Children were breathing secondhand smoke at a spray park and there were cigarette butts on the ground;
 - Patrons felt harassed from secondhand smoke and cigarette butts at OPRHP facilities; and
 - It is difficult to hike and exercise while breathing secondhand smoke.
- Response: OPRHP believes that the rule provides a workable middle ground to resolving patron complaints about secondhand smoke and cigarette butt litter by allowing the Commissioner to designate no-smoking areas in places where large numbers of people congregate.

Public Service Commission

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Recharge New York Program

I.D. No. PSC-09-13-00004-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 Consolidated Edison Company of New York, Inc. proposing revisions to its Allocation Ratio under General Rule II for standby service customers served under certain economic development programs.

Statutory authority: Public Service Law, section 66(12)

Subject: Recharge New York Program.

Purpose: To modify its Allocation Ratio for standby service customers served under certain economic development programs.

Substance of proposed rule: The Commission is considering whether to approve, modify or reject, in whole or in part, a proposal filed by Consolidated Edison Company of New York, Inc. to modify the Allocation Ratio of standby service customers served under General Rule II - Billing Applicable to Service Under Certain Economic Development Programs. The modification will provide an Allocation Ratio for standby service customers the same as the Allocation Ratio for non-Standby Service customers. The filing has a proposed effective date of May 20, 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.

(11-E-0176SP11)

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

Waiver of the Requirements of 16 NYCRR, Part 96, by Concern for Independent Living for 3349 Webster Avenue, Bronx, New York

I.D. No. PSC-09-13-00005-P

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

Proposed Action: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Concern for Independent Living for waiver of the requirements of 16 NYCRR, Part 96, to permit project construction as designed.

Statutory authority: Public Service Law, sections 2, 4(1), 30, 32-48, 52, 53, 65(1), 66(1), (2), (3), (4), (12) and (14)

Subject: Waiver of the requirements of 16 NYCRR, Part 96, by Concern for Independent Living for 3349 Webster Avenue, Bronx, New York.

Purpose: To consider the request for waiver from 16 NYCRR, Part 96, by Concern for Independent Living for 3349 Webster Avenue, Bronx, NY.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny, in whole or part, the petition of Concern for Independent Living for waiver of requirements of 16 NYCRR, Part 96, to permit project construction as designed located at 3349 Webster Avenue, Bronx, New York located in the territory of Consolidated Edison Company of New York, Inc.

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.

(12-E-0579SP1)

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

Business Incentive Rate (BIR)

I.D. No. PSC-09-13-00006-P

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

Proposed Action: The Commission is considering a filing by Consolidated Edison Company of New York, Inc. proposing revisions to Rider J — Business Incentive Rate contained in P.S.C. No. 10 — Electricity with an effective date of May 20, 2013.

Statutory authority: Public Service Law, section 66(12)

Subject: Business Incentive Rate (BIR).

Purpose: To modify Rider J — Business Incentive Rate to remove the 25% residential-use ceiling for certain customers.

Substance of proposed rule: The Commission is considering whether to approve, modify or reject, in whole or in part, a proposal filed by Consolidated Edison Company of New York, Inc. to modify Rider J — Business Incentive Rate (BIR). The proposed revisions would remove the 25% residential-use ceiling for allocations of BIR only where the customer receives high-tension service and applies for BIR as a medical Research Customer. The filing has a proposed effective date of May 20, 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-0043SP1)

Workers' Compensation Board

**EMERGENCY
RULE MAKING**

Filing Written Reports of Independent Medical Examinations (IMEs)

I.D. No. WCB-09-13-00002-E

Filing No. 175

Filing Date: 2013-02-08

Effective Date: 2013-02-11

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

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

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

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

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

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

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

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

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

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires May 8, 2013.

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

Regulatory Impact Statement

1. Statutory authority:

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

2. Legislative objectives:

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

3. Needs and benefits:

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

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

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

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

4. Costs:

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

5. Local government mandates:

Approximately 2511 political subdivisions currently participate as municipal employers in self-insured programs for workers' compensation coverage in New York State. These self-insured municipal employers will be affected by the proposed rule in the same manner as all other employers who are self-insured for workers' compensation coverage. As with all other participants, this proposal merely modifies the manner in which the time to file a report is calculated, and clarifies the meaning of the word "filed".

6. Paperwork:

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

7. Duplication:

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

8. Alternatives:

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

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

9. Federal standards:

There are no federal standards applicable to this proposed rule.

10. Compliance schedule:

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

Regulatory Flexibility Analysis

1. Effect of rule:

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

Small businesses that derive income from independent medical examinations are a regulated party and will be required to file reports of independent medical examinations conducted at their request within ten busi-

ness days of the exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

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

2. Compliance requirements:

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

3. Professional services:

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

4. Compliance costs:

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

5. Economic and technological feasibility:

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

6. Minimizing adverse impact:

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

7. Small business and local government participation:

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

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

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

2. Reporting, recordkeeping and other compliance requirements:

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

3. Costs:

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

4. Minimizing adverse impact:

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

5. Rural area participation:

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

Job Impact Statement

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