

# RULE MAKING ACTIVITIES

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

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

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

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## Office for the Aging

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

#### Limits on Administrative Expenses and Executive Compensation

I.D. No. AGE-22-12-00011-RP

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

**Proposed Action:** Addition of Part 6656 to Title 9 NYCRR.

**Statutory authority:** Elder Law, section 201(3); Not-for-Profit Corporation Law, section 508 and Executive Order No. 38

**Subject:** Limits on Administrative Expenses and Executive Compensation.

**Purpose:** To implement guidelines regarding placing limitations on Administrative Expenses and Executive Compensation.

**Substance of revised rule:** The revised rule would add a new Part 6656 entitled Limits on Administrative Expenses and Executive Compensation.

Section 6656.1 of the regulations provides the background and intent of the revised rule, which is to implement Executive Order No. 38, issued by Governor Andrew Cuomo on January 18, 2012.

Section 6656.2 sets forth the statutory authority for the promulgation of the rule by the New York State Office for the Aging (hereinafter the "Office").

Section 6656.3 contains definitions for purposes of this Part, including definitions for administrative expenses, covered operating expenses, covered executive, covered provider, executive compensation, Office, program services, program services expenses, related organization, reporting period, State-authorized payments, and State funds. The revised regulation adds a definition of covered reporting period.

Section 6656.4 contains limits on the use of State funds or State-authorized payments for administrative expenses. The restriction will ap-

ply to subcontractors and agents of covered providers which meet the specified criteria. The restriction will apply to covered providers receiving State funds or State-authorized payments from county or local governments, rather than directly from a State agency, pursuant to specified criteria. The regulation addresses how the restriction will apply in the event that a covered provider has multiple sources of State funds or State-authorized payments. The revised regulation specifies that a cover entity provider will not be held responsible for a subcontractor's or agent's failure to comply with the regulations.

Section 6656.5 contains restrictions on executive compensation provided to covered executives. The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria. The restriction will apply to covered providers receiving State funds or State-authorized payments from county or local governments, rather than directly from a State agency, pursuant to specified criteria. The rule addresses the application of this limit if the covered provider has multiple sources of State funds or State-authorized payments. The revised regulation specifies that a cover entity provider will not be held responsible for a subcontractor's or agent's failure to comply with the regulations.

Section 6656.6 enumerates the processes that have been established for covered providers to seek waivers of the limit on administrative expenses and the limits on executive compensation.

Section 6656.7 set forth the annual reporting requirements.

Section 6656.8 details the process that is established for the imposition of penalties in the event of non-compliance with the limit on administrative expenses or the limits on executive compensation.

A copy of the full text of the regulatory proposal is available on the New York State Office for the Aging's website at [www.aging.ny.gov](http://www.aging.ny.gov).

**Revised rule making(s) were previously published in the State Register** on October 31, 2012.

**Revised rule compared with proposed rule:** Substantial revisions were made in sections 6656.3, 6656.4, 6656.5, 6656.6 and 6656.7.

**Text of revised proposed rule and any required statements and analyses may be obtained from:** Stephen Syzdek, New York State Office for the Aging, Two Empire State Plaza, Albany, NY 12223, (518) 474-5041, email: [stephen.syzdek@ofa.state.ny.us](mailto:stephen.syzdek@ofa.state.ny.us)

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

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

#### Revised Regulatory Impact Statement

1. Statutory Authority – Section 201(3) of the New York State Elder Law allows the Director of the New York State Office for the Aging with the advice of the advisory committee for the aging to promulgate, adopt, amend or rescind rules and regulations necessary to carry out the provisions of Article II of the Elder Law.

Section 508 of the New York State Not-For-Profit Corporation Law requires that a corporation whose lawful activities involve among other things the charging of fees or prices for its services or products shall have the right to receive such income and, in so doing, may make an incidental profit. All such incidental profits shall be applied to the maintenance, expansion or operation of the lawful activities of the corporation, and in no case shall be divided or distributed in any manner whatsoever among the members, directors, or officers of the corporation.

Governor Cuomo's Executive Order #38 directs each state agency to promulgate regulations to address the extent and nature of administrative costs and executive compensation that providers of NYSOFA programs are reimbursed with State financial assistance or State-authorized payments for operating expenses.

2. Legislative Objectives – It is the objective of the New York State Legislature to ensure that NYSOFA administer programs and utilize program funds in the most effective and efficient manner possible for the benefit of older New Yorkers. This proposed regulation seeks to meet that legislative objective.

3. Needs and Benefits – The New York State Office for the Aging is proposing to adopt the following regulation because the State of New York directly or indirectly funds with taxpayer dollars a large number of tax exempt organizations and for-profit entities that provide critical services to New Yorkers in need and the goal is to ensure that taxpayers' dollars are used properly, efficiently, and effectively to improve the lives of New Yorkers. It is imperative that New York State and the New York State Office for the Aging ensure that state funds and state authorized funds are optimized for the purpose of providing services to those individuals who are in need of them. Applying state funds and state authorized funds primarily to providing direct care and services helps to guarantee that such funds are providing the greatest benefit to older New Yorkers. These regulations, which are required by Executive Order No. 38, will ensure that State funds or State-authorized payments paid by the New York State Office for the Aging to providers are used predominantly to provide direct care and services to older New Yorkers.

4. Costs – The costs of implementing this rule to affected providers is anticipated to be minimal since most, if not all, of the information that must be reported by such providers is already gathered or reported for other purposes. The costs to the agency of implementation are expected to be very limited as well, and efforts to ensure efficient centralization of certain aspects of such implementation are underway.

5. Paperwork – The proposed regulatory amendments will require limited additional information to be reported to the agency by providers receiving State funds or State-authorized payments. To the extent feasible, such reporting shall be made electronically to avoid unnecessary paperwork costs.

6. Local Government Mandates – The proposed rule does not impose any new program, service, duty or responsibility upon any city, county, town, village, school district or other special district.

7. Duplication – This proposed rule does not duplicate, overlap, or conflict with any State or federal statute or rule. However, the proposed rule seeks to minimize the reporting requirements faced by providers by building upon those requirements in the federal internal revenue code that require certain tax-exempt organizations to report information concerning their executive compensation and administrative costs.

8. Alternatives – Executive Order #38 and Executive Order #43 requires the adoption of this proposed regulation.

9. Federal Standards – This rule does not exceed Federal standards.

10. Compliance Schedule – The rule will become effective upon adoption. The implementation date establishing the limits on administrative expenses and executive compensation will be July 1, 2013.

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

This proposed rule will not have an adverse economic impact on small businesses or local governments nor will it impose new reporting, recordkeeping or compliance requirements on small businesses or local governments. This proposed rule is designed to address executive compensation and administrative costs of those providers of program services that receive State funding or State-authorized payments paid by the New York State Office for the Aging.

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

This proposed rule will not have an adverse economic impact on public or private entities in rural areas nor will it impose new reporting, recordkeeping or compliance requirements on public or private entities in rural areas. This proposed rule is designed to address executive compensation and administrative costs of those providers of program services that receive State fund or State-authorized payments paid by the New York State Office for the Aging.

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

The New York State Office for the Aging has determined that this proposed rule will not have a substantial adverse impact on jobs. This proposed rule is designed to address executive compensation and administrative costs of those providers of program services that receive State fund or State-authorized payments paid by the New York State Office for the Aging.

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

A Notice of Revised Rule Making was published in the New York State Register on October 31, 2012. NYSOFA received several sets of comments during the public comment period associated with the revised rulemaking. The issues and concerns raised in these comments are set forth below. Issues and concerns have been grouped according to the part of the revised rule they address because they are related or for convenience in providing an efficient response. Because many commenters addressed concerns that applied to all of the participating State agencies that are implementing Executive Order No. 38, the responses to comments provided by each of those agencies are incorporated by reference into these responses. NYSOFA's response is provided for each issue.

A number of comments objected generally to the underlying concept of the regulations, stating that the proposed regulation is overly broad in its authority and burdensome in its requirements. NYSOFA believes that the proposed limitations in the regulation further the legitimate goal of ensuring that public funds are properly expended and the use of such funds is properly monitored.

Clarification was requested concerning certain defined terms in the proposed regulation, in particular with respect to their intended scope. In response, and taking into account suggestions submitted, changes were made to the definitions of the following terms: administrative expenses, covered executive, covered provider, covered reporting period, executive compensation, program services expenses, reporting period, State-authorized payments and State funds.

Some commenters stated that the proposed limits on administrative expenses were burdensome and unnecessary, because they would interfere with existing contracts, because they were possibly duplicative of existing state and federal rules, or they will not enhance the protections already provided by restrictions from State reimbursement rates. Clarification was requested as to what will constitute administrative and program expenses. The proposed regulation has been further revised to clarify which administrative expenses are not included.

The definition of covered provider has been amended to address the individual or entity that has received State funds or State-authorized payments during the covered reporting period and the year prior to the covered reporting period. The definition of "covered provider" requires a contract or other agreement to render program services.

The regulation was not revised to alter the 75th percentile threshold because these revisions would compromise the goal of the regulation. Eliminating the executive compensation requirements would remove one of the key objectives of Executive Order No. 38: limiting the extent of such compensation paid by covered providers that rely to a significant degree upon public funds for their program and administrative services funding. These regulations provide a benchmark to ensure that State funds or State-authorized payments paid by this agency to providers are not used to support excessive compensation or unnecessary administrative costs.

Public comments tended to focus on executive compensation, stating the 75th percentile will drive salaries down as the outliers and reduce salaries in order to comply with the regulation. Implying this will depress the maximum salary permitted under the regulation. In addition, the State agencies' authority to deny all waivers related to executive compensation calls into question the integrity and the reasonableness of the entire process of reviewing executive compensation. The goal of the proposed regulation is to ensure that taxpayer dollars are used to provide critical services to New Yorkers in need.

The effective dates of provisions in the proposed regulations have been revised to clarify: (a) covered reporting period; (b) submission of waiver applications regarding executive compensation; (c) submission of waiver applications regarding administrative expenses; and (d) reporting periods.

The full Assessment of Comments is available on the NYSOFA website at [www.aging.ny.gov](http://www.aging.ny.gov)

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## Department of Agriculture and Markets

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

#### **Compliance with Executive Order No. 38 of 2012**

**I.D. No.** AAM-22-12-00013-RP

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

**Proposed Action:** Addition of Part 400 to Title 1 NYCRR.

**Statutory authority:** Agriculture and Markets Law, section 18; and Not-For-Profit Corporation Law, section 508

**Subject:** Compliance with Executive Order No. 38 of 2012.

**Purpose:** To limit administrative costs and executive compensation to ensure that services to New Yorkers are available and well-funded.

**Substance of revised rule:** The revised rule would add a new Part 400 to 1 NYCRR titled Limits on Administrative Expenses and Executive Compensation.

Section 400.1 contains definitions for purposes of this Part, including

definitions for administrative expenses, covered operating expenses, covered executive, covered operating expenses, covered provider, covered reporting period, Department, executive compensation, program services, program services expenses, related organization, reporting period, State-authorized payments and State funds.

**Section 400.2 Limits on Administrative Expenses.** Contains limits on the use of State funds or State-authorized payments for administrative expenses.

The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria.

The restriction will apply to covered providers receiving State funds or State-authorized payments from county or local governments, rather than directly from a State agency, pursuant to specified criteria.

The regulation addresses how the restriction will apply in the event that a covered provider has multiple sources of State funds or State-authorized payments.

**Section 400.3 Limits Executive Compensation.** Contains restrictions on executive compensation provided to covered executives.

The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria.

The restriction will apply to covered providers receiving State funds or State-authorized payments from county or local governments, rather than directly from a State agency, pursuant to specified criteria.

The revised rule addresses the application of this limit if the covered provider has multiple sources of State funds or State-authorized payments.

**Section 400.4 Waivers.** Processes are established for covered providers to seek waivers of the limit on administrative expenses and the limits on executive compensation.

**Section 400.5 Reporting by Covered Providers.** Covered providers are required to report information on an annual basis.

**Section 400.6 Penalties.** A process is established for the imposition of penalties in the event of non-compliance with the limit on administrative expenses or the limits on executive compensation.

A copy of the full text of the regulatory proposal is available on the New York State Department of Agriculture website, <http://www.agriculture.ny.gov/>.

**Revised rule making(s) were previously published in the State Register** on October 31, 2012.

**Revised rule compared with proposed rule:** Substantial revisions were made in sections 400.1, 400.2, 400.3, 400.4, 400.5 and 400.6.

**Text of revised proposed rule and any required statements and analyses may be obtained from:** Frederick B. Arnold, Esq., NYS Department of Agriculture and Markets, 10B Airline Drive, Albany, NY 12235, (518) 457-2449, email: [rick.arnold@agriculture.ny.gov](mailto:rick.arnold@agriculture.ny.gov)

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

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

#### **Revised Regulatory Impact Statement**

##### 1. Statutory authority:

Section 18 of the Agriculture and Markets Law provides, in part, that the Commissioner may enact, amend and repeal necessary rules which shall regulate and control the transaction of business by the Department and provide generally for the exercise of the powers and performance of the duties of the Department as prescribed in the Agriculture and Markets Law and the laws of the State and for the enforcement of their provisions and the provisions of the rules that have been enacted.

Section 508 of the Not-For-Profit Corporation Law provides, in part, that a corporation whose lawful activities involve among other things, the charging of fees or prices for its services or products shall have the right to receive such income and, in so doing, may make an incidental profit.

##### 2. Legislative objectives:

The statutory provision pursuant to which these regulations are proposed is intended to authorize the Department to promulgate rules necessary to properly exercise its powers and duties.

##### 3. Needs and benefits:

The proposed amendments implement the requirements set forth in Executive Order #38, which states that New York State directly or indirectly funds or authorizes reimbursements with other taxpayer dollars to contractors that provide critical services to New Yorkers in need; and expresses concern that such monies are being used for excessive administrative costs and executive compensation. The Executive Order directs that State agencies, including the Department, promulgate regulations to prevent excessive payment of taxpayer dollars for administrative expenses and executive compensation for these contractors.

The proposed regulations restrict administrative expenses for contractors to 25 percent and eventually 15 percent of the State's financial assistance or State-authorized payments. The proposed regulations also limit the annual compensation paid from State financial assistance or State-authorized payments to executives of contractors to \$199,000. The regula-

tions provide that contractors may make an application to the Department for a waiver of these requirements. Recordkeeping requirements are also included in the proposal to ensure compliance with these requirements. Finally, the proposed regulations set forth measures in response to failure to comply with these requirements.

The proposed amendments benefit the State by ensuring that the most State and taxpayer monies possible are allocated to delivery of services to the people of the State rather than to excessive funding for administrative costs and executive compensation. The proposed amendments also benefit the people of the State by not only ensuring the proper, efficient and effective use of taxpayer dollars, but also ensuring that those taxpayer dollars are used, to the extent possible, to help New Yorkers in need.

##### 4. Costs:

(a) Costs to private regulated parties: Contractors would incur minimal costs in complying with the reporting requirements in the rule since most, if not all, of the information to be reported is likely already collected or reported by the contractor for other purposes. Contractors would be limited in the dollar amounts they could allocate from State contracts for their administrative costs and executive compensation. However, the overall State funding award amounts would not decrease.

(b) Costs to the Department, State and local governments: The cost to the Department is expected to be minimal and consist, in part, of developing a reporting form. The State and local governments will not incur any expenses.

(c) The cost analysis is based upon the requirements for agencies in the proposal.

##### 5. Local government mandate:

None.

##### 6. Paperwork:

Contractors would need to complete and file a reporting form, and a waiver application as needed. To the extent feasible, such reporting will be made electronically to avoid unnecessary paperwork costs.

##### 7. Duplication:

This proposed rule does not duplicate, overlap, or conflict with any State or federal statute or rule. However, the proposed rule seeks to minimize the reporting requirements faced by providers by building upon those requirements in the federal internal revenue code that require certain tax-exempt organizations to report information concerning their executive compensation and administrative costs.

##### 8. Alternatives:

Since Executive Order #38 of 2012 directs State agencies to promulgate this regulation, there is no alternative to proposing this rule.

##### 9. Federal standards:

These amendments do not conflict with federal standards.

##### 10. Compliance schedule:

The rule will become effective upon adoption. The implementation date establishing the limits on administrative expenses and executive compensation will be July 1, 2013.

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

Revisions to the proposed regulations do not necessitate any changes to the Regulatory Flexibility Analysis for Small Businesses and Local Governments previously published.

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

Revisions to the proposed regulations do not necessitate any changes to the Rural Area Flexibility Analysis previously published.

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

Revisions to the proposed regulations do not necessitate any changes to the Statement in Lieu of Job Impact Statement previously published.

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

A Notice of Revised Rule Making was published in the State Register on October 31, 2012. The Department received several sets of comments during the public comment period associated with the revised rule making. The issues and concerns raised in these comments are set forth below. Because many commenters addressed concerns that applied to all of the participating State agencies that are implementing Executive Order No. 38, the responses to comments provided by each of those agencies are incorporated by reference into these responses. The Department's response is provided for each issue.

**Issue/Concern:** The revised regulations are discriminatory in that they only apply to nonprofit organizations, to which only \$3.2-billion in contracts were awarded. By contrast, the revised regulations do not apply to for profit organizations to whom the State awarded 32.6-billion in contracts, or 91-percent of the money allocated for contracts. Additionally, the revised regulations do not apply to state, local and public authorities, for which approximately 117,000 employees earn at least \$100,000 per year.

**Response:** For profit organizations that meet the definition of "covered provider" may be subject to these regulations.

**Issue/Concern:** The revised regulations set forth strict limitations on executive compensation, which are burdensome and unnecessary to accomplish the goals of limiting the compensation of nonprofit executives to reasonable levels. The Internal Revenue Service (IRS) rules already provide guidance to nonprofit organizations in determining reasonable compensation, provides for penalties for payment of unreasonable compensation and already limits executive pay to \$199,000 per year.

**Response:** The participating State agencies and the Division of the Budget (DOB) are aware that there are differences between the IRS rules and the revised regulations. The goal of these regulations is to implement Executive Order No. 38. Regarding the issue of penalties, the penalties section provides for notification of non-compliance, the submission of additional or clarifying information, a corrective action period, and the opportunity to appeal.

**Issue/Concern:** Strict limitations on executive compensation will unduly burden organizations that obtain all or substantially all of their compensation from State funds. This may lead to organizations cutting back on quality management, accounting, fundraising or compliance functions, which would potentially generate new administrative expenses in order to meet the requirements under the revised regulations.

**Response:** The Department believes that the proposed limitations in the regulation furthers the legitimate goal of ensuring that public funds are properly expended and the use of such funds is properly monitored.

**Issue/Concern:** The definition of "covered provider" includes an individual or entity that receives an average annual amount greater than \$500,000 to render program services and receives at least 30-percent of their/its total in-state revenue from State-funds or State-authorized funds. The revised regulations do not address the possible need to change these thresholds in the future.

**Response:** The regulations focus on New York State with the goal of identifying contractors providing program services in New York State who receive a significant portion of their funds to provide such services from State funds or State-authorized payments.

**Issue/Concern:** The definition of "program services" does not include property rental, mortgage or maintenance expenses, except where such expenses are made in connection with providing housing to members of the public receiving program services from a covered provider. However, the IRS already requires nonprofit organizations to report on their program and administrative expenses and further, allows the organization to allocate expenses related to real property between program services and administration. In not allowing such allocation, the revised regulations eliminate a category of expenses which directly support charitable services.

**Response:** The revised regulations conform some of the requirements to those with which many covered providers must already comply, including provisions incorporating the definitions applicable with non-profits under the IRS Code.

**Issue/Concern:** Regarding administrative expenses, a commenter approves of the provision that a covered provider may allocate a portion of an expense to program services and administration, if the allocation is supported by the nature of the expense. However, the commenter believes that the regulations should use the allocation methodology employed by the IRS which is based on generally accepted accounting principles (GAAP).

**Response:** The revised regulations have not added this requirement. However, the participating agencies will issue guidance to assist providers in complying with the new regulations.

**Issue/Concern:** Regarding administrative expenses, by requiring that State-funded nonprofit organizations allocate 75-percent (eventually 85-percent) of their State funds to program services, the revised regulations may prompt private funding sources to impose the same requirements on their funding. High administrative costs do not necessarily mean that the nonprofit organization is ineffective.

**Response:** Executive Order No. 38 is encouraging the effective and efficient delivery of program services to New Yorkers and preventing taxpayers from finding excessive administrative expenses.

**Issue/Concern:** Regarding executive compensation, the revised regulations subject the covered provider to penalties if the compensation is greater than \$199,000, is greater than the 75th percentile of that compensation provided to comparable executives and was not reviewed and approved by the covered provider's board of directors or governing body. Tying reasonable compensation to a specific percentile will lead to uncertainty among the larger nonprofit organizations which must pay higher compensation to retain quality employees capable of managing such large organizations.

**Response:** The participating State agencies periodically will assess the impact of the regulations on executive salaries and will propose any necessary adjustments to the regulations accordingly. The goal of the participating State agencies is not to control executive compensation, but to ensure that taxpayer dollars are used to provide critical services to New Yorkers in need.

**Issue/Concern:** The revised regulations define executive compensation to include all forms of cash and noncash payments or benefits, but exclude mandated benefits which are consistent with those received by the covered provider's other employees. This is inconsistent with IRS requirements, which provide that base compensation and all benefits for an executive of a nonprofit organization are to be disclosed. Data sufficient to satisfy IRS requirements would not address the more specific requirements under the revised regulations, making it difficult for covered providers to know whether the compensation for their executive is near or beyond the 75 percentile.

**Response:** The goal of the regulation is to ensure that public funds are properly expended and that taxpayer dollars are used to provide critical services to New Yorkers in need.

**Issue/Concern:** Limits on executive compensation may have a chilling effect on the growth of smaller nonprofits, since these entities may shy away from the complexity of compliance with the requirements in the revised regulations.

**Response:** The limitations in the regulations are designed to ensure that the most taxpayer dollars possible are being used to provide critical services to New Yorkers in need.

**Issue/Concern:** Regarding waivers, the waiver process is unnecessarily burdensome with uncertain outcomes. Nonprofit organizations would have to spend time and resources to qualify for a waiver, which may be required to pay higher salaries to qualified executives or allow administrative expenses to exceed the 75-percent threshold.

**Response:** The Department believes that the waiver process in the regulations furthers the legitimate goal of ensuring that public funds are properly expended to provide services to New Yorkers in need.

**Issue/Concern:** Payments through municipal or county contracts should not be considered State-authorized payments. Otherwise, the revised regulations would intrude upon the local contracting authority, and unnecessarily burden county and municipal governmental units. Additionally, service providers would be unable to discern how much of a municipal or county contract should be included for purposes of defining State-authorized payments or State funds. Under the revised regulations, guidance on these issues will be provided to the affected counties and local governments, but not to the service providers.

**Response:** The regulations remain unchanged in this regard.

**Issue/Concern:** The revised regulations should only cover State-authorized funds, not State funds, since State agencies have multiple opportunities to review allocation of State funds.

**Response:** The regulations would not adequately address the targeted problems of inflated executive compensation and excessive administrative expenses if only State-authorized funds were covered.

**Issue/Concern:** The minimum State funding should be based on total revenues, not just in-state revenues. It remains unclear whether funding from out of state that is not designated for a particular program would constitute in-state funding if the nonprofit entity also has program activity outside the State.

**Response:** Under the regulations, minimum State funding is based on total revenues.

**Issue/Concern:** The 75th percentile cut-off should be eliminated since it could result in unintended circumstances, such as nonprofit organizations paying their executives up to the 75 percentile when they might otherwise pay at a lower level and requiring the organizations to hire less qualified staff in order to meet the threshold due to the uncertainties of the waiver process.

**Response:** The Department believes that the proposed limitations in the regulations further the legitimate goal of ensuring that public funds are properly expended and the use of such funds is properly monitored.

**Issue/Concern:** The definition of executive compensation should not include the provision "... use of the organization's property, reportable on a covered executive's W-2 form," since it could be construed that the definition only applies to the executive's use of the organization's property and not to other non-salary benefits.

**Response:** The regulations remain unchanged in this regard.

**Issue/Concern:** Use of compensation surveys to determine executive compensation and that are identified, provided or recognized by the Department and Director of the Budget, may be burdensome if the survey isn't provided by the Department. This would require the nonprofit organization to absorb the cost of the survey which could be burdensome on the smaller entities. Further, it is unlikely that there are surveys which are appropriate for all positions in all covered providers. Finally, to the extent such surveys exist, they are based on IRS requirements which have a definition of executive compensation that differs from that which is in the revised regulations. The better approach would be to allow nonprofit organizations to use their own comparable salary data or use surveys which use IRS data.

**Response:** It is anticipated that sample compensation surveys will be provided upon request.

**Issue/Concern:** The revised regulations require that executive compensation in excess of \$199,000 per year and waivers of such compensation limitation must be approved by the covered provider's board of directors or equivalent governing body, including two independent directors or voting members. It appears that this requirement does not allow the delegation of review and approval to a committee of the board of directors, which is the practice in many nonprofit organizations. The revised regulations should be changed to allow for such delegation.

**Response:** The revised rule remains unchanged.

**Issue/Concern:** The revised regulations require that limits on executive compensation and administrative expenses be imposed upon subcontractors or agents of covered providers. "Administrative expenses" should not be included, since this would extend the limitation to agents and subcontractors who/which provide a purely administrative service (e.g. janitorial services), rather than program services.

**Response:** The Department believes that the proposed limitations in the regulations further the legitimate goal of ensuring that public funds are properly expended and the use of such funds is properly monitored.

**Issue/Concern:** The deadline for waiver applications for the reporting period beginning April 1, 2013 should be pushed back from January 1, 2013 to March 1, 2013, given that it may take time to obtain compensation surveys and that in any event, with the comment period extended to mid-December 2012, the revised regulations would not become effective until, at the earliest, less than one month after the regulations are issued.

**Response:** The implementation process will address waiver issues further.

**Issue/Concern:** The revised regulations provide that a decision on a waiver application must be made by the Department or Director of the Budget no later than 60 calendar days after submission of the application. However, the regulations do not indicate the consequences if the decision is not rendered within that timeframe.

**Response:** The implementation process will address waiver issues further.

**Issue/Concern:** The revised regulations provide that a request for reconsideration of a denial of a waiver shall stay any action to deny the request for the waiver and stay any action to enter a contract or other agreement. The stay regarding a contract or other agreement is unclear. Does the stay mean that the contract or agreement cannot be withdrawn during the stay? What effect does the stay have on the commencement date and service obligations under the contract or agreement? These questions should be clarified in the revised regulations.

**Response:** The implementation process will address waiver issues further.

covered executive, covered provider, covered reporting period, executive compensation, Office, program services, program services expenses, related organization, reporting period, State-authorized payments, and State funds.

**Section 812.4: Limits on Administrative Expenses.** Contains limits on the use of State funds or State-authorized payments for administrative expenses. The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria. The restriction will apply to covered providers receiving State funds or State-authorized payments from county or local governments, rather than directly from a State agency, pursuant to specified criteria. The revised regulation addresses how the restriction will apply in the event that a covered provider has multiple sources of State funds or State-authorized payments.

**Section 812.5: Limits on Executive Compensation.** Contains restrictions on executive compensation provided to covered executives. The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria. The restriction will apply to covered providers receiving State funds or State-authorized payments from county or local governments, rather than directly from a State agency, pursuant to specified criteria. The revised rule addresses the application of this limit if the covered provider has multiple sources of State funds or State-authorized payments.

**Section 812.6: Waivers.** Processes are established for covered providers to seek waivers of the limit on administrative expenses and the limits on executive compensation.

**Section 812.7: Reporting by Covered Providers.** Covered providers are required to report information on an annual basis.

**Section 812.8: Penalties.** A process is established for the imposition of penalties in the event of non-compliance with the limit on administrative expenses or the limits on executive compensation.

**Section 812.9: Severability.**

A copy of the full text of the regulatory proposal is available on the OASAS website at: <http://www.oasas.ny.gov/regs/index.cfm>

**Revised rule compared with proposed rule:** Substantial revisions were made in sections 812.2, 812.3, 812.4, 812.5 and 812.6.

**Text of revised proposed rule and any required statements and analyses may be obtained from:** Sara Osborne, Senior Attorney, NYS Office of Alcoholism and Substance Abuse Services, 1450 Western Ave., Albany, NY 12203, (518) 485-2317, email: SaraOsborne@oasas.ny.gov

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

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

**Revised Regulatory Impact Statement**

1. Statutory Authority:

a) Section 19.07(c) of the Mental Hygiene Law (MHL) charges OASAS with the responsibility of seeing that persons who abuse or are dependent on alcohol and/or substances and their families are provided with care and treatment that is effective and of high quality.

b) Section 19.07(e) of the MHL authorizes the Commissioner of OASAS to adopt standards including necessary rules and regulations pertaining to chemical dependence treatment services.

c) Section 19.09(b) of the MHL authorizes the Commissioner to adopt regulations necessary and proper to implement any matter under his/her jurisdiction.

d) Section 19.21(b) of the MHL requires the Commissioner to establish and enforce regulations concerning the licensing, certification, and inspection of chemical dependence treatment services.

e) Section 19.21(d) of the MHL requires OASAS to establish reasonable performance standards for providers of services certified by OASAS.

f) Section 19.40 of the MHL authorizes the Commissioner to issue operating certificates for the provision of chemical dependence treatment services.

g) Section 32.01 of the MHL authorizes the Commissioner to adopt any regulation reasonably necessary to implement and effectively exercise the powers and perform the duties conferred by Article 32 of the MHL.

h) Section 32.07(a) of the MHL authorizes the commissioner to adopt regulations to effectuate the provisions and purposes of article 32 of the MHL.

i) Executive Order No. 38 directs certain executive agencies to promulgate regulations addressing the extent and nature of a funded service provider's administrative costs and executive compensation eligible for reimbursement with State financial assistance or State-authorized payments for operating expenses.

j) Section 508 of the Not for Profit Corporation Law requires any incidental profit from fees charged for services shall be applied to the maintenance, expansion or operation of the activities of the not for profit corporation and in no case be distributed among members, directors or officers of the corporation.

2. Legislative Objectives:

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## Office of Alcoholism and Substance Abuse Services

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

**Limits on Administrative Expenses and Executive Compensation**

**I.D. No.** ASA-22-12-00014-RP

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

**Proposed Action:** Addition of Part 812 to Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 19.07, 19.09, 19.21, 19.40, 32.01, 32.07 and Executive Order No. 38

**Subject:** Limits on Administrative Expenses and Executive Compensation.

**Purpose:** Ensure state funds paid by this agency to providers are not used for excessive compensation or unnecessary administrative costs.

**Substance of revised rule:** The revised rule would add a new Part 812 to 14 NYCRR titled Limits on Administrative Expenses and Executive Compensation.

Section 812.1: Provides the background and intent of the revised rule, which is to implement Executive Order No. 38, issued by Governor Andrew Cuomo on January 18, 2012.

Section 812.2: Sets forth the statutory authority for the promulgation of the rule by the Office of Alcoholism and Substance Abuse Services (hereinafter the "Office").

Section 812.3: Contains definitions for purposes of this Part, including definitions for administrative expenses, covered operating expenses,

To comply with the requirements of Executive Order No. 38.

### 3. Needs and Benefits:

OASAS is proposing to adopt the following regulation because the State of New York directly or indirectly funds with taxpayer dollars a large number of tax exempt organizations and for-profit entities that provide critical services to New Yorkers in need and the goal is to ensure that taxpayers' dollars are used properly, efficiently, and effectively to improve the lives of New Yorkers. In certain instances, providers of services that receive State funds or State-authorized payments have used such funds to pay for excessive administrative costs or inflated compensation for their senior executives, rather than devoting a greater proportion of such funds to providing direct care or services to their clients. Such abuses involving public funds harm both the people of New York who are paying for such services, and those persons who must depend upon such services to be available and well-funded. These regulations, which are required by Executive Order No. 38, will ensure that State funds or State-authorized payments paid by OASAS to providers are not used to support excessive compensation or unnecessary administrative costs.

### 4. Costs:

The costs of implementing this rule to affected providers is anticipated to be minimal; most, if not all, of the information that must be reported by such providers is already gathered or reported for other purposes. Current regulations require the submission of substantial financial information, some of which will be additional to current requirements, or collected in another form. The costs to OASAS and providers of such implementation are expected to be limited, and efforts to ensure efficient centralization of certain aspects of such implementation are underway. OASAS estimates that minimal compliance activities will be needed to satisfy any additional reporting requirements.

### 5. Paperwork:

The proposed regulatory amendments will require limited additional information to be reported to the agency by providers receiving State funds or State-authorized payments. To the extent feasible, such reporting shall be made electronically to avoid unnecessary paperwork costs.

### 6. Local Government Mandates:

As this regulation does not apply to state and local governments, there are no new local government mandates.

### 7. Duplications:

This proposed rule does not duplicate, overlap, or conflict with any State or federal statute or rule. However, the proposed rule seeks to minimize the reporting requirements faced by providers by building upon those requirements in the federal internal revenue code that require certain tax-exempt organizations to report information concerning their executive compensation and administrative costs.

### 8. Alternatives:

Executive Order No. 38 requires the adoption of this proposed regulation.

### 9. Federal Standards:

These amendments do not conflict with federal standards.

### 10. Compliance Schedule:

This rule will become effective upon adoption; the implementation date establishing the limits on administrative expenses and executive compensation will be July 1, 2013.

### *Revised Regulatory Flexibility Analysis*

A Revised Regulatory Flexibility Analysis for Small Businesses and Local Governments (RFASBLG) is not being submitted with this notice because the changes to the proposed rule will not impose any adverse economic impact on small businesses, nor will it impose new reporting, record keeping or other compliance requirements on small businesses or local governments.

### *Revised Rural Area Flexibility Analysis*

A Revised Rural Area Flexibility Analysis (RAFA) is not being submitted with this notice because the changes to the proposed rule will not impose any adverse economic impact on rural areas.

### *Revised Job Impact Statement*

A Revised Job Impact Statement (JIS) is not being submitted with this notice because it is evident from the subject matter of the regulation that it will have no impact on jobs and employment opportunities.

### *Assessment of Public Comment*

A Notice of Revised Rule Making was published in the New York State Register on October 31, 2012. The Office of Alcoholism and Substance Abuse Services (OASAS) received four (4) sets of comments during the public comment period associated with the revised rulemaking from The Association of Fundraising Professionals ("AFP"), Coalition of Behavioral Health Agencies ("BHA"), Lawyers Alliance ("LA"), and Charity Defense Council ("CDC").

The issues and concerns raised in these comments are set forth below, grouped according to the part of the revised rule they commented upon.

Other participating state agencies received comments that applied to all agencies implementing Executive Order No. 38 and those comments and responses are incorporated by reference into these responses; however, only OASAS's response is provided for issues addressed to OASAS.

### Applicability

Issue/Concern: The Internal Revenue Service (IRS) rules and the Executive Order No. 38 regulations are not necessarily compatible concerning the issue of executive compensation. For instance, an organization that provides executive compensation which is reasonable pursuant to IRS rules may suddenly be subjected to penalties under the regulations.

Response: OASAS and the Division of the Budget (DOB) are aware that there are differences between the IRS rules and the revised regulations. The goal of these regulations is to implement Executive Order No. 38. Regarding penalties, the penalty provisions would not be applied "suddenly"; rather Section 812.8 provides for notification of non-compliance, the submission of additional or clarifying information, a corrective action period, and the opportunity to appeal.

Issue/Concern: The regulations should cover only State-authorized payments, and not other State funds. When State funds are awarded through a State agency contract, that State agency has multiple opportunities to review the contractor's use of the funds.

Response: The regulations cover those funds that are either State funds or State-authorized payments. The regulations would not adequately address the targeted problems of excessive administrative costs and inflated compensation and would create inequities if only State-authorized payments were covered.

Issue/Concern: Payments through municipal or county contracts should not be considered for purposes of determining whether a provider is covered. Funds awarded or granted by county or local governmental units should be excluded from the definitions of State-authorized payments and State funds.

Response: The regulations cover those funds that are awarded through a county or local government contract and are either State funds or State-authorized funds. The regulations would not adequately address the targeted problems of excessive administrative costs and inflated compensation if only providers that contracted directly with State agencies were covered. This would create inequities among providers depending upon whether their funding was received directly or indirectly from the State.

Issue/Concern: It is discriminatory that not-for-profit human service providers are subject to these regulations, but for profit corporations are not.

Response: For profit organizations that meet the definition of "covered provider" pursuant to Section 812.3(d) may be subject to these regulations.

Issue/Concern: It is wrong that the regulations do not apply to State agencies that pay their employees large salaries.

Response: The regulations have been developed to implement Executive Order No. 38, which addresses contracts to render program services.

### Definitions

Issue/Concern: The definition of "covered provider" at 812.3 (d) (1) (ii) should be based on total revenues, and not in-State revenues. The explanation of "in-State revenues" does not resolve the inherent complications that arise from the receipt of contributed revenue from outside New York State.

Response: The regulations focus on New York State with the goal of identifying contractors providing program services in New York State who receive a significant portion of their funds to provide such services from State funds or State-authorized payments.

Issue/Concern: The definition of "executive compensation" at 812.3 (e) should be revised to clarify that the qualifying phrase "reportable on a covered executive's W-2 form" is applicable not only to the personal use of the organization's property, but also to other non-salary benefits.

Response: This technical revision will be made to § 812.3 (f).

Issue/Concern: The definition of "program services expenses" at 812.3 (h) (2) (ii) should allow property rental, mortgage and maintenance expenses to be allocated between "program services" and "administrative expenses" based on the actual use of the property.

Response: With the noted exception of providing housing to members of the public receiving program services, participating State agencies maintain that for purposes of Executive Order No. 38, property rental, mortgage and maintenance expenses are not "program services expenses."

### Limits on administrative expenses

Issue/Concern: The regulations at 812.4 and 812.5 applying Executive Order No. 38 restrictions to subcontractors and agents of covered providers should be amended to remove "or administrative" from the following language: "...if and to the extent that such a subcontractor or agent has

received State funds or State-authorized payments from the covered provider to provide program or administrative services during the reporting period and would otherwise meet the definition of a covered provider but for the fact that it has received State funds or State-authorized payments from the covered provider rather than directly from a governmental agency." This language makes it unclear whether a subcontractor or agent providing purely administrative services would be subject to the limitations.

Response: The language "or administrative" does not need to be removed. As stated in the quote above, to be subject to the regulatory limitations, a subcontractor or agent would need to meet the definition of a "covered provider." The definition of "covered provider" requires a contract or other agreement to render program services.

Issue/Concern: The revised regulations create complicated new definitions and reporting requirements. Implementing the revised regulations will add significantly to the providers' administrative costs.

Response: The participating State agencies will maintain on-line guidance to assist providers in complying with the new regulations.

Issue/Concern: The limits on administrative expenses, set forth in 812.4, should require the Generally Accepted Accounting Principles (GAAP) permitted by the Form 990 as the allocation methodology for differentiating between administrative expenses and program expenses.

Response: The allocation methodology is flexible to allow for agency specific applications.

Issue/Concern: The regulations may set a precedent for others to impose similar restrictions on the use of funds for administrative expenses. Covered providers may lose their ability to use their best judgment to determine how to operate effectively and efficiently.

Response: Executive Order No. 38 is encouraging the effective and efficient delivery of program services to New Yorkers by encouraging the redirection of funds from administrative expenses to service delivery.

Issue/Concern: Agencies should periodically re-evaluate the impact of the limitation on administrative expenses to ensure that organizations are not cutting back on key administrative functions in such a manner as to jeopardize their ability to deliver quality program services.

Response: The participating State agencies together with DOB plan to monitor the impact of the regulations and make periodic updates as needed.

Issue/Concern: A provision should be added to the regulations requiring agencies to reevaluate the limitations on administrative expenses every five years.

Response: Pursuant to State Administrative Procedure Act § 207, OASAS is required to complete a periodic review of existing regulations, which includes an analysis of the need for and the legal basis of the regulations and invites public comment on the continuation or modification of the regulations.

Issue/Concern: The limits on administrative expenses do not allow for program expansion and will result in an underinvestment in organizational growth.

Response: The definition of administrative expenses at § 812.3 addresses this concern. Expenses in excess of \$10,000 that would otherwise be administrative expenses are excluded from consideration as either administrative expenses or program service expenses when they are either non-recurring (no more frequent than once every five years) or not anticipated by a covered provider.

#### Limits on Executive Compensation

Issue/Concern: Providers may need to pay more than \$199,000 per annum to find the quality leaders needed to facilitate the growth of their organizations.

Response: The regulations take this concern into consideration in § 812.6 and 812.6 by permitting consideration of such factors such as the compensation provided to comparable executives; the qualifications and experience possessed by or required of the covered executive; the provider's efforts to secure other comparable executives; and/or the nature, size and complexity of the covered provider's operations and program services.

Issue/Concern: The regulations should eliminate the 75th percentile cutoff on executive compensation.

Response: Eliminating the executive compensation requirements would remove one of the key objectives of Executive Order No. 38: limiting the extent of such compensation paid by covered providers that rely to a significant degree upon public funds for their program and administrative services funding. OASAS is proposing to adopt this regulation because New York State directly or indirectly funds with taxpayer dollars a large number of tax exempt organizations and for-profit entities that provide

critical services to New Yorkers in need, and the goal is to ensure that taxpayer dollars are used properly, efficiently and effectively to improve the lives of New Yorkers.

Issue/Concern: The 75th percentile will drive salaries down as the outliers reduce salaries in order to comply with the regulations. Eventually this will depress the maximum salary permitted under the regulations. In addition, the State agencies' authority to deny all waivers related to executive compensation calls into question the integrity and the reasonableness of the entire process of reviewing executive compensation.

Response: The participating State agencies periodically will assess the impact of the revised regulations on executive salaries and will propose any necessary adjustments to the regulations accordingly.

Issue/Concern: The revised regulations relating to executive compensation at § 812.5 and 812.6 should be revised to allow for the delegation of the approval of executive compensation by a committee of the Board of Directors, such as a compensation committee.

Response: The goal of EO No. 38 is to safeguard taxpayer dollars; it is appropriate that the required review and approval of executive compensation be at the level of the Board of Directors or an equivalent governing body (if such body exists); this has been addressed in the amended regulation.

Issue/Concern: The regulation at 812.5 should clarify by what mechanism compensation surveys will be "identified, provided or recognized." Also the participating State agencies need to approve their compensation surveys as soon as possible in order to allow providers sufficient time to review the surveys.

Response: The implementation process will address these issues. It is anticipated that a website will provide organizations guidance regarding acceptable compensation surveys and additional information regarding how compensation surveys will be identified, provided or recognized.

Issue/Concern: Instead of compensation surveys, a better approach would be to permit covered providers to develop and maintain a record of their own comparable salary information or, at a minimum, to explicitly allow the use of surveys based on information about compensation that has been reported for comparable positions at comparable organizations on the IRS Form 990.

Response: The revised regulations allow for new surveys to be developed. Consistent with the regulations at § 812.5, the new surveys would need to be identified, provided, or recognized by OASAS and the Director of DOB.

Issue/Concern: The definitions of "executive compensation" under Form 990 and the regulations vary. Because the regulations use a definition of executive compensation that includes only a portion of the benefits generally reported on Form 990, the comparability data necessary to assess compensation under the regulations may not be available.

Response: The participating State agencies currently are developing with DOB a list of acceptable compensation surveys.

Issue/Concern: The "grandfathering" provision for executive contracts prior to the effective date of the regulation is good but too short; concerns that it may still interfere with existing contractual obligations.

Response: This has period has been extended to exempt contracts entered into prior to July 1, 2012 unless the term of the contract extends beyond April 1, 2015. (812.5(h)).

#### Waivers

Issue/Concern: The effective date of the revised regulations requires clarification. Providers should not be required to file waivers prior to April 1, 2013.

Response: The revised regulations have changed the effective date.

Issue/Concern: The revised regulations at § 812.6 provide that a decision on a timely and complete waiver application shall be provided no later than 60 calendar days after submission of the application. This section should further state that such waiver applications shall be deemed to be granted in the event that a decision is not rendered within the 60 day deadline.

Response: The regulations will not be revised to make this requested change. The implementation process will address waiver issues further.

Issue/Concern: It is unrealistic to ask large organizations that have historically compensated their executives at levels which would necessitate a waiver to spend time and resources in an effort to hire qualified executives at lower rates and to document those efforts, in order to qualify for a waiver.

Response: The goal of Executive Order No. 38 is to ensure that taxpayer dollars are used to provide critical services to New Yorkers in need.

#### Penalties

Issue/Concern: After the proposed denial of a waiver, the revised

regulation at § 812.6 provides, "Submission of a request for reconsideration within thirty (30) calendar days shall stay any action to deny an applicant's request for a waiver, pending a decision regarding such request for reconsideration, and shall stay any action to enter into a contract or other agreement." The meaning of this latter statement concerning a "stay" is unclear.

Response: OASAS submits that the plain meaning of the word "stay" in the context of this regulation is sufficiently clear.

## Office of Children and Family Services

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

#### Establishing Limitations on Administrative Expenses and Executive Compensation of Service Providers Supported by State Funds

I.D. No. CFS-22-12-00010-RP

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

**Proposed Action:** Addition of Part 409 to Title 18 NYCRR; and Subpart 166-5 to Title 9 NYCRR.

**Statutory authority:** Social Services Law, sections 20(3)(d) and 34(3)(f); and Executive Law, section 501(5)

**Subject:** Establishing limitations on administrative expenses and executive compensation of service providers supported by State funds.

**Purpose:** To comply with Executive Order numbers 38 and 43.

**Substance of revised rule:** The proposed regulations would add a new Part 409 to Title 18 of NYCRR and a new Subpart 166-5 to Title 9 of NYCRR. The language of the two sets of regulations would be substantively the same.

Each set of regulations would have the following:

The first section would set forth the background and intent underlying the regulations. Both Part 409 and Subpart 166-5 are being added to comply with the requirements of Executive Order #38, which requires that the executive agencies promulgate regulations establishing limits on administrative costs and executive compensation of service providers where such costs and compensation are supported by State funds.

There would be a section setting forth the statutory basis for promulgating the regulations.

There would be a definitions section, which would include definitions of what service providers are covered, what administrative expenses are covered, what constitutes executive compensation, and what constitutes State funds for purposes of the regulations, as well as other useful definitions. The covered service providers would basically be entities or individuals having contracts or other agreements with the Office of Children and Family Services (Office) or another government entity for the year prior to and during the covered reporting period during which time the provider received an average amount greater than \$500,000 each year where at least 30 percent of the provider's total annual in-state revenues were derived from State funds, directly or indirectly. Governmental units and individual professionals providing program services under agreement with the State would not be covered. Also, Part 409 would provide that individuals or entities providing child day care services who are in receipt of child care subsidies under the Social Services Law would not be covered based on the receipt of such subsidies. However, such providers could be subject to the regulations if they receive State funds or State-authorized payments other than child day care subsidies.

There would be a section discussing the limitations on use of State funds to support administrative expenses. The limitation would basically be that no more than 25 percent of the State funds could be used for administrative expenses, with the percentage decreasing five percent each year until the limit would be 15 percent for calendar year 2015 and thereafter.

There would be a section discussing the limitations on use of State funds to support executive compensation. The limitation would basically be that no more than \$199,000 per year in executive compensation could be supported by State funds. This section also addresses certain variances from the standard limitation.

There would next be a section under which service providers who exceed the limitations on use of State funds to support administrative ex-

penses and executive compensation could seek waivers from those limitations. The section would establish standards for granting waivers and a process for determining whether to grant waivers.

There would be a section on reporting requirements for service providers subject to the new regulations, and provision for the consequences of failing to comply with the reporting requirements.

The final section would set forth the penalties to which a service provider would be subject if the service provider fails to comply with the limitations on use of State funds to support administrative expenses or executive compensation and fails to obtain a waiver of those limitations. This section would also set forth the procedure to be followed in assessing such penalties.

**Revised rule making(s) were previously published in the State Register on October 31, 2012.**

**Revised rule compared with proposed rule:** Substantial revisions were made in sections 409.2 - 409.7 and Subpart 166-5.

**Text of revised proposed rule and any required statements and analyses may be obtained from:** Public Information Office, NYS Office of Children and Family Services, 52 Washington Street, Rensselaer, N.Y. 12144, (518) 473-7793

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

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

#### Revised Regulatory Impact Statement

##### 1. Statutory authority:

Section 20(3)(d) of the Social Services Law (SSL) authorizes the Office of Children and Family Services (OCFS) to establish rules and regulations to carry out its powers and duties pursuant to the provisions of the SSL.

Section 34(3)(f) of the SSL requires the Commissioner of OCFS to establish regulations for the administration of public assistance and care within the State.

Section 501(5) of the Executive Law authorizes the Commissioner of OCFS to promulgate regulations necessary to establish, operate and maintain programs operated and oversee by OCFS under the Executive Law.

Section 508 of the Not-for-Profit Corporation Law provides that a not-for-profit corporation may make incidental profits, but any such incidental profits must be applied to the maintenance, expansion or operation of the corporation and cannot be divided or distributed to the members, directors or officers of the corporation.

##### 2. Legislative objectives:

The proposed regulations are necessary in order for New York State to maintain appropriate controls on administrative expenses and the amount of State funds going toward the purpose of executive compensation. This will support the legislative goal that State funds be expended in a manner consistent with the best fiscal interests of the State, as provided for throughout the State Finance Law.

##### 3. Needs and benefits:

OCFS is proposing to adopt the regulation because the State of New York directly or indirectly funds with taxpayer dollars a large number of tax exempt not-for-profit organizations and for-profit entities that provide critical services to New Yorkers in need. The goal of the regulation is to establish appropriate controls so that taxpayer dollars are used properly, efficiently, and effectively to improve the lives of New Yorkers. In certain instances, providers of services that receive State funds or State-authorized payments have used such funds to pay for excessive administrative costs or inflated compensation for their senior executives, rather than devoting a greater proportion of such funds to providing direct care or services to their clients. Such abuses involving public funds harm both the people of New York who are paying for such services, and those persons who must depend upon such services to be available and well-funded. These regulations, which are required by Executive Order No. 38, will establish standards to prevent the use of State funds or State-authorized payments that come through OCFS for support of excessive executive compensation or unnecessary administrative costs.

##### 4. Costs:

The compliance cost to providers of services is expected to be minimal because most, if not all, of the information that will be required to be reported by providers of services is already gathered and reported by such providers for other purposes.

It is estimated that the cost to OCFS of implementing this rule will be minimal, as the State will be making efforts to centralize as many of the functions associated with the rule as possible in order to efficiently implement the rule.

##### 5. Local government mandates:

The proposed regulations will impose very minimal additional mandates on social services districts. The social services districts may be asked to provide some information to OCFS concerning service providers with which the local districts have contractual relationships, or to provide a

reporting form or reporting information to their prospective contractors for the contractors to send to OCFS, but the administrative functions required by the proposed regulations will be carried out by OCFS.

6. Paperwork:

The proposed regulations will require some additional reporting of information to the State by service providers receiving State funds or State-authorized payments. The State will, to the extent feasible, provide that such reporting be done electronically to avoid unnecessary paperwork costs.

7. Duplication

The proposed regulations do not duplicate, overlap, or conflict with any other State or federal requirements. However, the proposed regulations seek to minimize the reporting requirements faced by service providers by building upon existing requirements in the federal Internal Revenue Code that require certain tax-exempt organizations to report information concerning their executive compensation and administrative costs.

8. Alternatives:

Since Executive Order #38 requires the adoption of the proposed regulations, there is no viable alternative to implementing the proposed regulations.

9. Federal standards:

The regulatory amendments do not conflict with any federal standards.

10. Compliance schedule:

This rule will become effective upon adoption. The implementation date establishing the limits on administrative expenses and executive compensation will be July 1, 2013.

**Revised Regulatory Flexibility Analysis**

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this notice because the proposed rule will not impose any adverse economic impact on small businesses, nor will it impose new reporting, record keeping or other compliance requirements on small businesses or local governments.

**Revised Rural Area Flexibility Analysis**

A Rural Area Flexibility Analysis is not being submitted with this notice because the proposed rule will not impose any adverse economic impact on rural areas.

**Revised Job Impact Statement**

A Job Impact Statement is not being submitted with this notice because it is evident from the subject matter of the regulation that it will have no impact on jobs and employment opportunities.

**Assessment of Public Comment**

A Notice of Revised Proposed Rule Making was published in the State Register on October 31, 2012.

All comments received were reviewed and evaluated. Many of the concerns expressed in the comments have been addressed by revisions to the various sections of the proposed regulations. Suggestions from others were determined to be contrary to the goals of the proposed rulemaking.

Some comments objected generally to the underlying concept of the regulations, stating that the proposed regulations are unnecessary and counter-productive. A comment was also received alleging that the proposed regulations discriminate against not-for-profit entities. The New York State Office of Children and Family Services (OCFS) believes that the proposed limitations in the regulations further the legitimate goal of ensuring that public funds are properly expended and the use of such funds is properly monitored. The proposed regulations were not revised to exclude not-for-profits from being covered by the regulations.

Clarification and changes were requested concerning certain defined terms in the proposed regulation, in particular with respect to their intended scope and meaning. In response, and taking into account suggestions submitted, changes were made to the definitions of the following terms: administrative expenses, covered provider, covered executive, executive compensation, program services expenses, reporting period, State-authorized payments and State funds. A definition was also added for the term "covered reporting period".

Clarification was requested as to what will constitute administrative and program expenses. The proposed regulations have been revised to clarify provisions related to those two expenses.

Comments were received seeking clarification of what is included within executive compensation. The proposed regulations have been revised to further clarify what is included within the term.

Comments were received concerning the treatment of subcontractors and agents for purposes of the regulations. The proposed regulations have been revised to clarify that covered providers will not be held responsible for the failure of an agent or subcontractor to comply with the requirements of the regulations.

A number of comments were concerned about the limits on executive compensation, including concerns that the proposed regulation should not intrude into the not-for-profit sector and inappropriately uses a percentile

standard that will gradually diminish executive compensation levels. Other comments criticized the methodology governing the use of the 75th percentile threshold. Also, commenters questioned the meaning of the exemption for executive compensation contracts entered into before April 1, 2012 that extend beyond April 1, 2014. There were also several comments concerning the use of recognized surveys or independent commissioned surveys or identification and recognition of specific compensation surveys to establish comparisons. And there were comments concerning the requirement that where executive compensation is subject to more stringent limits than those set forth in the regulations, the more stringent limits apply.

In response, the proposed regulations were revised to: clarify the standards for determining what activities by a covered executive would be subject to the compensation limits; extend the April 1, 2014 date to April 1, 2015; and further clarify the provision concerning the situation where executive compensation is subject to more stringent limits than those set forth in the regulations. The regulations were not revised to alter the 75th percentile threshold because such revisions would compromise the goal of the regulations.

Comments were received concerning the waiver process, the time for submitting waiver requests and the effect of a lack of timeliness in the process. Questions were also raised about the effect of a stay where a waiver denial is being appealed. In response to those comments, the proposed regulations have been revised to permit waivers to be granted to positions, not just to the individuals holding those positions. Changes were also made to the date when the limits on administrative expenses and executive compensation will take effect, which will also help address concerns about the timeliness of initial waiver requests. Changes were not made to the proposed regulations concerning the effect of a stay.

Comments were received concerning the ramifications of the April 1, 2013 effective date. The proposed regulations have been revised to provide that the limits on administrative expenses and executive compensation will take effect at the beginning of the first covered reporting period that begins after July 1, 2013.

Comments were received requesting that the regulations set forth the process for selection of a lead State agency for covered providers who are subject to oversight by more than one State agency. This will be handled administratively by the State agencies involved, and no change was made to the proposed regulations to address this issue.

Comments were received criticizing the need for the proposed regulations. OCFS believes the regulations are necessary to establish appropriate controls so that public funds are used properly, efficiently and effectively.

The full Assessment of Comments is available on the OCFS website at <http://ocfs.ny.gov>

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## Department of Civil Service

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

**Jurisdictional Classification**

**I.D. No.** CVS-11-13-00002-P

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

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

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

**Subject:** Jurisdictional Classification.

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

**Text of proposed rule:** Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Labor, by adding thereto the position of Employment Service Monitor Advocate (1).

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

**Data, views or arguments may be submitted to:** Ilene Lees, Counsel, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-2624, email: [ilene.lees@cs.state.ny.us](mailto:ilene.lees@cs.state.ny.us)

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

**Regulatory Impact Statement**

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

**Regulatory Flexibility Analysis**

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

**Rural Area Flexibility Analysis**

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

**Job Impact Statement**

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

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

**Jurisdictional Classification**

**I.D. No.** CVS-11-13-00003-P

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

**Proposed Action:** Amendment of Appendixes 1 and 2 of Title 4 NYCRR.

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

**Subject:** Jurisdictional Classification.

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

**Text of proposed rule:** Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Executive Department, by adding thereto the subheading "Gaming Commission," and the positions of Director Division of Charitable Games, Director Division of Gaming and Director Division of Horse Racing and Pari-Mutuel Wagering; and

Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Executive Department, by adding thereto the subheading "Gaming Commission," and the position of Manager of Lottery Drawings (1).

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

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

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

**Regulatory Impact Statement**

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

**Regulatory Flexibility Analysis**

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

**Rural Area Flexibility Analysis**

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

**Job Impact Statement**

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

**State Commission of  
Correction**

**NOTICE OF ADOPTION**

**Inmate Packages**

**I.D. No.** CMC-01-13-00013-A

**Filing No.** 188

**Filing Date:** 2013-02-20

**Effective Date:** 2013-03-13

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

**Action taken:** Amendment of sections 7005.7 and 7025.2 of Title 9 NYCRR.

**Statutory authority:** Correction Law, section 45(6) and (15)

**Subject:** Inmate packages.

**Purpose:** To allow local correctional facilities to regulate the source of incoming inmate packages.

**Text or summary was published** in the January 2, 2013 issue of the Register, I.D. No. CMC-01-13-00013-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Brian M. Callahan, Associate Attorney, New York State Commission of Correction, Alfred E. Smith State Office Building, 80 S. Swan Street, 12th Floor, Albany, New York 12210, (518) 485-2346, email: Brian.Callahan@scoc.ny.gov

**Initial Review of Rule**

As a rule that does not require a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2018, which is no later than the 5th year after the year in which this rule is being adopted.

**Assessment of Public Comment**

The agency received no public comment.

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

**Agency Address**

**I.D. No.** CMC-11-13-00004-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 sections 7022.5(c), 7200.2(a), 7200.3, 7200.6(b), 7202.4(a), 7202.6 and 7202.11(a) of Title 9 NYCRR.

**Statutory authority:** Correction Law, section 45(6) and (15)

**Subject:** Agency address.

**Purpose:** To amend the Commission of Correction's listed address.

**Text of proposed rule:** Subdivision (c) of section 7022.5 is amended to read as follows:

(c) Copies of the reportable incident guidelines manual are available, pursuant to the Freedom of Information Law, upon request from the New York State Commission of Correction, [80 Wolf Road, 4th Floor, Albany, New York 12205] *Alfred E. Smith State Office Building, 80 S. Swan Street, 12th Floor, Albany, New York 12210-8001*. All such requests should specify the item sought as Reportable Incident Guidelines for County Correctional Facilities. The guidelines manual consists of a soft-bound, indexed booklet 192 pages in length. A copy of these guidelines has been filed with the Department of State.

Subdivision (a) of section 7200.2 is amended to read as follows:

(a) The following person has been designated as records access officer to the commission: Public Information Officer, New York State Commission of Correction, [80 Wolf Road, 4th Floor, Albany, New York 12205] *Alfred E. Smith State Office Building, 80 S. Swan Street, 12th Floor, Albany, New York 12210-8001*.

Section 7200.3 is amended to read as follows:

Records shall be available for public inspection and copying at: State Commission of Correction, [80 Wolf Road, 4th Floor, Albany, New York

12205] *Alfred E. Smith State Office Building, 80 S. Swan Street, 12th Floor, Albany, New York 12210-8001.*

Subdivision (b) of section 7200.6 is amended to read as follows:

(b) Any person whose request for access to records has been denied pursuant to subdivision (a) of this section may, within 30 days, appeal such denial to the Special Counsel, State Commission of Correction, [80 Wolf Road, 4th Floor, Albany, New York 12205] *Alfred E. Smith State Office Building, 80 S. Swan Street, 12th Floor, Albany, New York 12210-8001.* Such appeal shall be in writing and shall include:

- (1) the date of the request for access to the records;
- (2) the location of the records sought;
- (3) a description of the records to which the requester was denied access;
- (4) a statement as to whether the denial of access was in writing or was a failure to grant or deny access within the time period required by section 7200.5(d) of this Part; and
- (5) the name and address of the requester.

Subdivision (a) of section 7202.4 is amended to read as follows:

(a) The following person has been designated as privacy compliance officer to the commission: Records Access Officer, New York State Commission of Correction, [80 Wolf Road, 4th Floor, Albany, New York 12205] *Alfred E. Smith State Office Building, 80 S. Swan Street, 12th Floor, Albany, New York 12210-8001.*

Section 7202.6 is amended to read as follows:

Records shall be available for public inspection at State Commission of Correction, [80 Wolf Road, 4th Floor, Albany, New York 12205] *Alfred E. Smith State Office Building, 80 S. Swan Street, 12th Floor, Albany, New York 12210-8001.*

Subdivision (a) of section 7202.11 is amended to read as follows:

(a) Any person denied access to a record or denied a request to amend or correct a record or personal information, may appeal to: Special Counsel, State Commission of Correction, [80 Wolf Road, 4th Floor, Albany, New York 12205] *Alfred E. Smith State Office Building, 80 S. Swan Street, 12th Floor, Albany, New York 12210-8001.*

**Text of proposed rule and any required statements and analyses may be obtained from:** Brian M. Callahan, Associate Attorney, New York State Commission of Correction, Alfred E. Smith State Office Building, 80 S. Swan Street, 12th Floor, Albany, New York 12210, (518) 485-2346, email: Brian.Callahan@scoc.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**

The Commission of Correction has determined that no person is likely to object to the rule as written because the proposed amendments change only the Commission's listed address, necessary following the agency's recent relocation.

**Job Impact Statement**

The Commission of Correction has determined that the rule will have no adverse effect on jobs and employment opportunities because the proposed amendments change only the Commission's listed address, necessary following the agency's recent relocation.

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

**Department of Corrections and Community Supervision**

**I.D. No.** CMC-11-13-00005-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 sections 7013.8, 7064.8, 7300.2, 7300.4, 7414.6, 7600.1, 7601.1 and 7651.3 of Title 9 NYCRR.

**Statutory authority:** Correction Law, section 45(6) and (15)

**Subject:** Department of Corrections and Community Supervision.

**Purpose:** To amend references of the Department of Correctional Services to the Department of Corrections and Community Supervision.

**Text of proposed rule:** Subparagraph (i) of paragraph (3) of subdivision (e) of section 7013.8 of Title 9 is amended to read as follows:

(i) the Department of [Correctional Services] *Corrections and Community Supervision*; or

Paragraphs (4) and (15) of subdivision (a) of section 7064.8 of Title 9 are amended to read as follows:

- (4) a health care provider or health facility, including a health care

provider employed or health facility operated by the Department of [Correctional Services] *Corrections and Community Supervision*, when knowledge of the HIV-related information is necessary to provide appropriate care or treatment to the protected individual or a child of the individual;

(15) an employee or agent of a provider of health or social services, including but not limited to the Department of [Correctional Services] *Corrections and Community Supervision* and local correctional facilities, when reasonably necessary to provide supervision, monitoring or administration of services and when these employees or agents have access in the ordinary course of business to records relating to the care, treatment, or provision of a health or social service, and in accordance with such provider's regulations promulgated in accordance with article 27-F of the Public Health Law. Disclosure to an employee or agent of a local correctional facility pursuant to this paragraph shall be consistent with section 601 of the Correction Law and Part 7033 of this Chapter and shall be authorized only when such disclosure is necessary to:

(i) enable the chief administrative officer to appropriately maintain custody and supervision of the protected person or provide for the safety and protection of the protected person or provide for the safety and protection of staff, other inmates, or the facility; and

(ii) the medical director reasonably believes that without disclosure circumstances will exist creating a significant risk of contracting or transmitting HIV infection.

Subdivisions (b) and (e) of section 7300.2 of Title 9 are amended to read as follows:

(b) Commissioner means the Commissioner of the New York State Department of [Correctional Services] *Corrections and Community Supervision*.

(e) Institution means a correctional facility under the jurisdiction of the New York State Department of [Correctional Services] *Corrections and Community Supervision*.

Subdivisions (c) and (e) of section 7300.4 of Title 9 are amended to read as follows:

(c) from a county jail or penitentiary to a facility under the jurisdiction of the New York City Department of Correction or to an institution under the jurisdiction of the New York State Department of [Correctional Services] *Corrections and Community Supervision*;

(e) consistent with the provisions of section 7300.6(e) of this Part, in returning such inmates from a correctional institution under the jurisdiction of the New York State Department of [Correctional Services] *Corrections and Community Supervision* to a county jail or penitentiary.

Subdivision (b) of section 7414.6 of Title 9 is amended to read as follows:

(b) When residents are transferred to another secure facility or to a Department of [Correctional Services] *Corrections and Community Supervision* facility, the resident's entire mental health record shall be forwarded by the facility director or designee to the receiving facility. The mental health record shall contain:

- (1) the name and relationship of a parent, legal guardian or spouse of the resident to be notified in case of the death, serious illness or other serious incident involving the resident;
- (2) a record of current medications used for mental health treatment;
- (3) all physician's orders; and
- (4) any parental/legal guardian consent(s).

Paragraph (3) of subdivision (b) of section 7600.1 of Title 9 is amended to read as follows:

(3) to establish procedures for the speedy and impartial review of grievances referred to it by the Commissioner of the Department of [Correctional Services] *Corrections and Community Supervision* (Correction Law, § 45(4));

Subdivisions (b), (d) and (f) of section 7601.1 of Title 9 are amended to read as follows:

(b) Commissioner shall mean the Commissioner of the New York State Department of [Correctional Services] *Corrections and Community Supervision*.

(d) Department and departmental shall mean the New York State Department of [Correctional Services] *Corrections and Community Supervision*.

(f) Inmate shall mean any person committed, transferred or placed in the care and custody of the Commissioner of the New York State Department of [Correctional Services] *Corrections and Community Supervision* for confinement in a correctional facility as defined by section 2(4) of the Correction Law.

Subdivision (e) of section 7651.3 of Title 9 is amended to read as follows:

(e) "Clinical physician" shall mean a physician licensed to practice medicine in New York State who is an independent contractor with or employee of the Department of [Correctional Services] *Corrections and Community Supervision*.

**Text of proposed rule and any required statements and analyses may be obtained from:** Brian M. Callahan, Associate Attorney, New York State Commission of Correction, Alfred E. Smith State Office Building, 80 S.

Swan Street, 12th Floor, Albany, New York 12210, (518) 485-2346, email: Brian.Callahan@scoc.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**

The Commission of Correction has determined that no person is likely to object to the rule as written because the proposed amendments serve only to change regulatory references to the Department of Correctional Services to the Department of Corrections and Community Supervision, as such agency's title was so amended in 2011.

#### **Job Impact Statement**

The Commission of Correction has determined that the rule will have no adverse effect on jobs and employment opportunities because the proposed amendments serve only to change regulatory references to the Department of Correctional Services to the Department of Corrections and Community Supervision, as such agency's title was so amended in 2011.

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## Department of Corrections and Community Supervision

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

#### **Limits on Administrative Expenses and Executive Compensation**

**I.D. No.** CCS-22-12-00015-RP

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

**Proposed Action:** Addition of Part 513 to Title 7 NYCRR.

**Statutory authority:** Correction Law, section 112

**Subject:** Limits on Administrative Expenses and Executive Compensation.

**Purpose:** To ensure the proper use of taxpayer dollars and the most effective provision of such services to the public.

**Substance of revised rule:** The revised rule would add a new Part 513 to 7 NYCRR titled Limits on Administrative Expenses and Executive Compensation.

Section 513.1 provides the background and intent of the revised rule, which is to implement Executive Order No. 38, issued by Governor Andrew Cuomo on January 18, 2012.

Section 513.2 sets forth the statutory authority for the promulgation of the rule by the Department of Corrections and Community Supervision (hereinafter the "Office").

Section 513.3 contains definitions for purposes of this Part, including definitions for administrative expenses, covered operating expenses, covered executive, covered provider, executive compensation, Office, program services, program services expenses, related organization, reporting period, State-authorized payments, and State funds.

The revised regulation provides the definition of covered reporting period as the provider's most recently completed annual reporting period, commencing on or after July 1, 2013.

Section 513.4, Limits on Administrative Expenses, contains limits on the use of State funds or State-authorized payments for administrative expenses.

The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria.

The restriction will apply to covered providers receiving State funds or State-authorized payments from county or local governments, rather than directly from a State agency, pursuant to specified criteria.

The revised regulation addresses how the restriction will apply in the event that a covered provider has multiple sources of State funds or State-authorized payments.

Section 513.5 Limits on Executive Compensation, contains restrictions on executive compensation provided to covered executives.

The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria.

The restriction will apply to covered providers receiving State funds or State-authorized payments from county or local governments, rather than directly from a State agency, pursuant to specified criteria.

The revised rule addresses the application of this limit if the covered provider has multiple sources of State funds or State-authorized payments.

Section 513.6 Waivers: Processes are established for covered providers to seek waivers of the limit on administrative expenses and the limits on executive compensation.

Section 513.7 Reporting by Covered Providers: Covered providers are required to report information on an annual basis.

Section 513.8 Penalties: A process is established for the imposition of penalties in the event of non-compliance with the limit on administrative expenses or the limits on executive compensation.

A copy of the full text of the regulatory proposal is available on the DOCCS website @ <http://www.doccs.ny.gov>

**Revised rule making(s) were previously published in the State Register** on October 31, 2012.

**Revised rule compared with proposed rule:** Substantial revisions were made in sections 513.2, 513.3, 513.4, 513.5, 513.6 and 513.7.

**Text of revised proposed rule and any required statements and analyses may be obtained from:** Maureen E. Boll, Deputy Commissioner and Counsel, NYS Department of Corrections and Community Supervision, The Harriman State Campus - Building 2, 1220 Washington Avenue, Albany, NY 12226-2050, (518) 457-4951, email: Rules@doccs.ny.gov

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

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

#### **Revised Regulatory Impact Statement**

Statutory Authority for proposing the regulation: Correction Law, Section 112

Legislative Objectives: Correction Law section 112 authorizes the Commissioner of the Department of Corrections and Community Supervision to promulgate regulations in the best interest of meeting the agencies objectives while ensuring the proper use of taxpayer dollars and the effective provision for the delivery of services to the public.

Needs and Benefits: The Department of Corrections and Community Supervision is proposing to adopt the following regulation because the State of New York directly or indirectly funds with taxpayer dollars a large number of tax exempt organizations and for-profit entities that provide critical services to New Yorkers in need and the goal is to ensure that taxpayers' dollars are used properly, efficiently, and effectively to improve the lives of New Yorkers. In certain instances, providers of services that receive State funds or State-authorized payments have used such funds to pay for excessive administrative costs or inflated compensation for their senior executives, rather than devoting a greater proportion of such funds to providing direct care or services to their clients. Such abuses involving public funds harm both the people of New York who are paying for such services, and those persons who must depend upon such services to be available and well-funded. These regulations, which are required by Executive Order No. 38, will ensure that State funds or State-authorized payments paid by this agency to providers are not used to support excessive compensation or unnecessary administrative costs.

Costs: The costs of implementing this rule to affected providers is anticipated to be minimal as most, if not all, of the information that must be reported by such providers is already gathered or reported for other purposes. The costs to the agency of such implementation are expected to be very limited as well, and efforts to ensure efficient centralization of certain aspects of such implementation are underway.

Paperwork/Reporting Requirements: The proposed regulatory amendments will require limited additional information to be reported to the agency by providers receiving State funds or State-authorized payments. To the extent feasible, such reporting shall be made electronically to avoid unnecessary paperwork costs.

Local Government Mandates: The proposed regulatory amendments does not anticipate any additional mandates.

Duplication: This proposed rule does not duplicate, overlap, or conflict with any State or federal statute or rule. However, the proposed rule seeks to minimize the reporting requirements faced by providers by building upon those requirements in the federal internal revenue code that require certain tax-exempt organizations to report information concerning their executive compensation and administrative costs.

Alternatives: Executive Order #38 and Executive Order #43 require the adoption of this proposed regulation; therefore no alternatives were considered.

Federal Standards: These amendments do not conflict with federal standards.

Compliance Schedule: The rule will become effective upon adoption. The implementation date establishing the limits on administrative expenses and executive compensation will be July 1, 2013.

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

A Revised Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this notice because the proposed rule will not impose any adverse economic impact on small busi-

nesses, nor will it impose new reporting, recordkeeping or other compliance requirements on small businesses or local governments.

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

A Revised Rural Area Flexibility Analysis is not being submitted with this notice because the proposed rule will not impose any adverse economic impact on rural areas.

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

A Revised Job Impact Statement is not being submitted with this notice because it is evident from the subject matter of the regulation that it will have no impact on jobs and employment opportunities.

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

A Notice of Revised Rule Making was published in the New York State Register on October 31, 2012. The Department of Corrections and Community Supervision received several sets of comments during the public comment period associated with the revised rulemaking. The issues and concerns raised in these comments are set forth below. Issues and concerns have been grouped according to the part of the revised rule they address because they are related or for convenience in providing an efficient response. Because many commenters addressed concerns that applied to all of the participating State agencies that are implementing Executive Order No. 38, the responses to comments provided by each of those agencies are incorporated by reference into these responses. The Department of Corrections and Community Supervision's response is provided for each issue.

A number of comments objected generally to the underlying concept of the regulations, stating that the proposed regulation is overly broad in its authority and burdensome in its requirements. The Department of Corrections and Community Supervision believes that the proposed limitations in the regulation further the legitimate goal of ensuring that public funds are properly expended and the use of such funds is properly monitored.

Clarification was requested concerning certain defined terms in the proposed regulation, in particular with respect to their intended scope. In response, and taking into account suggestions submitted, changes were made to the definitions of the following terms: administrative expenses, covered executive, covered provider, covered reporting period, executive compensation, program services expenses, reporting period, State-authorized payments and State funds.

Some commenters stated that the proposed limits on administrative expenses were burdensome and unnecessary, because they would interfere with existing contracts, because they were possibly duplicative of existing state and federal rules, or they will not enhance the protections already provided by restrictions from State reimbursement rates. Clarification was requested as to what will constitute administrative and program expenses. The proposed regulation has been further revised to clarify which administrative expenses are not included.

The definition of covered provider has been amended to address the individual or entity that has received State funds or State-authorized payments during the covered reporting period and the year prior to the covered reporting period. The definition of "covered provider" requires a contract or other agreement to render program services.

The regulation was not revised to alter the 75th percentile threshold because these revisions would compromise the goal of the regulation. Eliminating the executive compensation requirements would remove one of the key objectives of Executive Order No. 38: limiting the extent of such compensation paid by covered providers that rely to a significant degree upon public funds for their program and administrative services funding. These regulations provide a benchmark to ensure that State funds or State-authorized payments paid by this agency to providers are not used to support excessive compensation or unnecessary administrative costs.

Public comments tended to focus on executive compensation, stating the 75th percentile will drive salaries down as the outliers and reduce salaries in order to comply with the regulation. Implying this will depress the maximum salary permitted under the regulation. In addition, the State agencies' authority to deny all waivers related to executive compensation calls into question the integrity and the reasonableness of the entire process of reviewing executive compensation. The goal of the proposed regulation is to ensure that taxpayer dollars are used to provide critical services to New Yorkers in need.

The effective dates of provisions in the proposed regulations have been revised to clarify: (a) covered reporting period; (b) submission of waiver applications regarding executive compensation; (c) submission of waiver applications regarding administrative expenses; and (d) reporting periods.

The full Assessment of Comments is available on the Department of Corrections and Community Supervision website at [www.doccs.ny.gov](http://www.doccs.ny.gov)

## Division of Criminal Justice Services

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

#### **Limits on Administrative Expenses and Executive Compensation**

**I.D. No.** CJS-22-12-00016-RP

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

**Proposed Action:** Addition of 6157 to Title 9 NYCRR.

**Statutory authority:** Executive Order No. 38; Executive Law, section 837(13); and Not-For-Profit Corporation Law, section 508

**Subject:** Limits on Administrative Expenses and Executive Compensation.

**Purpose:** To implement Executive Order No. 38 issued by Governor Andrew Cuomo on January 18, 2012.

**Substance of revised rule:** The revised rule would add a new Part 6157 to 9 NYCRR entitled Limits on Administrative Expenses and Executive Compensation.

Section 6157.1 - Background and Intent. Provides the background and intent of the revised rule, which is to implement Executive Order No. 38, issued by Governor Andrew Cuomo on January 18, 2012.

Section 6157.2 - Definitions. Contains definitions for purposes of this Part, including definitions for administrative expenses, commissioner, covered executive, covered operating expenses, covered provider, covered reporting period, division, executive compensation, program services, program services expenses, related organization, reporting period, State-authorized payments, and State funds.

Section 6157.3 - Limits on Administrative Expenses. Contains limits on the use of State funds or State-authorized payments for administrative expenses.

The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria.

The restriction will apply to covered providers receiving State funds or State-authorized payments from county or local governments, rather than directly from a State agency, pursuant to specified criteria.

The revised regulation addresses how the restriction will apply in the event that a covered provider has multiple sources of State funds or State-authorized payments.

Section 6157.4 - Limits on Executive Compensation. Contains restrictions on executive compensation provided to covered executives.

The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria.

The restriction will apply to covered providers receiving State funds or State-authorized payments from county or local governments, rather than directly from a State agency, pursuant to specified criteria.

The revised rule addresses the application of this limit if the covered provider has multiple sources of State funds or State-authorized payments.

Section 6157.5 - Waivers. Processes are established for covered providers to seek waivers of the limits on administrative expenses and the limits on executive compensation.

Section 6157.6 - Reporting. Covered providers are required to report information on an annual basis.

Section 6157.7 - Penalties. A process is established for the imposition of penalties in the event of non-compliance with the limits on administrative expenses or the limits on executive compensation.

A copy of the full text of the regulatory proposal is available on the Division of Criminal Justice Services website at <http://www.criminaljustice.ny.gov/>.

**Revised rule making(s) were previously published in the State Register on** October 31, 2012.

**Revised rule compared with proposed rule:** Substantial revisions were made in sections 6157.2, 6157.3, 6157.4, 6157.5(a), (b) and 6157.6(a).

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

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

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

**Revised Regulatory Impact Statement**

## Statutory Authority:

Executive Order (E.O.) No. 38; Executive Law § 837(13); Not-For-Profit Corporation Law § 508. Executive Law § 837(13) authorizes the Division of Criminal Justice Services to adopt, amend or rescind regulations “as may be necessary or convenient to the performance of the functions, powers and duties of the [D]ivision.” Not-For-Profit Corporation Law § 508 pertains to income from corporate activities and provides, “[a] corporation whose lawful activities involve among other things the charging of fees or prices for its services or products shall have the right to receive such income and, in so doing, may make an incidental profit. All such incidental profits shall be applied to the maintenance, expansion or operation of the lawful activities of the corporation, and in no case shall be divided or distributed in any manner whatsoever among the members, directors, or officers of the corporation.”

## Legislative Objectives:

E.O. No. 38, which was issued by Governor Andrew Cuomo on January 18, 2012, provides for a limit on administrative expenses and executive compensation of providers of program services in order to meet the State’s ongoing obligation to ensure the proper use of taxpayer dollars and the most effective provision of such services to the public. The purpose of these regulations is to implement E.O. No. 38 by exercising the authority of the Commissioner of the Division of Criminal Justice Services to issue regulations governing the use of State funds and State-authorized payments in connection with providing program services to members of the public.

## Needs and Benefits:

The Division of Criminal Justice Services is proposing to adopt the following regulation because the State of New York directly or indirectly funds with taxpayer dollars a large number of tax exempt organizations and for-profit entities that provide critical services to New Yorkers in need and the goal is to ensure that taxpayer dollars are used properly, efficiently and effectively to improve the lives of New Yorkers. In certain instances, providers of services that receive State funds or State-authorized payments have used such funds to pay for excessive administrative costs or inflated compensation for their senior executives, rather than devoting a greater proportion of such funds to providing direct care or services to their clients. Such abuses involving public funds harm both the people of New York who are paying for such services, and those persons who must depend upon such services to be available and well-funded. These regulations, which are required by E.O. No. 38, will ensure that State funds or State-authorized payments paid by this agency to providers are not used to support excessive compensation or unnecessary administrative costs.

## Costs:

The costs of implementing this rule to affected providers is anticipated to be minimal as most, if not all, of the information that must be reported by such providers is already gathered or reported for other purposes. The costs to the agency of such implementation is expected to be very limited as well, and efforts to ensure efficient centralization of certain aspects of such implementation are underway.

## Local Government Mandates:

None. The Commissioner or his or her designee, rather than the county or local unit of government, shall be responsible for obtaining the necessary reporting from and compliance by such covered providers, and shall issue guidance to affected county and local governments to set forth the procedures by which the Commissioner or his or her designee shall do so.

## Paperwork/Reporting Requirements:

The proposed regulatory amendments will require limited additional information to be reported to the agency by providers receiving State funds or State-authorized payments. To the extent feasible, such reporting shall be made electronically to avoid unnecessary paperwork costs.

## Duplication:

This proposed rule does not duplicate, overlap or conflict with any State or federal statute or rule. However, the proposed rule seeks to minimize the reporting requirements faced by providers by building upon those requirements in the federal internal revenue code that require certain tax-exempt organizations to report information concerning their executive compensation and administrative costs.

## Alternatives:

E.O. No. 38 requires the adoption of this proposed regulation.

## Federal Standards:

These amendments do not conflict with federal standards.

## Compliance Schedule:

This rule will become effective when adopted and the Notice of Adoption is published in the State Register. The implementation date establishing the limits on administrative expenses and executive compensation will be July 1, 2013.

**Revised Regulatory Flexibility Analysis**

A revised Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this notice because the

changes will not impose any adverse economic impact on small businesses, nor will the changes impose new reporting, record keeping or other compliance requirements on small businesses or local governments.

The proposed regulatory amendments are designed to address executive compensation and administrative costs of those providers of program services that receive State funds or State-authorized payments paid by the Division of Criminal Justice Services.

**Revised Rural Area Flexibility Analysis**

A revised Rural Area Flexibility Analysis is not being submitted with this notice because the changes will not impose any adverse economic impact on rural areas or reporting, record keeping or other compliance requirements on public or private entities in rural areas.

The proposed regulatory amendments are designed to address executive compensation and administrative costs of those providers of program services that receive State funds or State-authorized payments paid by the Division of Criminal Justice Services.

**Revised Job Impact Statement**

A revised Job Impact Statement is not being submitted with this notice because it is evident from the subject matter of the regulation that it will have no impact on jobs and employment opportunities.

**Assessment of Public Comment**

A Notice of Revised Rule Making was published in the New York State Register on October 31, 2012. The Division of Criminal Justice Services (Division) received several sets of comments during the public comment period associated with the revised rule-making. The issues and concerns raised in these comments are set forth below. Issues and concerns have been grouped according to the part of the revised rule they address because they are related or for convenience in providing an efficient response. Because many commenters addressed concerns that applied to all of the participating State agencies that are implementing Executive Order No. 38, the responses to comments provided by each of those agencies are incorporated by reference into these responses. The Division’s response is provided for each issue.

A number of comments objected generally to the underlying concept of the regulations, stating that the proposed regulation is overly broad in its authority and burdensome in its requirements. The Division believes that the proposed limitations in the regulation further the legitimate goal of ensuring that public funds are properly expended and the use of such funds is properly monitored.

Clarification was requested concerning certain defined terms in the proposed regulation, in particular with respect to their intended scope. In response, and taking into account suggestions submitted, changes were made to the definitions of the following terms: administrative expenses, covered executive, covered provider, covered reporting period, executive compensation, program services expenses, reporting period, State-authorized payments and State funds.

Some commenters stated that the proposed limits on administrative expenses were burdensome and unnecessary, because they would interfere with existing contracts, because they were possibly duplicative of existing state and federal rules, or they will not enhance the protections already provided by restrictions from State reimbursement rates. Clarification was requested as to what will constitute administrative and program expenses. The proposed regulation has been further revised to clarify which administrative expenses are not included.

The definition of “covered provider” has been amended to address the individual or entity that has received State funds or State-authorized payments during the covered reporting period and the year prior to the covered reporting period. The definition of “covered provider” requires a contract or other agreement to render program services.

The proposed regulation was not revised to alter the 75th percentile threshold because these revisions would compromise the goal of the regulation. Eliminating the executive compensation requirements would remove one of the key objectives of Executive Order No. 38: limiting the extent of such compensation paid by covered providers that rely to a significant degree upon public funds for their program and administrative services funding. These regulations provide a benchmark to ensure that State funds or State-authorized payments paid by this agency to providers are not used to support excessive compensation or unnecessary administrative costs.

Public comments tended to focus on executive compensation, stating the 75th percentile will drive salaries down as the outliers and reduce salaries in order to comply with the regulation. Implying this will depress the maximum salary permitted under the regulation. In addition, the State agencies’ authority to deny all waivers related to executive compensation calls into question the integrity and the reasonableness of the entire process of reviewing executive compensation. The goal of the proposed regulation is to ensure that taxpayer dollars are used to provide critical services to New Yorkers in need.

The effective dates of provisions in the proposed regulations have been

revised to clarify: (a) covered reporting period; (b) submission of waiver applications regarding executive compensation; (c) submission of waiver applications regarding administrative expenses; and (d) reporting periods.

The full Assessment of Comments is available on the Division's website at <http://www.criminaljustice.ny.gov/>.

## Department of Economic Development

### EMERGENCY RULE MAKING

#### Economic Transformation and Facility Redevelopment Program

**I.D. No.** EDV-11-13-00001-E

**Filing No.** 186

**Filing Date:** 2013-02-20

**Effective Date:** 2013-02-20

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

**Action taken:** Addition of Parts 200-204 to Title 5 NYCRR.

**Statutory authority:** Economic Development Law, art. 18

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

**Specific reasons underlying the finding of necessity:** Regulatory action is needed immediately to implement the Economic Transformation and Facility Redevelopment Program ("the Program") which was created by Chapter 61 of the Laws of 2011. The Program is created to support communities affected by the closure of correctional and juvenile justice facilities. The Program will provide tax credits to firms that create jobs and make investments in certain areas designated as economic transformation areas. The Program will leverage private sector job creation and investments and help transform the economies of the communities in these areas and lessen the impact of the facility closures.

New York is in the midst of a national economic slowdown. The impact of the national financial crisis and resulting slowed economic growth was particularly devastating to New York State and could be even more severe for those communities where correctional and juvenile justice facilities will be closed.

The Economic Transformation and Facility Redevelopment Program will be a key economic development tool for creating jobs and private sector investment in communities affected by the facility closures. It is imperative that this Program be implemented immediately so that the State can respond quickly to the dislocation and job losses that will likely result from the closure of these facilities.

It bears noting that section 403 of the Economic Development Law directs the Commissioner of Economic Development to promulgate regulations and explicitly indicates that such regulations may be adopted on an emergency basis.

**Subject:** Economic Transformation and Facility Redevelopment Program.

**Purpose:** Allow Department to implement the Economic Transformation and Facility Redevelopment Program.

**Substance of emergency rule:** The regulation creates new Parts 200-204 in 5 NYCRR as follows:

1) The regulation adds the definitions relevant to the Economic Transformation and Facility Redevelopment Program (the "Program"). Key definitions include, but are not limited to, certificate of eligibility, preliminary schedule of benefits, net new jobs, new business, economic transformation area, and closed facility.

2) The regulation creates the application and review process for the Program. In order to become a participant in the Program, an applicant must submit a complete application by the later of: (1) the date that is three years after the date of the closure of the closed facility located in the economic transformation area in which the business entity would operate or (2) January 1, 2015. An applicant must also agree to a variety of requirements, including, but not limited to, the following: (a) allowing the exchange of its tax information between Department of Taxation and Finance and Department of Economic Development (the "Department"); (b) allowing the exchange of its tax and employer information between the Department of Labor and the Department; and (c) agreeing to not partici-

pate in either the Excelsior Jobs Program, the Empire Zones Program or claim any tax credits under the Brownfield Cleanup Program if admitted into the Economic Transformation and Facility Redevelopment Program specifically with regard to the facility located in the economic transformation area.

3) Upon receiving a complete application, the Commissioner of the Department shall review the application to ensure it meets eligibility criteria set forth in the statute (see 5 below). If it does not, the application shall not be accepted. If it does meet the eligibility criteria, the Commissioner may admit the applicant into the Program. If admitted into the Program, an applicant will receive a certificate of eligibility. When considering an application, the Commissioner shall consider factors including, but not limited to, the overall cost and effectiveness of the project, and whether the project is consistent with the intent of the Program. If a participant does not start construction on or acquire a qualified investment or create at least one net new job within one year of the issuance of its certificate of eligibility, the participant will not be eligible for any of the Program's tax credits.

4) The regulation sets forth the eligibility criteria for the Program. In order to qualify for the Program, (1) a participant must create and maintain at least five net new jobs in an economic transformation area, and must demonstrate that its benefit-cost ratio is at least ten to one; (2) a participant must be in compliance with all worker protection and environmental laws and regulations; (3) a participant must not owe past due federal or state taxes or local property taxes, unless those taxes are being paid pursuant to an executed payment plan; and (4) the location of the participant's operations for which it seeks tax benefits must be wholly located within the economic transformation area.

5) In addition, a business entity that is primarily operated as a retail business is not eligible to participate in the program if its application is for any facility or business location that will be primarily used in making retail sales to customers who personally visit such facilities. A business entity that is engaged in offering professional services licensed by the state or by the courts of this state is not eligible to participate in the Economic Transformation and Facility Redevelopment Program. In addition, a business entity that is or will be principally operated as a real estate holding company or landlord for retail businesses or entities offering professional services licensed by the state or by the courts of this state is also not eligible to participate in the Note, however, that the commissioner may determine that such a business entity described in the preceding three sentences may be eligible to participate in the Program at the site of a closed facility if it is pursuant to an adaptive reuse plan for a substantial portion of such facility, the adaptive reuse plan is consistent with the strategic plan of the Regional Economic Development Council and it has been recommended by the Regional Economic Development Council to the Commissioner.

6) The regulation sets forth the fourteen (14) evaluation standards that the Commissioner can utilize when determining whether to admit an applicant to the Program. These include, but are not limited to, the following: (1) the number of net new jobs to be created in New York State; or (2) the amount of capital investment to be made; or (3) whether the applicant is proposing to substantially renovate and reuse closed facilities; or (4) whether the applicant will use energy-efficient measures, including, but not limited to, the reduction of greenhouse gas and emissions and the Leadership in Energy and Environmental Design (LEED) green building rating system for the project identified in its application; or (5) whether the application has been recommended by the Regional Economic Council representing the region where the project will be located; or (6) the degree to which the project is consistent with the strategic plan and priorities for the region; or (7) the degree of economic distress in the area where the applicant will locate the project identified in its application; or (8) the degree of an applicant's financial viability, strength of financials, readiness and likelihood of completion of the project identified in the application; or (9) the degree to which the project identified in the application supports New York State's minority and women business enterprises; or (10) the degree to which the project identified in the application supports the principles of Smart Growth; or (11) the estimated return on investment that the project identified in the application will provide to the state; or (12) the overall economic impact that the project identified in the application will have on a region, including, but not limited to, the impact of any direct and indirect jobs that will be created; or (13) the degree to which other state or local incentive programs are available to the applicant; or (14) the likelihood that the project identified in the application would be located outside of New York State or would not occur but for the availability of state or local incentives.

7) The regulation states that the Commissioner shall prepare a program report on a quarterly basis for posting on the Department's website.

8) The regulation calls for removal of a participant in the Program for failing to meet the application requirements or eligibility criteria of the statute. Upon removal, a participant will be notified in writing and have the right to appeal such removal.

9) The regulation lays out the appeal process for participants who have been removed from the Program. A participant will have thirty (30) days to appeal to the Department. An appeal officer will be appointed and shall evaluate the merits of the appeal and any response from the Department. The appeal officer will determine whether a hearing is necessary and the level of formality required. The appeal officer will prepare a report and make recommendations to the Commissioner. The Commissioner will then issue a final decision in the case.

The full text of the emergency rule is available at the Department's website at <http://esd.ny.gov/BusinessPrograms/EconomicTransformation.html>.

*This notice is intended* to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires May 20, 2013.

*Text of rule and any required statements and analyses may be obtained from:* Thomas P Regan, NYS Department of Economic Development, 30 South Pearl Street, Albany, NY 12245, (518) 292-5123, email: [tregan@empire.state.ny.us](mailto:tregan@empire.state.ny.us)

#### **Regulatory Impact Statement**

##### **STATUTORY AUTHORITY:**

Chapter 61 of the Laws of 2011 established Article 18 of the Economic Development Law, creating the Economic Transformation and Facility Redevelopment Program and authorizing the Commissioner of Economic Development to adopt, on an emergency basis, rules and regulations governing the Program.

##### **LEGISLATIVE OBJECTIVES:**

The emergency rulemaking accords with the public policy objectives the Legislature sought to advance because they directly address the legislative findings and declarations that New York State needs, as a matter of public policy, to create competitive financial incentives for businesses to create jobs and invest in the redevelopment of closed facilities and the economic transformation of surrounding communities. The Economic Transformation and Facility Redevelopment Program is created to support communities affected by closure of correctional and juvenile justice facilities. The Program will provide tax credits to firms that create jobs and make investments in certain areas designated as economic transformation areas. The Program will leverage private sector job creation and investments and help transform the economies of the communities in these areas and lessen the impact of the facility closures. The emergency rule is specifically authorized by the Legislature.

##### **NEEDS AND BENEFITS:**

The emergency rule is required in order to immediately implement the statute contained in Article 18 of the Economic Development Law, creating the Economic Transformation and Facility Redevelopment Program. The statute directed the Commissioner of Economic Development to adopt regulations with respect to an application process and eligibility criteria and authorized the adoption of such regulations on an emergency basis notwithstanding any provisions to the contrary in the state administrative procedures act. New York is in the midst of a national economic slowdown. The impact of the national financial crisis and resulting slowed economic growth was particularly devastating to New York State and could be even more severe for those communities where correctional and juvenile justice facilities will be closed.

The Economic Transformation and Facility Redevelopment Program will be one of the State's key economic development tools for creating jobs and private sector investment in communities affected by the facility closures. It is imperative that this Program be implemented immediately so that the State can respond quickly to the dislocation and job losses that will likely result from closure of these facilities.

This rule will establish the process and procedures for launching this new Program in the most efficient and cost-effective manner while protecting all New York State taxpayers with rules to ensure accountability, performance and adherence to commitments by businesses choosing to participate in the Program.

##### **COSTS:**

A. Costs to private regulated parties: None. There are no regulated parties in the Economic Transformation and Facility Redevelopment Program, only voluntary participants.

B. Costs to the agency, the State, and local governments: The Department of Economic Development does not anticipate any significant costs with respect to implementation of this program. There is no additional cost to local governments.

C. Costs to the State government: None. There will be no additional costs to New York State as a result of the emergency rule making.

##### **LOCAL GOVERNMENT MANDATES:**

None. There are no mandates on local governments with respect to the Economic Transformation and Facility Redevelopment Program. This emergency rule does not impose any costs to local governments for administration of the Economic Transformation and Facility Redevelopment Program.

##### **PAPERWORK:**

The emergency rule requires businesses choosing to participate in the Economic Transformation and Facility Redevelopment Program to establish and maintain complete and accurate books relating to their participation in the Economic Transformation and Facility Redevelopment Program for a period of three years beyond their participation in the Program. However, this requirement does not impose significant additional paperwork burdens on businesses choosing to participate in the Program but instead simply requires that information currently established and maintained be shared with the Department in order to verify that the business has met its job creation and investment commitments.

##### **DUPLICATION:**

The emergency rule does not duplicate any state or federal statutes or regulations.

##### **ALTERNATIVES:**

No alternatives were considered with regard to amending the regulation in response to statutory revisions.

##### **FEDERAL STANDARDS:**

There are no federal standards in regard to the Economic Transformation and Facility Redevelopment Program. Therefore, the emergency rule does not exceed any Federal standard.

##### **COMPLIANCE SCHEDULE:**

The period of time the state needs to assure compliance is negligible, and the Department of Economic Development expects to be compliant immediately.

#### **Regulatory Flexibility Analysis**

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

The emergency rule imposes record-keeping requirements on all businesses (small, medium and large) that choose to participate in the Economic Transformation and Facility Redevelopment Program. The emergency rule requires all businesses that participate in the Program to establish and maintain complete and accurate books relating to their participation in the Program for the duration of their term in the Program plus three additional years. Local governments are unaffected by this rule.

##### **2. Compliance requirements**

Each business choosing to participate in the Economic Transformation and Facility Redevelopment Program must establish and maintain complete and accurate books, records, documents, accounts, and other evidence relating to such business's application for entry into the program and relating to annual reporting requirements. Local governments are unaffected by this rule.

##### **3. Professional services**

The information that businesses choosing to participate in the Economic Transformation and Facility Redevelopment Program would be required to keep is information such businesses already must establish and maintain in order to operate, i.e. wage reporting, financial records, tax information, etc. No additional professional services would be needed by businesses in order to establish and maintain the required records. Local governments are unaffected by this rule.

##### **4. Compliance costs**

Businesses (small, medium or large) that choose to participate in the Economic Transformation and Facility Redevelopment Program must create new jobs and/or make capital investments in order to receive any tax incentives under the Program. If businesses choosing to participate in the Program do not fulfill their job creation or investment commitments, such businesses would not receive the tax incentives. There are no other initial capital costs that would be incurred by businesses choosing to participate in the Economic Transformation and Facility Redevelopment Program. Annual compliance costs are estimated to be negligible for businesses because the information they must provide to demonstrate their compliance with their commitments is information that is already established and maintained as part of their normal operations. Local governments are unaffected by this rule.

##### **5. Economic and technological feasibility**

The Department of Economic Development ("DED") estimates that complying with this record-keeping is both economically and technologically feasible. Local governments are unaffected by this rule.

##### **6. Minimizing adverse impact**

DED finds no adverse economic impact on small or large businesses with respect to this rule. Local governments are unaffected by this rule.

##### **7. Small business and local government participation**

DED is in compliance with SAPA Section 202-b(6), which ensures that small businesses and local governments have an opportunity to participate in the rule-making process. DED has conducted outreach within the small and large business communities and maintains continuous contact with small and large businesses with regard to their participation in this program. Local governments are unaffected by this rule.

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

The Economic Transformation and Facility Redevelopment Program is a tax credit program available to new businesses that locate in communities

affected by the closure of correctional and juvenile justice facilities, create jobs and make private sector investments. Economic transformation areas will be designated through implementation of these regulations. New businesses to these areas that create jobs and make investments are eligible to apply to participate in the Program entirely at their discretion. Municipalities are not eligible to participate in the Program. The emergency rule does not impose any special reporting, record keeping or other compliance requirements on private entities in rural areas. Therefore, the emergency rule will not have a substantial adverse economic impact on rural areas nor on the reporting, record keeping or other compliance requirements on public or private entities in such rural areas. Accordingly, a rural area flexibility analysis is not required and one has not been prepared.

**Job Impact Statement**

The emergency rule relates to the Economic Transformation and Facility Redevelopment Program. The Economic Transformation and Facility Redevelopment Program will enable New York State to provide financial incentives to businesses that create jobs and make investments in communities affected by the closure of correctional and juvenile justice facilities. This Program, given its design and purpose, will have a substantial positive impact on job creation and employment opportunities. The emergency rule will immediately enable the Department to fulfill its mission of job creation and investment in certain areas designated as economic transformation areas. Because this emergency rule will authorize the Department to immediately begin offering financial incentives to firms that commit to creating new jobs and/or to making significant capital investment in these areas, it will have a positive impact on job and employment opportunities. Accordingly, a job impact statement is not required and one has not been prepared.

based on a person’s actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender or sex; the identification and mitigation of harassment, bullying and discrimination; and strategies for effectively addressing problems of exclusion, bias and aggression in educational settings.

A new subpart 57-4 of the Regulations of the Commissioner of Education is added, effective July 1, 2013 to establish standards for approval and the approval process for providers of course work or training in harassment, bullying and discrimination, prevention and intervention that is offered to candidates for a teachers’ certificate or license in the classroom teaching service, school service, or administrative and supervisory service, as required by section 14 of the Education Law.

Section 57-4.1 discusses the purpose of the new subpart.

Section 57-4.2 sets forth the definitions for terms used in the Subpart, including definitions for coursework or training and provider.

Section 57-4.3 requires person or organization seeking approval as a provider to submit to the department, an application on forms prescribed by the commissioner, with a fee of \$600. To be approved, each applicant shall submit evidence acceptable to the department that the applicant:

- (1) has and will maintain adequate resources to offer the course work or training;
- (2) has and will ensure that faculty who will offer the course work or training have demonstrated, their competence to offer the course work or training;
- (3) certifies in writing that the coursework or training will be conducted through use of a curriculum which, at a minimum, includes the syllabus prepared by the department;
- (4) certifies, in writing, that certification of completion forms obtained from the department will be issued to students upon completion of the course work or training for their use in documenting satisfaction of the requirement of course work or training in the Prevention and Intervention of Harassment, Bullying and Discrimination; and
- (5) certifies, in writing, that it will maintain and produce evidence of completion for all students who complete the course work or training and that it will submit such evidence to the department, in a time and format prescribed by the Commissioner.

Section 57-4.4 sets for a three year term of approval, except that approved status of such providers may be terminated during this term by the department in accordance with section 57-4.6 of this Subpart and allows the provider to reapply to the department for approval following the requirements of section 57-4.3 of this Subpart, including payment of the required fee.

Section 57-4.5 sets for the responsibility of providers, which includes the following responsibilities:

(a) A provider, at a minimum, shall offer the syllabus prepared by the department and demonstrate that at least three of the six clock hours shall be conducted through face-to-face instruction. However, nothing in this section shall preclude providers from offering additional coursework or training which exceeds, or expands upon, the six hour syllabus prescribed by the department.

(b) An approved provider of such course work or training shall execute a certification of completion of each person completing course work or training, and within 21 calendar days of the completion of course work or training, the provider shall submit the certification of completion to the person completing the course work or training for that person’s use in documenting such completion.

(c) The provider shall retain a copy of the certification of completion in the provider’s files for not less than six years from the date of completion of course work or training.

(d) In the event that an approved provider discontinues offering coursework or training, all copies of certifications of completion issued within the six years prior to such discontinuance shall be transferred to the department.

(e) Coursework or training shall be taught by instructors who have demonstrated by training, education and experience their competence to teach the course content prescribed in subdivision (a) of this section.

Section 57-4.6 authorizes the department to review approved providers during the term of approval to ensure compliance with the requirements of this Subpart and allows them to request information from a provider and may conduct site visits, pursuant to such review. A determination by the department that the services offered by a provider are inadequate, incomplete or otherwise unsatisfactory pursuant to the standards set forth in this Subpart shall result in the denial or termination of the approved status of the provider.

Section 57-4.7 provides an exemption from the \$600 fee for an institution that offers a registered program leading to certification pursuant to section 52.21 of this Title.

Section 80-1.13 of the Regulations of the Commissioner of Education is added to require all candidates for a certificate or license valid for an administrative or supervisory service, classroom teaching service or school

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## Education Department

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### NOTICE OF EXPIRATION

The following notice has expired and cannot be reconsidered unless the Education Department publishes a new notice of proposed rule making in the *NYS Register*.

**Special Education Impartial Hearings**

I.D. No.	Proposed	Expiration Date
EDU-05-12-00007-RP	February 1, 2012	February 22, 2013

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

**Coursework or Training in Harassment, Bullying and Discrimination Prevention and Intervention**

**I.D. No.** EDU-11-13-00016-P

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

**Proposed Action:** Amendment of section 52.21 and Part 80; and addition of Subpart 57-4 to Title 8 NYCRR.

**Statutory authority:** Education Law, sections 14(5), 207(not subdivided), 212(3), 305(1), (2), 3004(1) and 3007(not subdivided); and L. 2012, ch. 102

**Subject:** Coursework or training in harassment, bullying and discrimination prevention and intervention.

**Purpose:** To require that applicants have completed at least six hours of coursework or training in harassment, bullying and discrimination prevention and intervention.

**Substance of proposed rule (Full text is posted at the following State website: [www.regents.nysed.gov/meetings](http://www.regents.nysed.gov/meetings)):** Section 52.21 of the Commissioner’s regulations is amended to require, beginning July 1, 2013, all registered teacher education programs leading to certification in the classroom teaching service, school service, or administrative and supervisory service to provide six clock hours, of which at least three hours must be conducted through face-to-face instruction, of coursework or training in the prevention and intervention of harassment, bullying and discrimination. Such coursework or training shall include, training on the social patterns of harassment, bullying and discrimination, as defined in section 11 of the Education Law, including but not limited to those acts

service who apply for a certificate or license on or after July 1, 2013, shall have completed at least six clock hours, of which at least three hours must be conducted through face-to-face instruction, of course work or training in harassment, bullying and discrimination prevention and intervention, as required by section 14 the Education Law, which is provided by a registered program leading to certification pursuant to section 52.21 of this Title or other approved provider pursuant to Subpart 57-4 of this Title.

Several other conforming amendments are made to Part 80 to require a candidate who applies for the certificate on or after July 1, 2013, to complete at least six clock hours, of which at least three hours must be conducted through face-to-face instruction, of coursework or training in harassment, bullying and discrimination prevention and intervention, as required by section 14 the Education Law.

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

**Data, views or arguments may be submitted to:** Peg Rivers, State Education Department, Office of Higher Education, Room 979, Washington Avenue, 89 Washington Ave., Albany, NY 12234, (518) 486-3633, email: privers@mail.nysed.gov

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

#### Regulatory Impact Statement

##### 1. STATUTORY AUTHORITY:

Subdivision (5) of Section 14 of the Education Law, as amended by Chapter 102 of the Laws of 2012 requires the Commissioner to prescribe regulations to require that school professionals applying on or after July 1, 2013 for a certificate or license, including but not limited to a certificate or license valid for service as a classroom teacher, school counselor, school psychologist, school social worker, school administrator or supervisor or superintendent of schools to complete training on the social patterns of harassment, bullying and discrimination.

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

Subdivision (3) of section 212 of the Education Law authorizes the Department to fix by regulation fees for certification or permits for which fees are not otherwise provided under the Education Law.

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

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

Subdivision (1) of section 3004 of the Education Law authorizes the Commissioner of Education to prescribe, subject to the approval of the Regents, regulations governing the examination and certification of teachers employed in all public schools in the State.

Section 3007 of the Education Law authorizes the Commissioner of Education to endorse a diploma or certificate issued in another state.

##### 2. LEGISLATIVE OBJECTIVES:

The proposed amendment is necessary to implement Education Law 14(5), as added by Chapter 102 of the Laws of 2012, by requiring school professionals applying on or after July 1, 2013 for a certificate or license to complete training on the social patterns of harassment, bullying and discrimination and establishing standards for Education Department approval of providers of such course work or training.

##### 3. NEEDS AND BENEFITS:

The proposed amendment is necessary to implement Education Law section 14, by requiring school professionals applying on or after July 1, 2013 for a certificate or license to complete training on the social patterns of harassment, bullying and discrimination and establishing standards for Education Department approval of providers of such course work or training.

##### 4. COSTS:

###### (a) Costs to State government:

No additional costs are imposed on the State beyond those imposed by statute.

###### (b) Costs to local governments:

School districts and BOCES seeking status as an approved provider of training courses will be required to submit an application fee of \$600 to the Department. However, the decision as to whether to become an approved provider is permissive in nature. Therefore, no mandatory costs are imposed on local governments beyond those imposed by statute.

###### (c) Cost to private regulated parties:

The proposed amendment will impose a cost of \$600 on private

regulated parties that select to apply to become an approved provider of the required course work or training, except an institution that offers a registered program leading to certification under section 52.21 of Commissioner's regulations shall not be required to pay a fee. However, the decision as to whether to become an approved provider is permissive in nature. Therefore, no mandatory costs are imposed on private regulated parties beyond those imposed by statute.

For candidates seeking certification on or after July 1, 2013, there may be additional fees to take the courses or training needed to obtain certification, however, no additional costs are imposed beyond those imposed by statute.

(d) Costs to regulating agency for implementing and continued administration of the rule:

As stated above in "Costs to State Government," the amendment will impose minimal additional costs on the State Education Department.

##### 5. LOCAL GOVERNMENT MANDATES:

The Dignity for All Students Act (DASA) added Article 2 to the Education Law (Education Law §§ 10 through 18), to require, among other things, school districts to create policies and guidelines to be used in school training programs to discourage the development of discrimination or harassment and to enable employees to prevent and respond to discrimination or harassment. These provisions took effect on July 1, 2012.

In June 2012 the Legislature enacted Chapter 102 of the Laws of 2012, which amended the Dignity Act to include a requirement that school professionals applying for a certificate or license on or after July 1, 2013 complete training on the social patterns of harassment, bullying and discrimination.

In response to the new law, the Department consulted with a work group, which was comprised of representatives of teachers, administrators, school social workers, school counselors, school guidance counselors, school psychologists, superintendents, school boards, teacher education program faculty, GLESN and Empire Pride Agenda to seek recommendations on how many hours and the types of training needed to ensure that school personnel have adequate training in harassment, bullying and discrimination. The work group recommended that the following actions be taken:

- Part 52 of the Commissioner's Regulations be amended to require teacher and school leadership preparation programs to include at least six hours of training in Harassment, Bullying and Discrimination Prevention and Intervention.

- A new Subpart 57-4 of the Commissioner's Regulations be added to establish standards under which the Department will approve providers of this training.

- Part 80 of the Commissioner's Regulations be amended to require that anyone applying for an administrative or supervisory service, classroom teaching service or school service certificate or license on or after July 1, 2013, shall have completed at least six clock hours of course-work or training in Harassment, Bullying and Discrimination Prevention and Intervention.

The proposed amendment imposes no mandates on local governments, beyond those imposed by statute.

##### 6. PAPERWORK:

Any person or organization seeking approval as a provider must complete an application and submit a \$600 fee. At the expiration of its 3 year term of approval, a provider may reapply to the Department in accordance with the procedures set forth in proposed section 57-4.3, including payment of the required fee. However, an institution that offers a registered program leading to certification under section 52.21 of Commissioner's regulations shall not be required to pay a fee for approval under this section. An approved provider shall execute a certification of completion for each person completing course work or training, and within 21 calendar days of completion of the course work or training, the provider shall submit the certification of completion to the person completing the course work or training. The provider shall retain a copy of the certification of completion in the provider's files for not less than 6 years from the date of completion. In the event the provider discontinues offering course work or training, all copies of certifications of completion issued within the 6 years prior to the discontinuance shall be transferred to the Department.

##### 7. DUPLICATION:

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

##### 8. ALTERNATIVES:

Since these amendments are required by Chapter 102 of the Laws of 2012, no alternatives were considered.

##### 9. FEDERAL STANDARDS:

There are no related Federal standards governing the certification of teachers and administrators.

##### 10. COMPLIANCE SCHEDULE:

It is anticipated that regulated parties will be able to achieve compliance with this amendment by its stated effective date.

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

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

**Regulatory Flexibility Analysis****(a) Small Businesses:****1. EFFECT OF RULE:**

The Dignity for All Students Act (DASA) added Article 2 to the Education Law (Education Law § § 10 through 18), to require, among other things, school districts to create policies and guidelines to be used in school training programs to discourage the development of discrimination or harassment and to enable employees to prevent and respond to discrimination or harassment. These provisions took effect on July 1, 2012.

In June 2012 the Legislature enacted Chapter 102 of the Laws of 2012, which amended the Dignity Act to include a requirement that school professionals applying for a certificate or license on or after July 1, 2013 complete training on the social patterns of harassment, bullying and discrimination.

In response to the new law, the Department consulted with a work group, which was comprised of representatives of teachers, administrators, school social workers, school counselors, school guidance counselors, school psychologists, superintendents, school boards, teacher education program faculty, GLESN and Empire Pride Agenda to seek recommendations on how many hours and the types of training needed to ensure that school personnel have adequate training in harassment, bullying and discrimination. The work group recommended that the following actions be taken:

- Part 52 of the Commissioner's Regulations be amended to require teacher and school leadership preparation programs to include at least six hours of training in Harassment, Bullying and Discrimination Prevention and Intervention.
- A new Subpart 57-4 of the Commissioner's Regulations be added to establish standards under which the Department will approve providers of this training.
- Part 80 of the Commissioner's Regulations be amended to require that anyone applying for an administrative or supervisory service, classroom teaching service or school service certificate or license on or after July 1, 2013, shall have completed at least six clock hours of coursework or training in Harassment, Bullying and Discrimination Prevention and Intervention.

The proposed amendment implements these recommendations. A teachers' or professional organization or association that seeks to become an approved provider of this training could be a small business.

**2. COMPLIANCE REQUIREMENTS:**

There are compliance requirements for institutions or small businesses seeking to become an approved provider. Any person or organization seeking approval as a provider must complete an application and submit a \$600 fee. At the expiration of its 3 year term of approval, a provider may reapply to the Department in accordance with the procedures set forth in proposed section 57-4.3, including payment of the required fee. However, an institution that offers a registered program leading to certification under section 52.21 of Commissioner's regulations shall not be required to pay a fee for approval under this section. An approved provider shall execute a certification of completion for each person completing course work or training, and within 21 calendar days of completion of the course work or training, the provider shall submit the certification of completion to the person completing the course work or training. The provider shall retain a copy of the certification of completion in the provider's files for not less than 6 years from the date of completion. In the event the provider discontinues offering course work or training, all copies of certifications of completion issued within the 6 years prior to the discontinuance shall be transferred to the Department.

**3. PROFESSIONAL SERVICES:**

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

**4. COMPLIANCE COSTS:**

The proposed amendment will impose a cost of \$600 on private regulated parties that select to apply to become an approved provider of the required course work or training, except an institution that offers a

registered program leading to certification under section 52.21 of Commissioner's regulations shall not be required to pay a fee. However, the decision as to whether to become an approved provider is permissive in nature.

**5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:**

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

**6. MINIMIZING ADVERSE IMPACT:**

Since these amendments are required by Chapter 102 of the Laws of 2012, no alternatives were considered.

Moreover, the Department believes that the standards for sponsor review by the State Education Department are reasonable, and that uniform standards should apply, regardless of the size of the sponsoring organization, in order to ensure the quality of the continuing education.

**7. SMALL BUSINESS PARTICIPATION:**

In response to the new law, the Department consulted with a work group, which was comprised of representatives of teachers, administrators, school social workers, school counselors, school guidance counselors, school psychologists, superintendents, school boards, teacher education program faculty, GLESN and Empire Pride Agenda to seek recommendations on how many hours and the types of training needed to ensure that school personnel have adequate training in harassment, bullying and discrimination.

**(b) Local Governments:****1. EFFECT OF RULE:**

The Dignity for All Students Act (DASA) added Article 2 to the Education Law (Education Law §§ 10 through 18), to require, among other things, school districts to create policies and guidelines to be used in school training programs to discourage the development of discrimination or harassment and to enable employees to prevent and respond to discrimination or harassment. These provisions took effect on July 1, 2012.

In June 2012 the Legislature enacted Chapter 102 of the Laws of 2012, which amended the Dignity Act to include a requirement that school professionals applying for a certificate or license on or after July 1, 2013 complete training on the social patterns of harassment, bullying and discrimination.

In response to the new law, the Department consulted with a work group, which was comprised of representatives of teachers, administrators, school social workers, school counselors, school guidance counselors, school psychologists, superintendents, school boards, teacher education program faculty, GLESN and Empire Pride Agenda to seek recommendations on how many hours and the types of training needed to ensure that school personnel have adequate training in harassment, bullying and discrimination. The work group recommended that the following actions be taken:

- Part 52 of the Commissioner's Regulations be amended to require teacher and school leadership preparation programs to include at least six hours of training in Harassment, Bullying and Discrimination Prevention and Intervention.
- A new Subpart 57-4 of the Commissioner's Regulations be added to establish standards under which the Department will approve providers of this training.
- Part 80 of the Commissioner's Regulations be amended to require that anyone applying for an administrative or supervisory service, classroom teaching service or school service certificate or license on or after July 1, 2013, shall have completed at least six clock hours of coursework or training in Harassment, Bullying and Discrimination Prevention and Intervention.

The proposed amendment implements these recommendations and authorizes school districts and BOCES to apply to become an approved provider of this training.

**2. COMPLIANCE REQUIREMENTS:**

There are compliance requirements for school districts or BOCES seeking to become an approved provider. Any person or organization seeking approval as a provider must complete an application and submit a \$600 fee. At the expiration of its 3 year term of approval, a provider may reapply to the Department in accordance with the procedures set forth in proposed section 57-4.3, including payment of the required fee. An approved provider shall execute a certification of completion for each person completing course work or training, and within 21 calendar days of completion of the course work or training, the provider shall submit the certification of completion to the person completing the course work or training. The provider shall retain a copy of the certification of completion in the provider's files for not less than 6 years from the date of completion. In the event the provider discontinues offering course work or training, all copies of certifications of completion issued within the 6 years prior to the discontinuance shall be transferred to the Department.

**3. PROFESSIONAL SERVICES:**

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

## 4. COMPLIANCE COSTS:

The proposed amendment will impose a cost of \$600 on school districts and BOCES that select to apply to become an approved provider of the required course work or training. However, the decision as to whether to become an approved provider is permissive in nature.

## 5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

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

## 6. MINIMIZING ADVERSE IMPACT:

Since these amendments are required by Chapter 102 of the Laws of 2012, no alternatives were considered.

Moreover, the Department believes that the standards for sponsor review by the State Education Department are reasonable, and that uniform standards should apply, regardless of whether the sponsor is a local government, in order to ensure the quality of the continuing education.

## 7. LOCAL GOVERNMENT PARTICIPATION:

In response to the new law, the Department consulted with a work group, which was comprised of representatives of teachers, administrators, school social workers, school counselors, school guidance counselors, school psychologists, superintendents, school boards, teacher education program faculty, GLESN and Empire Pride Agenda to seek recommendations on how many hours and the types of training needed to ensure that school personnel have adequate training in harassment, bullying and discrimination.

*Rural Area Flexibility Analysis*

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

The proposed amendment will affect anyone applying for an administrative or supervisory service, classroom teaching service or school service certificate or license on or after July 1, 2013 who are certified in another State and who are applying for a teaching certificate in all parts of this State, including those located in the 44 rural counties with fewer than 200,000 inhabitants and the 71 towns and urban counties with a population density of 150 square miles or less.

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

The Dignity for All Students Act (DASA) added Article 2 to the Education Law (Education Law §§ 10 through 18), to require, among other things, school districts to create policies and guidelines to be used in school training programs to discourage the development of discrimination or harassment and to enable employees to prevent and respond to discrimination or harassment. These provisions took effect on July 1, 2012.

In June 2012 the Legislature enacted Chapter 102 of the Laws of 2012, which amended the Dignity Act to include a requirement that school professionals applying for a certificate or license on or after July 1, 2013 complete training on the social patterns of harassment, bullying and discrimination.

In response to the new law, the Department consulted with a work group, which was comprised of representatives of teachers, administrators, school social workers, school counselors, school guidance counselors, school psychologists, superintendents, school boards, teacher education program faculty, GLESN and Empire Pride Agenda to seek recommendations on how many hours and the types of training needed to ensure that school personnel have adequate training in harassment, bullying and discrimination. The work group recommended that the following actions be taken:

- Part 52 of the Commissioner's Regulations be amended to require teacher and school leadership preparation programs to include at least six hours of training in Harassment, Bullying and Discrimination Prevention and Intervention.
- A new Subpart 57-4 of the Commissioner's Regulations be added to establish standards under which the Department will approve providers of this training.
- Part 80 of the Commissioner's Regulations be amended to require that anyone applying for an administrative or supervisory service, classroom teaching service or school service certificate or license on or after July 1, 2013, shall have completed at least six clock hours of course-work or training in Harassment, Bullying and Discrimination Prevention and Intervention.

The proposed amendment implements these recommendations and provides that any person or organization seeking approval as a provider must complete an application and submit a \$600 fee. At the expiration of its 3 year term of approval, a provider may reapply to the Department in accordance with the procedures set forth in proposed section 57-4.3, including payment of the required fee. However, an institution that offers a registered program leading to certification under section 52.21 of Commissioner's regulations shall not be required to pay a fee for approval under this section. An approved provider shall execute a certification of completion for each person completing course work or training, and within 21 calendar days of completion of the course work or training, the provider

shall submit the certification of completion to the person completing the course work or training. The provider shall retain a copy of the certification of completion in the provider's files for not less than 6 years from the date of completion. In the event the provider discontinues offering course work or training, all copies of certifications of completion issued within the 6 years prior to the discontinuance shall be transferred to the Department.

## 3. COSTS:

The proposed amendment will impose a cost of \$600 on private regulated parties that select to apply to become an approved provider of the required course work or training, except an institution that offers a registered program leading to certification under section 52.21 of Commissioner's regulations shall not be required to pay a fee. However, the decision as to whether to become an approved provider is permissive in nature. Therefore, no mandatory costs are imposed on private regulated parties beyond those imposed by statute.

For candidates seeking certification on or after July 1, 2013, there may be additional fees to take the courses or training needed to obtain certification, however, no additional costs are imposed beyond those imposed by statute.

## 4. MINIMIZING ADVERSE IMPACT:

Since these amendments are required to implement the provisions of Chapter 102 of the Laws of 2012, no alternatives were considered. In addition, uniform certification standards must be applied throughout the State to ensure the consistency of teacher qualifications across the State.

## 5. RURAL AREA PARTICIPATION:

In response to the new law, the Department consulted with a work group, which was comprised of representatives of teachers, administrators, school social workers, school counselors, school guidance counselors, school psychologists, superintendents, school boards, teacher education program faculty, GLESN and Empire Pride Agenda to seek recommendations on how many hours and the types of training needed to ensure that school personnel have adequate training in harassment, bullying and discrimination. The work included representatives from across the State, including members from rural areas.

*Job Impact Statement*

The proposed amendment requires that anyone applying for an administrative or supervisory service, classroom teaching service or school service certificate or license on or after July 1, 2013 to complete at least six clock hours of coursework or training in Harassment, Bullying and Discrimination Prevention and Intervention in order to implement the policies, procedures and guideline requirements of the Dignity for All Students Act, as amended by Chapter 102 of the Laws of 2012. The proposed amendment also sets forth the standards and process for approval of providers of such training. The proposed amendment will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the proposed amendment that it will have a positive impact, or no impact, on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

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

**Policy, Procedures and Guidelines Prohibiting Harassment, Bullying (Including Cyberbullying) and Discrimination Against Students**

**I.D. No.** EDU-11-13-00017-P

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

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

**Statutory authority:** Education Law, sections 11(7) and (8), 12(1), 13(1-5), 14(1-5), 101(not subdivided), 207(not subdivided), 305(1) and (2) and 2854(1)(b); and L. 2012, ch. 102

**Subject:** Policy, procedures and guidelines prohibiting harassment, bullying (including cyberbullying) and discrimination against students.

**Purpose:** To implement the ch. 102, L. 2012 amendments to the Dignity for All Students Act.

**Text of proposed rule:** Subdivision (jj) of section 100.2 of the Regulations of the Commissioner of Education is amended, effective July 1, 2013, as follows:

(jj) Dignity [For All Students] Act Coordinator and School Employee Training Program.

(1) Definitions. As used in this subdivision:

(i) "School property" means in or within any building, structure,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) On or before July 1, [2012] 2013, each school district and each charter school shall establish *policies, procedures and guidelines* for its school or schools to implement, commencing with the [2012-2013] 2013-2014 school year and continuing in each school year thereafter, Dignity [for All Students] *Act* school employee training programs to promote a positive school environment that is free from [discrimination and] harassment, *bullying and/or discrimination*; and to discourage and respond to incidents of [discrimination and/or] harassment, *bullying, and/or discrimination* on school property or at a school function, *or off school property pursuant to subclause (1)(viii) (c)(iii) of this subdivision*. Such *policies, procedures and guidelines* shall be approved by the board of education, trustees or sole trustee of the school district (or by the chancellor of the city school district, in the case of the City School District of the City of New York) or by the board of trustees of the charter school.

(3) The *policies, procedures and guidelines* shall include, but not be limited to, *guidelines relating to the development of nondiscriminatory instructional and counseling methods, and providing employees, including school and district administrators and instructional and non-instructional staff, with [(i)] training to:*

(a) raise awareness and sensitivity to potential acts of [discrimination and/or] harassment, *bullying, and/or discrimination* directed at students that are committed by students and/or school employees on school property or at a school function, *or off school property pursuant to subclause (1)(viii)(c)(iii) of this subdivision*; including, but not limited to, [discrimination and/or] harassment, *bullying, and/or discrimination* based on a person's actual or perceived race, color, weight, national origin, ethnic

group, religion, religious practice, disability, sexual orientation, gender, or sex. *Such training shall address the social patterns of harassment, bullying and/or discrimination, the identification and mitigation of such acts, and strategies for effectively addressing problems of exclusion, bias and aggression in educational settings; [and]*

(b) [training to] enable employees to prevent and respond to incidents of [discrimination and/or] harassment, *bullying, and/or discrimination, consistent with Education Law section 13(4);*

(c) *make school employees aware of the effects of harassment, bullying, cyberbullying, and/or discrimination on students;*

(d) *ensure the effective implementation of school policy on school conduct and discipline, including but not limited to, guidelines on promoting a safe and supportive school climate while discouraging harassment, bullying, and/or discrimination against students by students and/or school employees; and*

(e) *include safe and supportive school climate concepts in curriculum and classroom management.*

[(c)] (f) [such] *Such training may be implemented and conducted in conjunction with existing professional development training pursuant to subparagraph 100.2(dd)(2)(ii) of this Title and/or with any other training for school employees; and* .

[(ii)] *guidelines relating to the development of nondiscriminatory instructional and counseling methods.*]

(4) At least one employee in every school shall be designated as a Dignity Act Coordinator [and] *who shall be:*

(i) instructed in the provisions of this subdivision [and];

(ii) thoroughly trained to handle human relations in the areas of race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender, and sex;

(iii) *provided with training which addresses the social patterns of harassment, bullying and discrimination, including but not limited to those acts based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender, and sex;*

(iv) *provided with training in the identification and mitigation of harassment, bullying and discrimination; and*

(v) *provided with training in strategies for effectively addressing problems of exclusion, bias, and aggression in educational settings.*

[(i)] (vi) The designation of each Dignity Act Coordinator shall be approved by the board of education, trustees or sole trustee of the school district (or in the case of the City School District of the City of New York, by the principal of the school in which the designated employee is employed) or, in the case of a charter school, by the board of trustees. *The Coordinator shall be employed by such school district, BOCES or charter school, as applicable, and be licensed and/or certified by the Commissioner as a classroom teacher, school counselor, school psychologist, school nurse, school social worker, school administrator or supervisor, or superintendent of schools.*

[(ii)] (vii) The name(s) and contact information for the Dignity Act Coordinator(s) shall be shared with all school personnel, students, and persons in parental relation, which shall include, but is not limited to, providing the name, designated school, and contact information of each Dignity Act Coordinator by:

(a) listing such information in the code of conduct and updates posted on the Internet web site, if available, of the school or school district, or of the board of cooperative educational services, pursuant to subclause 100.2(l)(2)(iii)(b)(1) of this Part; *provided that, notwithstanding the provisions of clause 100.2(l)(2)(iii)(a) of this Title, a change in the name and/or contact information of a Dignity Act Coordinator shall not be deemed to constitute a revision to the code of conduct so as to require a public hearing be held pursuant to such clause, and nothing herein shall be deemed to require such public hearing in such instance; and*

(b) *posting such information in highly-visible areas of school buildings; and*

(c) *making such information available at the district and school-level administrative offices; and either*

[(b)] (d) including such information in the plain language summary of the code of conduct provided to all persons in parental relation to students before the beginning of each school year, pursuant to subclause 100.2(l)(2)(iii)(b)(3); or

[(c)] (e) providing such information to parents and persons in parental relation [in] at least [one] *once* per school year [district or school mailing or other method of distribution] *in a manner as determined by the school, including, but not limited to, through electronic communication and/or sending such information home with [each student] students [and, if such information changes, in at least one subsequent district or school mailing or other such method of distribution as soon as practicable thereafter];*

[(d)] *posting such information in highly-visible areas of school buildings; and*

(e) making such information available at the district and school-level administrative offices.]

[(iii)] (viii) In the event a Dignity Act Coordinator vacates his or her position, another [school] *eligible* employee shall be immediately designated for an interim appointment as Coordinator, pending approval of a successor Coordinator by the applicable governing body as set forth in subparagraph [(i)] (vi) of this paragraph within 30 days of the date the position was vacated. In the event a Coordinator is unable to perform the duties of his or her position for an extended period of time, another [school] *eligible* employee shall be immediately designated for an interim appointment as Coordinator, pending return of the previous Coordinator to his or her duties as Coordinator.

(5) Nothing in this subdivision shall be construed to prohibit a denial of admission into, or exclusion from, a course of instruction based on a person's gender that would be permissible under Education Law sections 3201-a or 2854(2)(a) and Title IX of the Education Amendments of 1972 (20 U.S.C. section 1681, et seq.), or to prohibit, as discrimination based on disability, actions that would be permissible under section 504 of the Rehabilitation Act of 1973.

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

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

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

#### Regulatory Impact Statement

##### 1. STATUTORY AUTHORITY:

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

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

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

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

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

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

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

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

Education Law section 14, as amended by Chapter 102 of the Laws of 2012, requires the Commissioner to provide direction, including model policies and, to the extent possible, direct services to school districts in preventing harassment, bullying and discrimination and fostering an environment in every school where all children can learn free of manifesta-

tions of bias. Section 14(3), as amended, authorizes the Commissioner to promulgate regulations to assist school districts in developing measured, balanced and age-appropriate response to violations of this policy, with remedies and procedures following a progressive model that makes appropriate use of intervention, discipline and education and provide guidance related to the application of regulations. Section 14(4), as added by Chapter 102, requires the Commissioner to provide guidance and educational materials to schools districts relating to best practices in addressing cyberbullying and helping families and communities work cooperatively with schools in addressing cyberbullying, whether on or off school property or at or away from a school function.

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

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

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

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

##### 2. LEGISLATIVE OBJECTIVES:

The proposed amendment is necessary to implement the policies, procedures and guidelines provisions of the Dignity Act, as amended by Ch. 102, L. 2012.

##### 3. NEEDS AND BENEFITS:

The proposed rule is necessary to implement policies, procedures and guidelines provisions of the Dignity Act, as amended by Ch. 102, L. 2012, to ensure no student shall be subjected to harassment, bullying (including cyberbullying) and discrimination by employees or students.

##### 4. COSTS:

(a) Costs to State government:

None.

(b) Costs to local government:

None.

(c) Costs to private regulated parties:

None.

(d) Costs to regulating agency for implementation and continued administration of this rule:

None.

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

##### 5. LOCAL GOVERNMENT MANDATES:

The proposed amendment implements policies, procedures and guidelines provisions under the Dignity Act, as amended by Ch. 102, L. 2012, and will not impose any additional program, service, duty or responsibility beyond those imposed by the statute.

The proposed amendment to section 100.2(jj) implements the policies, guidelines and training requirements of the Ch. 102, L. 2012 amendments to the Dignity Act by establishing standards for the School Employee Training program to train school employees and administrators to promote a positive school environment that is free from harassment, bullying (including cyberbullying) and discrimination. Specifically, the proposed rule requires each school district, BOCES and charter school to:

(1) establish policies, procedures and guidelines, on or before July 1, 2013, to implement school employee training programs, commencing with the 2013-14 school year and thereafter, to promote a positive school environment that is free from harassment, bullying and discrimination and to discourage and respond to incidents of harassment, bullying and discrimination on school property or at a school function, or off school property where such acts create or would foreseeably create a risk of substantial disruption within the school environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property. Employee training policies, procedures and guidelines shall be approved by the board of education of the school district (or by the chancellor of the city school district in the case of the City School District of the City of New York) and by the board of trustees of the charter school;

(2) provide training for employees, including school and district administrators that:

(i) raises awareness and sensitivity to potential acts of harassment, bul-

lying and discrimination directed at students that are committed by students and/or school employees on school property or at school functions, or off school property where such acts create or would foreseeably create a risk of substantial disruption within the school environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property. The training shall address the social patterns of harassment, bullying and discrimination, the identification and mitigation of such acts, and strategies for effectively addressing problems of exclusion, bias and aggression in educational settings;

(ii) enables employees to prevent and respond to incidents of harassment, bullying and discrimination;

(iii) makes school employees aware of the effects of harassment, bullying, cyberbullying, and/or discrimination on students;

(iv) ensures the effective implementation of school policy on school conduct and discipline, including but not limited to, guidelines on promoting a safe and supportive school climate while discouraging harassment, bullying, and/or discrimination against students by students and/or school employees; and

(v) includes safe and supportive school climate concepts in curriculum and classroom management; and

(3) establish guidelines relating to the development of nondiscriminatory instructional and counseling methods.

The proposed amendment also implements the Ch 102, L. 2012 amendments to the Dignity Act by establishing standards for the Dignity Act Coordinator. The proposed amendment requires that:

(1) At least one employee in every school shall be designated as a Dignity Act Coordinator, who shall be:

(i) instructed in the provisions of the proposed rule;

(ii) thoroughly trained in methods to respond to human relations in the areas of race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender and sex;

(iii) provided with training which addresses the social patterns of harassment, bullying, and discrimination, including but not limited to those acts based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender, and sex;

(iv) provided with training in the identification and mitigation of harassment, bullying, and discrimination; and

(v) provided with training in strategies for effectively addressing problems of exclusion, bias, and aggression in educational settings.

(2) The Coordinator shall be employed by the school district, BOCES or charter school, as applicable, and be licensed and/or certified by the Commissioner as a classroom teacher, school counselor, school psychologist, school nurse, school social worker, school administrator or supervisor, or superintendent of schools.

(3) The designation of each Dignity Act Coordinator shall be approved by the board of education, trustees or sole trustee of the school district (or in the case of the City School District of the City of New York, by the principal of the school in which the designated employee is employed) and, in the case of a charter school, by the board of trustees.

(4) The name(s) and contact information for the Dignity Act Coordinator(s) shall be shared with all school personnel, students, and persons in parental relation, which shall include but is not limited to, providing such information to parents and persons in parental relation at least once per school year in a manner as determined by the school, including, but not limited to, through electronic communication and/or sending such information home with students.

#### 6. PAPERWORK:

Consistent with Ch. 102, L. 2012, the proposed rule requires each school district, BOCES and charter school to create guidelines to provide, on or before July 1, 2013, for schools to implement school employee training programs, commencing with the 2013 -14 school year and thereafter, to promote a positive school environment that is free from harassment, bullying and discrimination and to discourage and respond to incidents of harassment, bullying and discrimination on school property or at a school function, or off school property where such acts create or would foreseeably create a risk of substantial disruption within the school environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property. Employee training policies, procedures and guidelines shall be approved by the board of education of the school district (or by the chancellor of the city school district in the case of the City School District of the City of New York) and by the board of trustees of the charter school.

#### 7. DUPLICATION:

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

#### 8. ALTERNATIVES:

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

#### 9. FEDERAL STANDARDS:

There are no related Federal standards.

#### 10. COMPLIANCE SCHEDULE:

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

#### Regulatory Flexibility Analysis

##### Small Businesses:

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

##### Local Governments:

#### 1. EFFECT OF RULE:

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

#### 2. COMPLIANCE REQUIREMENTS:

The proposed amendment implements policies, procedures and guidelines provisions under the Dignity Act, as amended by Ch. 102, L. 2012, and will not impose any additional compliance requirements on school districts, BOCES or charter schools beyond those imposed by the statute.

The proposed amendment to section 100.2(j) implements the policies, guidelines and training requirements of the Ch. 102, L. 2012 amendments to the Dignity Act by establishing standards for the School Employee Training program to train school employees and administrators to promote a positive school environment that is free from harassment, bullying (including cyberbullying) and discrimination. Specifically, the proposed rule requires each school district, BOCES and charter school to:

(1) establish policies, procedures and guidelines, on or before July 1, 2013, to implement school employee training programs, commencing with the 2013-14 school year and thereafter, to promote a positive school environment that is free from harassment, bullying and discrimination and to discourage and respond to incidents of harassment, bullying and discrimination on school property or at a school function, or off school property where such acts create or would foreseeably create a risk of substantial disruption within the school environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property. Employee training policies, procedures and guidelines shall be approved by the board of education of the school district (or by the chancellor of the city school district in the case of the City School District of the City of New York) and by the board of trustees of the charter school;

(2) provide training for employees, including school and district administrators that:

(i) raises awareness and sensitivity to potential acts of harassment, bullying and discrimination directed at students that are committed by students and/or school employees on school property or at school functions, or off school property where such acts create or would foreseeably create a risk of substantial disruption within the school environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property. The training shall address the social patterns of harassment, bullying and discrimination, the identification and mitigation of such acts, and strategies for effectively addressing problems of exclusion, bias and aggression in educational settings;

(ii) enables employees to prevent and respond to incidents of harassment, bullying and discrimination;

(iii) makes school employees aware of the effects of harassment, bullying, cyberbullying, and/or discrimination on students;

(iv) ensures the effective implementation of school policy on school conduct and discipline, including but not limited to, guidelines on promoting a safe and supportive school climate while discouraging harassment, bullying, and/or discrimination against students by students and/or school employees; and

(v) includes safe and supportive school climate concepts in curriculum and classroom management; and

(3) establish guidelines relating to the development of nondiscriminatory instructional and counseling methods.

The proposed amendment also implements the Ch 102, L. 2012 amendments to the Dignity Act by establishing standards for the Dignity Act Coordinator. The proposed amendment requires that:

(1) At least one employee in every school shall be designated as a Dignity Act Coordinator, who shall be:

- (i) instructed in the provisions of the proposed rule;
- (ii) thoroughly trained in methods to respond to human relations in the areas of race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender and sex;
- (iii) provided with training which addresses the social patterns of harassment, bullying, and discrimination, including but not limited to those acts based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender, and sex;
- (iv) provided with training in the identification and mitigation of harassment, bullying, and discrimination; and
- (v) provided with training in strategies for effectively addressing problems of exclusion, bias, and aggression in educational settings.

(2) The Coordinator shall be employed by the school district, BOCES or charter school, as applicable, and be licensed and/or certified by the Commissioner as a classroom teacher, school counselor, school psychologist, school nurse, school social worker, school administrator or supervisor, or superintendent of schools.

(3) The designation of each Dignity Act Coordinator shall be approved by the board of education, trustees or sole trustee of the school district (or in the case of the City School District of the City of New York, by the principal of the school in which the designated employee is employed) and, in the case of a charter school, by the board of trustees.

(4) The name(s) and contact information for the Dignity Act Coordinator(s) shall be shared with all school personnel, students, and persons in parental relation, which shall include but is not limited to, providing such information to parents and persons in parental relation at least once per school year in a manner as determined by the school, including, but not limited to, through electronic communication and/or sending such information home with students.

#### 3. PROFESSIONAL SERVICES:

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

#### 4. COMPLIANCE COSTS:

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

#### 5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any additional technological requirements. Economic feasibility is addressed under the Compliance Costs section above.

#### 6. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to conform the Commissioner's Regulations to the policies, procedures and guidelines requirements of the Dignity Act, as amended by Chapter 102 of the Laws of 2012, and will not impose any additional compliance requirements or costs on school districts, BOCES and charter schools beyond those imposed by the statute. Because these statutory requirements specifically apply it is not possible to exempt them from the proposed amendment's requirements or impose a lesser standard. The proposed amendment has been carefully drafted to meet statutory requirements and Regents policy while minimizing the impact on school districts and BOCES. Where possible, the regulations have incorporated existing requirements and eliminated redundant requirements to minimize work at the local level and have emphasized local flexibility in meeting statutory requirements.

#### 7. LOCAL GOVERNMENT PARTICIPATION:

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

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

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

Making published herewith, and must be received within 45 days of the State Register publication date of the Notice.

#### *Rural Area Flexibility Analysis*

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

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

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

The proposed amendment implements policies, procedures and guidelines provisions under the Dignity Act, as amended by Ch. 102, L. 2012, and will not impose any additional reporting, recordkeeping or other compliance requirements on school districts, BOCES or charter schools beyond those imposed by the statute.

The proposed amendment to section 100.2(jj) implements the policies, guidelines and training requirements of the Ch. 102, L. 2012 amendments to the Dignity Act by establishing standards for the School Employee Training program to train school employees and administrators to promote a positive school environment that is free from harassment, bullying (including cyberbullying) and discrimination. Specifically, the proposed rule requires each school district, BOCES and charter school to:

(1) establish policies, procedures and guidelines, on or before July 1, 2013, to implement school employee training programs, commencing with the 2013-14 school year and thereafter, to promote a positive school environment that is free from harassment, bullying and discrimination and to discourage and respond to incidents of harassment, bullying and discrimination on school property or at a school function, or off school property where such acts create or would foreseeably create a risk of substantial disruption within the school environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property. Employee training policies, procedures and guidelines shall be approved by the board of education of the school district (or by the chancellor of the city school district in the case of the City School District of the City of New York) and by the board of trustees of the charter school;

(2) provide training for employees, including school and district administrators that:

(i) raises awareness and sensitivity to potential acts of harassment, bullying and discrimination directed at students that are committed by students and/or school employees on school property or at school functions, or off school property where such acts create or would foreseeably create a risk of substantial disruption within the school environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property. The training shall address the social patterns of harassment, bullying and discrimination, the identification and mitigation of such acts, and strategies for effectively addressing problems of exclusion, bias and aggression in educational settings;

(ii) enables employees to prevent and respond to incidents of harassment, bullying and discrimination;

(iii) makes school employees aware of the effects of harassment, bullying, cyberbullying, and/or discrimination on students;

(iv) ensures the effective implementation of school policy on school conduct and discipline, including but not limited to, guidelines on promoting a safe and supportive school climate while discouraging harassment, bullying, and/or discrimination against students by students and/or school employees; and

(v) includes safe and supportive school climate concepts in curriculum and classroom management; and

(3) establish guidelines relating to the development of nondiscriminatory instructional and counseling methods.

The proposed amendment also implements the Ch 102, L. 2012 amendments to the Dignity Act by establishing standards for the Dignity Act Coordinator. The proposed amendment requires that:

(1) At least one employee in every school shall be designated as a Dignity Act Coordinator, who shall be:

(i) instructed in the provisions of the proposed rule;

(ii) thoroughly trained in methods to respond to human relations in the areas of race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender and sex;

(iii) provided with training which addresses the social patterns of harassment, bullying, and discrimination, including but not limited to those acts based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender, and sex;

(iv) provided with training in the identification and mitigation of harassment, bullying, and discrimination; and

(v) provided with training in strategies for effectively addressing problems of exclusion, bias, and aggression in educational settings.

(2) The Coordinator shall be employed by the school district, BOCES or charter school, as applicable, and be licensed and/or certified by the Commissioner as a classroom teacher, school counselor, school psychologist, school nurse, school social worker, school administrator or supervisor, or superintendent of schools.

(3) The designation of each Dignity Act Coordinator shall be approved by the board of education, trustees or sole trustee of the school district (or in the case of the City School District of the City of New York, by the principal of the school in which the designated employee is employed) and, in the case of a charter school, by the board of trustees.

(4) The name(s) and contact information for the Dignity Act Coordinator(s) shall be shared with all school personnel, students, and persons in parental relation, which shall include but is not limited to, providing such information to parents and persons in parental relation at least once per school year in a manner as determined by the school, including, but not limited to, through electronic communication and/or sending such information home with students.

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

### 3. COSTS:

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

### 4. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to conform the Commissioner's Regulations with the policies, procedures and guideline requirements of the Dignity Act and will not impose any additional compliance requirements or costs beyond those imposed by the statute. The proposed rule has been carefully drafted to meet statutory requirements and Regents policy while minimizing the impact on school districts, BOCES and charter schools. Where possible, the regulations have incorporated existing requirements and eliminated redundant requirements to minimize work at the local level and have emphasized local flexibility in meeting statutory requirements. The statute which the proposed rule implements applies to all school districts, BOCES and charter schools throughout the State, including those in rural areas. Therefore, it was not possible to establish different requirements for entities in rural areas, or to exempt them from the rule's provisions.

### 5. RURAL AREA PARTICIPATION:

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

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

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

### Job Impact Statement

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

## Department of Financial Services

### EMERGENCY RULE MAKING

#### License, Financial Responsibility, Education and Test Requirements for Mortgage Loan Originators

**I.D. No.** DFS-11-13-00007-E

**Filing No.** 192

**Filing Date:** 2013-02-22

**Effective Date:** 2013-02-25

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

**Action taken:** Addition of Part 420; amendment of Supervisory Procedure MB 107; and repeal of Supervisory Procedure MB 108 of Title 3 NYCRR.

**Statutory authority:** Banking Law, arts. 12-D and 12-E

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

**Specific reasons underlying the finding of necessity:** Article 12-E of the Banking Law provides for the regulation of mortgage loan originators (MLOs). Article 12-E was recently amended in order to conform the regulation of MLOs in New York to new federal legislation (Title V of the Housing and Economic Recovery Act of 2008, known as the "SAFE Act").

The SAFE Act authorized the federal Department of Housing and Urban Development ("HUD") to assume the regulation of MLOs in any state that did not enact acceptable implementing legislation by August 1, 2009. In response, the Legislature enacted revised Article 12-E.

The emergency rulemaking revises the existing MLO regulations, which implement the prior version of Article 12-E, to conform to the changes in the statute.

Under the new legislation, MLOs, including those already engaged in the business of originating mortgage loans, must complete new education, testing and bonding requirements prior to licensure. Meeting these requirements will likely entail significant time and effort on the part of individuals subject to the revised law and regulations.

Emergency adoption of the revised regulations is necessary in order to afford such individuals sufficient advance notice of the new substantive rules and licensing procedures for MLOs that they will have an adequate opportunity to comply with the new licensing requirements and in order to protect against federal preemption of the regulation of MLOs in New York.

**Subject:** License, financial responsibility, education and test requirements for mortgage loan originators.

**Purpose:** To require that individuals engaging in mortgage loan origination activities must be licensed by the Superintendent of Financial Services.

**Substance of emergency rule:** Section 420.1 summarizes the scope and application of Part 420. It notes that all individuals unless exempt must be licensed under Article 12-E to engage in mortgage loan originator ("MLO") activities. It also sets forth the basic authority of the Superintendent to revoke or suspend a license.

Section 420.2 sets out the exemptions available to individuals from the general license requirements. Specifically, the proposed regulation includes a number of exemptions, including exemptions for individuals who work for banking institutions as mortgage loan originators and individuals who arrange mortgage loans for family members. Also, individuals who work for mortgage loan servicers and negotiate loan modifications are only subject to the license requirement if required by HUD. The Superintendent is authorized to approve other exemptions for good cause.

Section 420.3 contains a number of definitions of terms that are used in Part 420. These include definitions for "mortgage loan originator," "originating entity," "residential mortgage loan" and "loan processor or underwriter".

Section 420.4 describes the applications procedures for applying for a license as an MLO. It also provides important transitional rules for individuals already engaging in mortgage loan origination activities pursuant to the authority of the prior version of Article 12-E or, in the case of individuals engaged in the origination of manufactured homes, not previously subject to regulation by the Department of Financial Services (formerly the Banking Department).

Section 420.5 describes the circumstances in which originating entities may employ or contract with MLOs to engage in mortgage loan origination activities during the application process.

Section 420.6 sets forth the steps the Superintendent of Financial Services (formerly the Superintendent of Banks) must take upon determining to approve or disapprove an application for an MLO license.

Section 420.7 describes the circumstances when an MLO license is inactive and how an MLO may maintain his or her license during such periods.

Section 420.8 sets forth the circumstances when an MLO license may be suspended or terminated. Specifically, the proposed regulation provides that an MLO license shall terminate if the annual license renewal fee has not been paid or the requisite number of continuing education credits have not been taken. The Superintendent also may issue an order suspending an MLO license if the licensee does not file required reports or maintain a bond. The license of an MLO that has been suspended pursuant to this authority shall automatically terminate by operation of law after 90 days unless the licensee has cured all deficiencies within this time period.

Section 420.9 sets forth the process for the annual renewal of an MLO license.

Section 420.10 sets forth the process by which an MLO may surrender his or her license.

Section 420.11 sets forth the pre-licensing educational requirements applicable to applicants seeking an MLO license. Twenty hours of educational courses are required, including courses related to federal law and state law issues.

Section 420.12 sets out the requirement that pre-licensing education and continuing education courses and education course providers must be approved by the Nationwide Mortgage Licensing System and Registry (the "NMLS"). This represents a change from the prior law pursuant to which the Superintendent issued such approvals.

Section 420.13 sets forth the pre-licensing testing requirements for applicants for an MLO license. It also sets out the test location requirements and the minimum passing grades to obtain a license.

Section 420.14 sets out the continuing education requirements applicable to MLOs seeking to renew their licenses.

Section 420.15 sets out the new requirements that MLOs have a surety bonds in place as a condition to being licensed under Article 12-E. It also sets out the minimum amounts of such bonds.

Section 420.16 requires the Superintendent to make reports to the NMLS annually regarding violations by, and enforcement actions against, MLOs. It also provides a mechanism for MLOs to challenge the content of such reports.

Section 420.17 sets forth the process for calculating and collecting fees applicable to MLO licensing.

Sections 420.18 and 420.19 set forth the various duties of MLOs and originating entities. Section 420.20 also describes conduct prohibited for MLOs and loan originators.

Finally, Section 420.21 describes the administrative action and penalties that the Superintendent may take against an MLO for violations of law or regulation.

Section 107.1 contains definitions of defined terms used in the Supervisory Procedure. Importantly, it defines the National Mortgage Licensing System (NMLS), the web-based system with which the Superintendent has entered into a written contract to process applications for initial licensing and applications for annual license renewal for MLOs.

Section 107.2 contains general information about applications for initial licensing and annual license renewal as an MLO. It states that a sample of the application form (which must be completed online) may be found on the Department's website and includes the address where certain information required in connection with the application for licensing must be mailed.

Section 107.3 describes the parts of an application for initial licensing. The application includes (1) the application form, (2) fingerprint cards, (3) the fees, (4) applicant's credit report, (5) an affidavit subscribed under penalty of perjury in the form prescribed by the Superintendent, and (6) any other information that may be required by the Superintendent. It also describes the procedure when the Superintendent determines that the information provided by the application is not complete.

Section 107.4 describes the required submissions for annual license renewal of an MLO.

Section 107.5 covers inactive status.

Section 107.6 provides information on places where applicants may obtain additional instructions and assistance on the Department's website, by email, by mail, and by telephone.

Supervisory Procedure MB 108 is hereby repealed.

**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 22, 2013.

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

### **Regulatory Impact Statement**

1. Statutory authority.

Revised Article 12-E of the Banking Law became effective on July 11, 2009 when Governor Paterson signed into law Chapter 123 of the Laws of 2009. The revised version of Article 12-E is modeled on the provisions of Title V of the federal Housing and Economic Recovery Act of 2008, also known as the S.A.F.E. Mortgage Licensing Act (the "SAFE Act") pertaining to the regulation of mortgage loan originators. Hence, the licensing and regulation of mortgage loan regulators in New York now closely tracks the federal standard.

Current Part 420 of the Superintendent's Regulations, implementing the prior version of Article 12-E, was adopted on an emergency basis in December of 2008. Since the new version of Article 12-E is already effective, it is necessary to revise Part 420 and adopt the revised version on an emergency basis. An earlier draft of this regulation was published on the Department's website on August 27, 2009. To date, the Department has received two sets of comments, and these have been incorporated into the current version of the revised regulation as appropriate.

New Section 599-a of the Banking Law sets forth the legislative purpose of new Article 12-E. It notes that the new Article is intended to enhance consumer protection, reduce fraud and ensure the public welfare. It also notes that the new regulatory scheme is to be consistent with the SAFE Act.

Section 599-b sets forth the definitions used in the new Article. Defined terms include: mortgage loan originator ("MLO"); mortgage loan processor -- an individual who may not need to be licensed; residential mortgage loans -- loans for which an MLO must be licensed; residential real property; and the Nationwide Mortgage Licensing System and Registry (the "NMLS").

Section 599-c sets forth the requirements for being licensed as an MLO, the effective date for licensing and exemptions from the licensing requirements. Exemptions include ones for individuals who work for insured financial institutions, licensed attorneys who negotiate the terms of a loan for a client as an ancillary to the attorney's representation of the client, and, unless required to be licensed by the U.S. Department of Housing and Urban Development ("HUD"), certain individuals employed by a mortgage loan servicer.

Section 599-d sets out the process for obtaining an MLO license. It also sets out the Department's authority for imposing fees, the authority of the NMLS to collect such fees, the ability of the Superintendent of Financial Services (formerly the Superintendent of Banks) to modify the requirements of Article 12-E in order to ensure compliance with the SAFE Act, the requirement that filings be made electronically and required background information from all applicants.

Section 599-e sets forth the findings that the Superintendent must make before a license is issued. These include a finding that the applicant not have any felony convictions within seven years or any fraud convictions at any time, that the applicant demonstrate acceptable character and fitness, educational and testing criteria and a bonding requirement. An MLO also must be affiliated with an originating entity -- a licensed mortgage banker or registered mortgage broker (or other licensed entity in the case of individuals originating manufactured homes) -- or working for mortgage loan servicers.

Section 599-f sets out the pre-licensing education requirements, and Section 599-g sets forth the pre-licensing testing requirements. Section 599-h imposes a reporting requirement on entities employing MLOs. Such entities must make annual filings through the NMLS.

Section 599-i sets forth the annual license renewal requirements for MLOs. In addition to continuing to satisfy the initial requirements for licensing, MLOs must satisfy annual continuing educational requirements and must have paid all fees. Failure to meet these requirements shall result in the automatic termination of an MLO's license. The statute also provides for a licensee going into inactive status, provided the individual continues to pay all applicable fees and to take required education courses.

Section 599-j sets forth the continuing education requirements for MLOs, and Section 599-k sets forth the requirements for a surety bond. Section 599-l requires the Superintendent to report through the NMLS at least annually on all violations of Article 12-E and all enforcement actions. MLOs may challenge the information contained in such reports. Section 599-m sets forth the records and reports that originating entities must maintain or make on MLOs employed by, or working for, such entities. This section also requires the Superintendent to maintain on the internet a list of all MLOs licensed by the Department and requires reporting to the Department by MLOs.

Section 599-n sets forth the enforcement authority of the Superintendent. In addition to "for good cause" suspension authority, the Superintendent may revoke a license for stated reasons (after a hearing), and the Superintendent may suspend a license if a required surety bond is allowed to lapse or thirty days after a required report is not filed. This section also sets out the requirements for surrendering a license and the

implications of any surrender, revocation, termination or suspension of a license.

Section 599-o sets forth the authority of the Superintendent to adopt rules and regulations implementing Article 12-E, including the authority to adopt expedited review and licensing procedures for individuals previously authorized under the prior version of Article 12-E to act as MLOs. It also authorizes the Superintendent to investigate licensees and the entities with which they are associated.

Section 599-p requires that the unique identifier of every originator be clearly shown on certain documents. Section 599-q provides certain confidentiality protections for information provided to the Superintendent by an MLO, notwithstanding the sharing of such information with other regulatory bodies.

#### 2. Legislative objectives.

As noted, new Article 12-E was intended to conform New York Law to federal law and to enhance the regulation of MLOs operating in this state. These objectives have taken on increased urgency with the problems evidenced in the mortgage banking industry over the past few years.

The regulations implement this statute. New Part 420 differs from the prior version in a number of respects. The following is a summary of the major changes from the previous regulation:

1. The definition of a mortgage loan originator is broadened to include any individual who takes a mortgage application or offers or negotiates the terms of the mortgage with a consumer.

2. Individuals who originate loans on manufactured homes will be subject to the regulation for the first time.

3. If licensing of individuals who work for mortgage loan servicers and who engage in loan modification activities is required by the U.S. Department of Housing and Urban Development, such individuals may be subject to the licensing requirements of the new law and to the new regulation.

4. Individuals who have applied for "authorization" under the prior version of Article 12-E and Part 420 have a simplified process for becoming licensed and may continue to originate loans until they are licensed under the revised regulation or their applications are denied.

5. Individuals with a felony conviction within the last seven years or a felony conviction for fraud at any time are now prohibited from being licensed as MLOs in New York State.

6. Individuals must satisfy new pre-license education and testing requirements. There also are new bonding requirements and continuing education requirements.

7. A license automatically terminates if the licensee does not pay his or her annual license renewal fee or take the requisite amount of continuing education credits. The authority of the Superintendent to suspend an individual for good cause also has been clarified.

When Part 420 was originally adopted on an emergency basis, the Superintendent also adopted Supervisory Procedures MB 107 and MB 108. Supervisory Procedure MB107 deals with applications to become an MLO. It has been updated in line with the revisions to Article 12-E and Part 420.

Supervisory Procedure MB 108, relating to the approval of education providers and courses, was originally adopted because the prior version of Article 12-E required the Superintendent to approve both courses and providers. This activity has been transferred to the NMLS under new Article 12-E. Accordingly, Supervisory Procedure MB 108 is being rescinded.

#### 3. Needs and benefits.

The SAFE Act is intended to impose a nationwide standard for MLO regulation; new Article 12-E constitutes New York's effort to adopt a regulatory regime consistent with this uniform standard. This regulation is needed to implement revised Article 12-E and is necessary to address problems that have surfaced over the last several years in the mortgage industry.

As has now been recognized at the federal level in the SAFE Act, increased oversight of mortgage loan originators is necessary to curb disreputable and deceptive businesses practices by MLOs. Individuals engaging in abusive practices have avoided detection by moving from company to company and in some instances, from state to state. The licensing of MLOs will greatly assist the Department in its efforts to oversee the mortgage industry and protect consumers. The regulation will enable the Department to identify, track and hold accountable those individuals who engage in abusive practices, and ensure continuing education for all MLOs that are licensed by the Department.

These regulatory requirements will improve accountability among mortgage industry professionals, protect and promote the integrity of the mortgage industry, and improve the quality of service, thereby helping to restore consumer confidence.

If New York did not adopt the new federal standards for MLO regulation or failed to implement its requirements, the SAFE Act requires that HUD assume the licensing of MLOs in New York State. This would result in ceding an important responsibility and element of state sovereignty to the federal government.

#### 4. Costs.

MLOs are already experiencing increased costs as a result of the fees and continuing education requirements associated with the prior version of Article 12-E. These costs will continue under the new law and regulations.

The amount of the fingerprint fee is set by the State Division of Criminal Justice Services and the processing fees of the National Mortgage Licensing System and Registry are set by that body.

The ability by the Department to regulate MLOs is expected to substantially decrease losses to consumers and the mortgage industry, as well as to assist in decreasing the number of foreclosures in the State and the associated direct and indirect costs of such foreclosures. It is expected also to reduce consumer complaints regarding MLO conduct.

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

#### 5. Local government mandates.

None.

#### 6. Paperwork.

An application process has been established for MLOs electronically through the NMLS. Over time, the application process is expected to become virtually paperless; accordingly, while a limited number of documents, including fingerprints where necessary, currently have to be submitted to the Department in paper form, these requirements should diminish with the passage of time.

The specific procedures that are to be followed in order to apply for licensing as a mortgage loan originator are detailed in revised Supervisory Procedure MB 107.

#### 7. Duplication.

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

#### 8. Alternatives.

The purpose of the regulation is to carry out the statutory mandate to license and regulate MLOs in a manner consistent with the SAFE Act. As noted above, the alternative would be to cede this responsibility to the federal government. By enacting revised Article 12-E, the Legislature has indicated its desire to retain this responsibility at the state level.

#### 9. Federal standards.

Currently, mortgage loan originators are required under the SAFE Act to be licensed under requirements nearly identical to those set forth in new Article 12-E.

#### 10. Compliance schedule.

New Article 12-E became effective on July 11, 2009.

A transitional period is provided for mortgage loan originators who, as of July 11, 2009, were authorized to act as MLOs or had filed applications to be so authorized. Such MLOs may continue to engage in MLO activities, provided they submit any additional, updated information required by the Superintendent. The transitional period runs until January 1, 2011, in the case of authorized persons, and until July 31, 2010, in the case of applicants (unless their applications are denied or withdrawn as of an earlier date). Applicants are required to complete their applications considerably in advance of these dates under the regulations in order to allow the Department to complete their processing.

#### *Regulatory Flexibility Analysis*

##### 1. Effect of the Rule:

The revised regulation will not have any impact on local governments. However, many of the originating entities who employ or are affiliated with mortgage loan originators are mortgage bankers or mortgage brokers who are considered small businesses. In excess of 2,700 of these businesses are licensed or registered by the Department of Financial Services (formerly the Banking Department).

##### 2. Compliance Requirements:

The revised regulation reflects the changes made in revised Article 12-E of the Banking Law. The small businesses that MLOs are employed by or affiliated with will be required to ensure that all MLOs employed by them have been duly licensed, report four times a year on the MLOs newly employed by them or dismissed for actual or alleged violations, determine that each MLO employed by or affiliated with them has the character, fitness and education qualifications to warrant the belief he or she will engage in mortgage loan originating honestly, fairly and efficiently; and, finally, retain acceptable documentation as evidence of satisfactory completion of required education courses for each MLO for a period of six years. In addition to these requirements, originating entities will be required to assign MLOs to registered locations and to ensure that an MLO's unique identifier is recorded on each mortgage application he or she originates.

##### 3. Professional Services:

None.

##### 4. Compliance Costs:

As under the existing Part 420, some mortgage entities may choose to pay for costs associated with initial licensing and annual license renewal for their MLOs and with continuing education requirements, but are not required to do so. Costs associated with electronic filing of quarterly employment reports and retaining for six years evidence of completion by MLOs of required continuing education are expected to be minimal.

5. Economic and Technological Feasibility:

The rule-making should impose no adverse economic or technological burden on small businesses that MLOs are employed by or affiliated with.

6. Minimizing Adverse Impacts:

The industry, and specifically small businesses who are licensed and registered mortgage businesses, supported passage of the previous Banking Law Article 12-E and had substantial opportunity to comment on the specific requirements of this statute and its supporting regulations. In addition, these businesses were involved in a policy dialogue with the Department during rule development. In order to minimize any potential adverse economic impact of the rulemaking, outreach was conducted with associations representing the industries that would be affected thereby (mortgage bankers, and mortgage brokers).

The revised regulation implements changes in Article 12-E of the Banking Law. An earlier draft of the revised regulation was published on the Department's website on August 27, 2009. Changes incorporating the comments have been made in the regulation where appropriate.

7. Small Business and Local Government Participation:

See response to Item 6 above.

**Rural Area Flexibility Analysis**

**Types and Estimated Numbers:** The New York State Department of Financial Services (formerly the Banking Department) licenses over 1,045 mortgage bankers and brokers, of which over 761 are located in the state. It has received 19,000 applications from MLOs under the present regulations and anticipates receiving approximately 500 initial licensing applications from individuals who seek to enter and/or re-enter the market as the economy stabilizes. Many of these entities and MLOs will be operating in rural areas of New York State and would be impacted by the regulation.

**Compliance Requirements:** Mortgage loan originators in rural areas must be licensed by the Superintendent of Financial Services (formerly the Superintendent of Banks) to engage in the business of mortgage loan origination. The application process established by the regulations requires an MLO to apply for a license electronically and to submit additional background information to the Mortgage Banking unit of the Department. This additional information consists of fingerprints, a recent credit report, supplementary background information and an attestation as to the truthfulness of the applicant's statements. Mortgage brokers and bankers are required to ensure that all MLOs employed by them have been duly licensed, report four times a year on the MLOs newly employed by them or dismissed for cause, determine that each MLO employed by or affiliated with them has the character, fitness and education qualifications to warrant the belief he or she will engage in mortgage loan originating honestly, fairly and efficiently; and, finally, retain acceptable documentation as evidence of satisfactory completion of required education courses for each MLO for a period of six years. The Department believes that this rule will not impose a burdensome set of requirements on entities operating in rural areas.

**Costs:** Some mortgage businesses in rural areas may choose to pay the increased costs associated with the continuing education requirements and the fees associated with licensing and annual renewal of their MLOs, but are not required to do so. The regulation sets forth the manner in which the background investigation fee, the initial license processing fee and the annual renewal fee are established. There will also be a fee for the processing of fingerprints and fees to cover the cost of third party processing of the application. Fees charged to the industry will be adjusted periodically to cover Department expenses incurred in carrying out its regulatory responsibilities. Costs associated with electronic filing of quarterly employment reports and retaining for six years evidence of completion by MLOs of required continuing education courses are expected to be minimal. The cost of continuing education is estimated to be approximately \$500 every two years. The Department's increased effectiveness in fighting mortgage fraud and predatory lending will lower costs related to litigation and will decrease losses to consumers and the mortgage industry by hundreds of millions of dollars.

**Minimizing Adverse Impacts:** The industry supported passage of the prior Article 12-E and had substantial opportunity to comment on the specific requirements of this statute and its supporting regulation. In addition, the industry was involved in a dialogue with the Department during rule development.

The revised regulations implement revised Article 12-E of the Banking Law, which in turn closely tracks the provisions of Title V of the federal Housing and Economic Recovery Act of 2008, also known as the S.A.F.E. Mortgage Licensing Act (the "SAFE Act"). Hence, the licensing and regulation of mortgage loan originators in New York now closely tracks

the federal standard. If New York did not adopt this standard, the SAFE Act requires that the federal Department of Housing and Urban Development assume the licensing of MLOs in New York State.

**Rural Area Participation:** Representatives of various entities, including mortgage bankers and brokers conducting business in rural areas and entities that conduct mortgage originating in rural areas, participated in outreach meetings that were conducted during the process of drafting the prior Article 12-E and the implementing regulations. As noted above, the revised statute and regulations closely track the provisions of the federal SAFE Act.

**Job Impact Statement**

Revised Article 12-E of the Banking Law, effective on July 11, 2009, replaces the prior version of Article 12-E with respect to the licensing and regulation of mortgage loan servicers. This regulation sets forth the application, exemption and approval procedures for licensing registration as a Mortgage Loan Originator (MLO), as well as financial responsibility requirements for individuals engaging in MLO activities. The regulation also provides transition rules for individuals who engaged in MLO activities under the prior version of the article to become licensed under the new statute.

The requirement to comply with the regulations is not expected to have a significant adverse effect on jobs or employment activities within the mortgage loan servicing industry. This is because individuals were already subject to regulation under the prior version of Article 12-E of the Banking Law. New Article 12-E and Part 420 are intended to conform the regulation of MLOs to the requirements of federal law. Absent action by New York to conform this regulation to federal requirements, federal law authorized the Department of Housing and Urban Affairs to take control of the regulation of MLOs in New York State.

As with their predecessors, the new statute and regulations require the use of the internet-based National Mortgage Licensing System and Registry (NMLS), developed by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators. This system uses a common on-line application for MLO registration in New York and other participating states. It is believed that any remaining adverse impact would be due primarily to the nature and purpose of the statutory licensing requirement rather than the provisions of the regulations.

Supervisory Procedure 108 relates to the approval by the Superintendent of Financial Services (formerly the Superintendent of Banks) of educational courses and course providers for MLOs. Under revised Article 12-E, this function has been transferred to the NMLS. Moreover, educational requirements have been increased under the new law and regulation by the Superintendent.

**EMERGENCY  
RULE MAKING**

**Unfair Claims Settlement Practices and Claim Cost Control Measures**

**I.D. No.** DFS-11-13-00009-E

**Filing No.** 194

**Filing Date:** 2013-02-25

**Effective Date:** 2013-02-25

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

**Action taken:** Addition of section 216.13 (Regulation 64) to Title 11 NYCRR.

**Statutory authority:** Financial Services Law, sections 202 and 302; and Insurance Law, sections 301, 2601 and 3404(e)

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

**Specific reasons underlying the finding of necessity:** Insurance Law § 2601 prohibits an insurer doing business in New York State from engaging in unfair claims settlement practices and sets forth a list of acts that, if committed without just cause and performed with such frequency as to indicate a general business practice, will constitute unfair claims settlement practices. Insurance Regulation 64 sets forth the standards insurers are expected to observe to settle claims properly.

On October 26, 2012, in anticipation of extensive power outages, loss of life and property, and ongoing harm to public health and safety expected to result from then-Hurricane Sandy, Governor Andrew M. Cuomo issued Executive Order 47, declaring a State of Disaster Emergency for all 62 counties within New York State. As anticipated, Storm Sandy struck New York State on October 29, 2012, causing extensive power outages, loss of

life and property, and ongoing harm to public health and safety. In addition, a nor'easter struck New York just a week later, adding to the damage and dislocation. Many people still had not had basic services such as electric power restored before the second storm hit.

Insurers insuring property in areas that were hit the hardest by the storms, including Long Island and New York City, have a large number of claims left to settle. As a result, many homeowners and small business owners have not been able to start to repair or replace their damaged property, or in some cases, complete their repairs. Moreover, there are many insureds who have had their claims denied by their insurers and whose only remaining option is to file a civil suit against their insurers. Lawsuits such as these can often take years to resolve, and homeowners and small businesses can not afford to wait for the resolution of their claims in the courts.

Fair and prompt settlement of claims is critical for homeowners, many of whom have been displaced from their homes or are living in unsafe conditions through this winter season, and for small businesses, many of which have yet to return to full operation and to recover their losses caused by the storm.

Given the nature and extent of the damage and the wintry weather, an alternative avenue to mediate the claims would help protect the public and ensure its safety and welfare.

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

**Subject:** Unfair Claims Settlement Practices and Claim Cost Control Measures.

**Purpose:** To create a mediation program to facilitate the negotiation of certain insurance claims arising between 10/26/12 - 11/15/12.

**Text of emergency rule:** 216.13 Mediation.

(a) This section shall apply to any claim for loss or damage, other than claims made under flood policies issued under the national flood insurance program, occurring from October 26, 2012 through November 15, 2012, in the counties of Bronx, Kings, Nassau, New York, Orange, Queens, Richmond, Rockland, Suffolk or Westchester, including their adjacent waters, with respect to:

- (1) loss of or damage to real property; or
- (2) loss of or damage to personal property, other than damage to a motor vehicle.

(b)(1) Except as provided in paragraph (2) of this subdivision, an insurer shall send the notice required by paragraph (3) of this subdivision to a claimant, or the claimant's authorized representative:

- (i) at the time the insurer denies a claim in whole or in part;
- (ii) within 10 business days of the date that the insurer receives notification from a claimant that the claimant disputes a settlement offer made by the insurer, provided that the difference between the positions of the insurer and claimant is \$1,000 or more; or
- (iii) within two business days when the insurer has not offered to settle within 45 days after it has received a properly executed proof of loss and all items, statements and forms that the insurer had requested from the claimant.

(2) If, prior to the effective date of this section: the insurer denied a claim in whole or in part; or a claimant disputed a settlement offer, or more than 45 days elapsed after the insurer received a properly executed proof of loss and all items, statements and forms that the insurer had requested from the claimant, and in either case the claim still remains unresolved as of the effective date of this section, then the insurer shall provide the notice required by paragraph (3) of this subdivision within ten business days from the effective date of this section.

(3) The notice specified in paragraphs (1) and (2) of this subdivision shall inform the claimant of the claimant's right to request mediation and shall provide instructions on how the claimant may request mediation, including the name, address, phone number, and fax number of an organization designated by the superintendent to provide a mediator to mediate claims pursuant to this section. The notice shall also provide the insurer's address and phone number for requesting additional information.

(c) If the claimant submits a request for mediation to the insurer, the insurer shall forward the request to the designated organization within three business days of receiving the request.

(d) The insurer shall pay the designated organization's fee for the mediation to the designated organization within five days of the insurer receiving a bill from the designated organization.

(e)(1) The mediation shall be conducted in accordance with procedures established by the designated organization and approved by the superintendent.

(2) A mediation may be conducted by face-to-face meeting of the parties, videoconference, or telephone conference, as determined by the designated organization in consultation with the parties.

(3) A mediation may address any disputed issues for a claim to which

this section applies, except that a mediation shall not address and the insurer shall not be required to attend a mediation for:

(i) a dispute in property valuation that has been submitted to an appraisal process or a claim that is the subject of a civil action filed by the insured against the insurer, unless the insurer and the insured agree otherwise;

(ii) any claim that the insurer has reason to believe is a fraudulent transaction or for which the insurer has knowledge that a fraudulent insurance transaction has taken place; or

(iii) any type of dispute that the designated organization has excepted from its mediation process in accordance with the organization's procedures approved by the superintendent.

(f)(1) The insurer must participate in good faith in all mediations scheduled by the designated organization, which shall at a minimum include compliance with paragraphs (2), (3), and (4) of this subdivision.

(2) The insurer shall send a representative to the mediation who is knowledgeable with respect to the particular claim; and who has authority to make a binding claims decision on behalf of the insurer and to issue payment on behalf of the insurer. The insurer's representative must bring a copy of the policy and the entire claims file, including all relevant documentation and correspondence with the claimant.

(3) An insurer's representatives shall not continuously disrupt the process, become unduly argumentative or adversarial or otherwise inhibit the negotiations.

(4) An insurer that does not alter its original decision on the claim is not, on that basis alone, failing to act in good faith if it provides a reasonable explanation for its action.

(g) An insured's right to request mediation pursuant to this section shall not affect any other right the insured may have to redress the dispute, including remedies specified in the insurance policy, such as an insured's right to request an appraisal, the right to litigate the dispute in the courts if no agreement is reached, or any right provided by law.

(h)(1) No organization shall be designated by the superintendent unless it agrees that:

(i) the superintendent shall oversee the operational procedures of the designated organization with respect to administration of the mediation program, and shall have access to all systems, databases, and records related to the mediation program; and

(ii) the organization shall make reports to the superintendent in whatever form and as often as the superintendent prescribes.

(2) No organization shall be designated unless its procedures, approved by the superintendent, require that:

(i) the parties agree in writing prior to the mediation that statements made during the mediation are confidential and will not be admitted into evidence in any civil litigation concerning the claim, except with respect to any proceeding or investigation of insurance fraud;

(ii) a settlement agreement reached in a mediation shall be transcribed into a written agreement, on a form approved by the superintendent, that is signed by a representative of the insurer with the authority to do so and by the claimant; and

(iii) a settlement agreement prepared during a mediation shall include a provision affording the claimant a right to rescind the agreement within three business days from the date of the settlement, provided that the insured has not cashed or deposited any check or draft disbursed to the claimant for the disputed matters as a result of the agreement reached in the mediation.

(3) No organization shall be designated unless its procedures, approved by the superintendent, provide that:

(i) the mediator may terminate a mediation session if the mediator determines that either the insurer's representative or the claimant is not participating in the mediation in good faith, or if even after good faith efforts, a settlement can not be reached;

(ii) the designated organization may schedule additional mediation sessions if it believes the sessions may result in a settlement;

(iii) the designated organization may require the insurer to send a different representative to a rescheduled mediation session if the representative has not participated in good faith, the fee for which shall be paid by the insurer; and

(iv) the designated organization may reschedule a mediation session if the mediator determines that the claimant is not participating in good faith, but only if the claimant pays the organization's fee for the mediation.

**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 25, 2013.

**Text of rule and any required statements and analyses may be obtained from:** Brenda Gibbs, NYS Department of Financial Services, One Commerce Plaza, Albany, NY 12257, (518) 408-3451, email: [brenda.gibbs@dfs.ny.gov](mailto:brenda.gibbs@dfs.ny.gov)

**Regulatory Impact Statement**

1. **Statutory authority:** Sections 202 and 302 of the Financial Services Law and Sections 301 and 2601 of the Insurance Law. Financial Services Law § 202 grants the Superintendent of Financial Services (“Superintendent”) the rights, powers, and duties in connection with financial services and protection in this state, expressed or reasonably implied by the Financial Services Law or any other applicable law of this state. Insurance Law § 301 and Financial Services Law § 302 authorize the Superintendent to prescribe regulations interpreting the provisions of the Insurance Law and to effectuate any power granted to the Superintendent in the Insurance Law. Insurance Law § 2601 prohibits an insurer doing business in New York State from engaging in unfair claims settlement practices, sets forth certain acts that, if committed without just cause and performed with such frequency as to indicate a general business practice, constitute unfair claims settlement practices, and imposes penalties if an insurer engages in these acts. Such practices include “not attempting in good faith to effectuate prompt, fair and equitable settlements of claims submitted in which liability has become reasonably clear” and “compelling policyholders to institute suits to recover amounts due under its policies by offering substantially less than the amounts ultimately recovered in suits brought by them.”

2. **Legislative objectives:** As noted in the Department’s statement in support for the bill that added the predecessor section to § 2601, Section 40-d, to the Insurance Law in 1970 (Chapter 296 of the Laws of 1970), an insurance company’s obligation to deal fairly with claimants and policyholders in the settlement of claims – indeed, its simple obligation to pay claims at all – was solely a matter of private contract law. That left the Department unable to aid consumers and relegated them solely to the courts. There was a wide variety in insurers’ claims practices. Insurance Law § 2601 reflects the Legislature’s concerns with insurance claims practices of insurers. In enacting that section, the Legislature authorized the Superintendent to monitor and regulate insurance claims practices.

3. **Needs and benefits:** On October 26, 2012, in anticipation of extensive power outages, loss of life and property, and ongoing harm to public health and safety expected to result from then-Hurricane Sandy, Governor Andrew M. Cuomo issued Executive Order 47, declaring a State of Disaster Emergency for all 62 counties within New York State. As anticipated, Storm Sandy struck New York State on October 29, 2012, causing extensive power outages, loss of life and property, and ongoing harm to public health and safety. In addition, a nor’easter struck New York just a week later, adding to the damage and dislocation. Many people still had not had basic services such as electric power restored before the second storm hit.

Insurers insuring property in areas that were hit the hardest by the storms, including Long Island and New York City, have a large number of claims left to settle. As a result, many homeowners and small business owners have not been able to start to repair or replace their damaged property, or in some cases, complete their repairs. Many small businesses have suffered losses of income that threaten their survival. Fair and prompt settlement of claims is critical for homeowners, many of whom who have been displaced from their homes or who are living in unsafe conditions through this winter season, and for small businesses, to enable them to return to full operation and to recover their losses caused by the storm. Furthermore, many small businesses provide essential services to and a significant source of employment in the communities in which they are located.

Moreover, there are many insureds who have had their claims denied by their insurers and whose only remaining option is to file a civil suit against their insurers. Lawsuits such as these can often take years to resolve, and homeowners and small businesses can not afford to wait for the resolution of their claims in the courts.

Therefore, this rule creates a mediation program to facilitate the negotiation of certain insurance claims arising in the counties of New York, Bronx, Kings, Richmond, Queens, Nassau, Suffolk, Westchester, Rockland, and Orange, the areas that suffered the greatest storm damage, between October 26, 2012 and November 15, 2012. An insured may request mediation for a claim for loss or damage to personal or real property (1) that the insurer has denied, (2) for which the insured disputes the insurer’s settlement offer if the difference between what the insured seeks and the insurer offers is more than \$1,000, or (3) that has not been settled within 45 days after the insurer received all the information the insurer needs to decide the claim. The amendment does not provide for mediation of claims for damage to motor vehicles.

Participation in the mediation program by insureds is voluntary. Participation by insurers in the mediation program is mandatory, except that an insurer is not required to participate in a mediation for any claim involving a dispute in property valuation that has been submitted to an appraisal process or that has become the subject of civil litigation, unless the insurer and insured agree otherwise. An insurer also is not required to mediate any claim for which the insurer has reason to believe or knowledge that a fraudulent insurance transaction has taken place.

4. **Costs:** This rule does not impose compliance costs on state or local governments. The rule may increase costs for insurers, because they will need to pay the costs of mediation and provide representatives to send to the mediations. However, by providing an alternative to litigation, the insurers should also realize savings from mediations that result in settlements because the cost to mediate a claim is significantly less than the cost to defend against civil litigation brought by insureds. The actual cost effect of the rule is difficult to quantify because it is dependent upon unknown variables such as how many claims will be subject to litigation, how many insureds will select the mediation option, and how many claims that are mediated will be successfully resolved without the insured resorting to litigation. Nothing in this rule requires insurers to reach a settlement in the course of a mediation.

5. **Local government mandates:** This rule does not impose any requirement upon a city, town, village, school district, or fire district.

6. **Paperwork:** This rule does not impose any additional paperwork.

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

8. **Alternatives:** The Department considered making this rule applicable to the entire state. However, since the major concerns appeared to be localized, the applicability of the amendment is limited to those counties most impacted by the storm. In addition, the Department could have made the rule apply to all claims, even those that had been settled before the effective date of the rule. However, after meeting with industry trade groups and hearing their concerns, the Department modified the rule to make clear that, for claims that had already been made as of the rule’s effective date, only those that were denied or unresolved as of the rule’s effective date are covered by the rule. The Department also changed the rule so that it applies only to disputes where the parties’s positions are \$1,000 or more apart.

9. **Federal standards:** There are no minimum standards of the federal government for the same or similar subject areas. The rule is consistent with federal standards or requirements. The regulation does not apply to claims made under policies issued under the national flood insurance program.

10. **Compliance schedule:** Insurers will be required to comply with this rule upon the Superintendent’s filing the rule with the Secretary of State.

**Regulatory Flexibility Analysis**

1. **Small businesses:** The Department of Financial Services (“Department”) finds that this rule will not impose any adverse economic impact on small businesses and will not impose any reporting, recordkeeping, or other compliance requirements on small businesses. The basis for this finding is that this rule is directed at insurers authorized to do business in New York State, none of which fall within the definition of a “small business” as found in State Administrative Procedure Act § 102(8). The Department has monitored annual statements and reports on examination of authorized insurers subject to this rule, and believes that none of the insurers falls within the definition of “small business” because no insurer is both independently owned and has fewer than 100 employees.

2. **Local governments:** The rule does not impose any impact, including any adverse impact, or reporting, recordkeeping, or other compliance requirements on any local governments. The basis for this finding is that this rule is directed at authorized insurers, which are not local governments.

**Rural Area Flexibility Analysis**

1. **Types and estimated numbers of rural areas:** “Rural areas”, as used in State Administrative Procedure Act (“SAPA”) § 102(10), means counties within the state having less than 200,000 population, and the municipalities, individuals, institutions, communities, programs and such other entities or resources as are found therein. In counties of 200,000 or greater population, “rural areas” means towns with population densities of 150 persons or less per square mile, and the villages, individuals, institutions, communities, programs and such other entities or resources as are found therein. While insurers affected by this rule may be headquartered in rural areas, the rule itself only applies within the counties of New York, Bronx, Kings, Richmond, Queens, Nassau, Suffolk, Westchester, Rockland, and Orange. None of these counties is a rural area, and the Department of Financial Services (“Department”) does not believe that there are any towns within any of those counties that would be considered to be rural areas within the SAPA definition.

2. **Reporting, recordkeeping and other compliance requirements, and professional services:** The rule would not impose any additional reporting or recordkeeping requirements. However, the rule would impose other compliance requirements on insurers that may be headquartered in rural areas by requiring insurers to participate in mediation sessions when an insured with a claim subject to the rule requests mediation of his or her claim.

It is unlikely that professional services would be needed in rural areas to comply with this rule.

3. **Costs:** The rule may result in additional costs to insurers headquarter-

tered in rural areas, because they will need to pay the costs of mediation and provide representatives to send to the mediations. However, by providing an alternative to litigation, the insurers may also realize savings from mediations that result in settlements because the cost to mediate a claim is significantly less than the cost to defend against civil litigation brought by insureds. The actual cost effect of the rule is difficult to quantify because it is dependent upon unknown variables such as how many claims will be subject to litigation, how many insureds will select the mediation option, and how many claims that are mediated will be successfully resolved without the insured resorting to litigation. Nothing in this rule requires insurers to reach a settlement in the course of a mediation.

4. Minimizing adverse impact: The Department considered the approaches suggested in SAPA § 202-bb(2) for minimizing adverse economic impacts. Because the public health, safety, or general welfare has been endangered, establishment of differing compliance or reporting requirements or timetables based upon whether or not the damage occurred in a rural area is not appropriate. However, the rule applies only in the counties of New York, Bronx, Kings, Richmond, Queens, Nassau, Suffolk, Westchester, Rockland, and Orange, the areas that suffered the greatest storm damage, and thus the impact of the rule on rural areas is minimized, since none of those counties are rural areas.

5. Rural area participation: Due to the short timeframe to promulgate the amendment, participation with the industry was limited to discussion of the provisions of the amendment with industry trade groups. Public and private interests in rural areas will have a fuller opportunity to participate in the rule making process once the rule is published in the State Register and posted on the Department's website.

**Job Impact Statement**

The Department of Financial Services does not believe that this rule will have any adverse impact on jobs or employment opportunities, including self-employment opportunities. This rule provides insureds with open or denied claims for loss or damage to personal and real property, except damage to automobiles, arising in New York, Bronx, Kings, Richmond, Queens, Nassau, Suffolk, Westchester, Rockland, and Orange counties between October 26, 2012 and November 15, 2012, with an option to participate in a mediation program to facilitate the negotiation of their claims with their insurers.

**EMERGENCY  
RULE MAKING**

**Unfair Claims Settlement Practices and Claim Cost Control Measures**

**I.D. No.** DFS-11-13-00018-E

**Filing No.** 231

**Filing Date:** 2013-02-26

**Effective Date:** 2013-02-26

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

**Action taken:** Amendment of Part 216 (Regulation 64) of Title 11 NYCRR.

**Statutory authority:** Financial Services Law, sections 202 and 302; and Insurance Law, sections 301, 2601 and 3404(e)

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

**Specific reasons underlying the finding of necessity:** Insurance Law § 2601 prohibits an insurer doing business in New York State from engaging in unfair claims settlement practices and sets forth a list of acts that, if committed without just cause and performed with such frequency as to indicate a general business practice, will constitute unfair claims settlement practices. Insurance Regulation 64 sets forth the standards insurers are expected to observe to settle claims properly.

On October 26, 2012, in anticipation of extensive power outages, loss of life and property, and ongoing harm to public health and safety expected to result from then-Hurricane Sandy, Governor Andrew M. Cuomo issued Executive Order 47, declaring a State of Disaster Emergency for all 62 counties within New York State. As anticipated, Storm Sandy struck New York State on October 29, 2012, causing extensive power outages, loss of life and property, and ongoing harm to public health and safety. Just a week later, a nor'easter hit the State, causing further damage. The counties of New York, Bronx, Kings, Richmond, Queens, Nassau, Suffolk, Westchester, Rockland, and Orange suffered the greatest damage from Storm Sandy and the nor'easter.

Insurers insuring property in affected areas have not always begun

investigating claims, including by deploying insurance adjusters to adjust the claims, in a prompt manner. As a result, homeowners and small business owners have not always been able to start to repair or replace their damaged property. In addition, even though several months have now passed since the storms, claimants still are filing claims, and many claims previously filed are still pending with insurers. It is of the utmost importance that homeowners and small business owners be able to start rebuilding their homes and businesses right away and, if there are legitimate reasons for any delay in making payments, the insurer should apprise the claimant on a regular basis of those reasons.

Given the nature and extent of the damage and the wintry weather, the existing regulation's time frames were and remain inadequate to protect the public and ensure its safety and welfare.

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

**Subject:** Unfair Claims Settlement Practices and Claim Cost Control Measures.

**Purpose:** To ensure timely claims investigation and resolution, permit certain immediate repairs when needed to protect health or safety.

**Text of emergency rule:** Section 216.5(a) is amended to read as follows:

(a)(1) Every insurer shall [establish procedures to] commence an investigation of any claim filed by a claimant, or by a claimant's authorized representative, within 15 business days of receiving notice of claim. An insurer shall furnish to every claimant, or claimant's authorized representative, a notification of all items, statements and forms, if any, which the insurer reasonably believes will be required of the claimant, within 15 business days of receiving notice of the claim. A claim filed with an agent of an insurer shall be deemed to have been filed with the insurer unless, consistent with law or contract, such agent notifies the person filing the claim that the agent is not authorized to receive notices of claim.

(2)(i) Notwithstanding paragraph one of this subdivision, the provisions of this paragraph shall apply to any claim filed on or after November 29, 2012 for loss, damage, or liability for loss, damage, or injury, occurring from October 26, 2012 through November 15, 2012, in the counties of Bronx, Kings, Nassau, New York, Orange, Queens, Richmond, Rockland, Suffolk or Westchester, including their adjacent waters, with respect to:

- (a) loss of or damage to real property;
- (b) loss of or damage to personal property; or
- (c) other liabilities for loss of, damage to, or injury to persons or property.

(ii) Every insurer shall commence an investigation of any claim filed by a claimant, or by a claimant's authorized representative, within six business days of receiving notice of claim. If the insurer wishes its investigation to include an inspection of the damaged or destroyed property, the inspection, whether performed by the insurer, an independent adjuster, or other representative of the insurer, must occur within the time frames specified in this paragraph.

(iii) An insurer shall furnish to every claimant, or claimant's authorized representative, a written notification detailing all items, statements and forms, if any, that the insurer reasonably believes will be required of the claimant, within six business days of receiving notice of the claim.

(iv) A claim filed with an agent of an insurer shall be deemed to have been filed with the insurer unless, consistent with law or contract, the agent notifies the person filing the claim that the agent is not authorized to receive notices of claim.

(v) Where necessary to protect health or safety, a claimant may commence immediate repairs to heating systems, hot water systems, and necessary electrical connections, as well as exterior windows, exterior doors, and, for minor permanent repairs, exterior walls, in order to enable property to retain heat, and any policy requirement that the policyholder exhibit the remains of the property may be satisfied by the policyholder submitting proof of loss documentation of the damaged or destroyed property, including photographs or video recordings; material samples, if applicable; and inventories, as well as receipts for any repairs to or replacement of property. This subparagraph does not apply to claims under flood policies issued under the national flood insurance program.

Section 216.6(c) is amended to read as follows:

(c)(1) Within 15 business days after receipt by the insurer of a properly executed proof of loss and receipt of all items, statements and forms which the insurer requested from the claimant, the claimant, or the claimant's authorized representative, shall be advised in writing of the acceptance or rejection of the claim by the insurer. When the insurer suspects that the claim involves arson, the foregoing 15 business days shall be read as 30 business days pursuant to section 2601 of the Insurance Law.

(2) If the insurer needs more time to determine whether the claim should be accepted or rejected, it shall so notify the claimant, or the

claimant's authorized representative, within 15 business days after receipt of such proof of loss, or requested information. Such notification shall include the reasons additional time is needed for investigation. If the claim remains unsettled, unless the matter is in litigation or arbitration, the insurer shall, 90 days from the date of the initial letter setting forth the need for further time to investigate, and every 90 days thereafter, send to the claimant, or the claimant's authorized representative, a letter setting forth the reasons additional time is needed for investigation. If the claim is accepted, in whole or in part, the claimant, or the claimant's authorized representative, shall be advised in writing of the amount offered. In any case where the claim is rejected, the insurer shall notify the claimant, or the claimant's authorized representative, in writing, of any applicable policy provision limiting the claimant's right to sue the insurer.

(3)(i) *Notwithstanding paragraph two of this subdivision, the provisions of this paragraph shall apply to any claim for loss, damage, or liability for loss, damage, or injury, occurring from October 26, 2012 through November 15, 2012 in the counties of Bronx, Kings, Nassau, New York, Orange, Queens, Richmond, Rockland, Suffolk or Westchester, including their adjacent waters, with respect to:*

- (a) *loss of or damage to real property;*
- (b) *loss of or damage to personal property; or*
- (c) *other liabilities for loss of, damage to, or injury to persons*

*or property.*

(ii) *If the insurer needs more time to determine whether the claim should be accepted or rejected, it shall so notify the claimant, or the claimant's authorized representative, in writing, within 15 business days after receipt of such proof of loss, or requested information. Such notification shall include the reasons additional time is needed for investigation and the anticipated date a determination on the claim will be provided. If the claim remains unsettled, unless the matter is in litigation or arbitration, the insurer shall, 30 days from the date of the initial letter setting forth the need for further time to investigate, and every 30 days thereafter, send to the claimant, or the claimant's authorized representative, a letter setting forth the reasons additional time is needed for investigation and the anticipated date a determination on the claim will be provided. If the claim is accepted, in whole or in part, the claimant, or the claimant's authorized representative, shall be advised in writing of the amount offered. If the insurer rejects a claim subject to clause (a) or (b) of subparagraph (i) of this paragraph, the insurer shall notify the claimant, or the claimant's authorized representative, in writing, of any applicable policy provision limiting the claimant's right to sue the insurer.*

(iii) *If an insurer has any claim subject to this paragraph under which the claimant, or the claimant's authorized representative, has not been advised in writing of the insurer's acceptance or rejection of the claim within the time frames specified in paragraph (1) of this subdivision, the insurer shall submit a report to the superintendent in a form acceptable to the superintendent. The insurer shall submit the report each week that the insurer has any such claims. The insurer shall submit the report on the Tuesday of the week, except if that day is a holiday, then the report shall be submitted on the next business day. For each such claim, the insurer shall specify:*

- (a) *the date the loss was alleged to have occurred;*
- (b) *the date the claim was filed with the insurer;*
- (c) *the date a properly executed proof of loss and receipt of all items, statements and forms required by the insurer were received by the insurer;*
- (d) *the alleged estimated amount of the loss;*
- (e) *the reason given for the extension;*
- (f) *the anticipated date a determination will be made on the claim provided to the claimant;*
- (g) *how many extensions have been requested on that claim;*

*and*

- (h) *the zip code where the loss occurred.*

**This notice is intended** to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires May 26, 2013.

**Text of rule and any required statements and analyses may be obtained from:** Joana Lucashuk, New York State Department of Financial Services, 25 Beaver Street, New York, NY 10004, (212) 480-2125, email: joana.lucashuk@dfs.ny.gov

#### **Regulatory Impact Statement**

1. Statutory authority: Sections 202 and 302 of the Financial Services Law and Sections 301, 2601, and 3404(e) of the Insurance Law. Financial Services Law § 202 grants the Superintendent of Financial Services ("Superintendent") the rights, powers, and duties in connection with financial services and protection in this state expressed or reasonably implied by the Financial Services Law or any other applicable law of this state. Insurance Law § 301 and Financial Services Law § 302 authorize the Superintendent to prescribe regulations interpreting the provisions of the Insurance Law and to effectuate any power granted to the Superintendent under the Insur-

ance Law. Insurance Law § 2601 prohibits an insurer doing business in New York State from engaging in unfair claims settlement practices; sets forth certain acts that, if committed without just cause and performed with such frequency as to indicate a general business practice, constitute unfair claims settlement practices; and imposes penalties if an insurer engages in these acts. Insurance Law § 3404(e) sets forth the form of the standard fire insurance policy (which may be substituted for another policy form provided that, with respect to the peril of fire, terms and provisions are no less favorable to the insured). This form requires an insured to protect the insured's property from further damage.

2. Legislative objectives: As noted in the Department's statement in support for the bill that added the predecessor section to Insurance Law § 2601, Section 40-d, to the Insurance Law in 1970 (Chapter 296 of the Laws of 1970), an insurance company's obligation to deal fairly with claimants and policyholders in the settlement of claims – indeed, its simple obligation to pay claims at all – was solely a matter of private contract law. That left the Department unable to aid consumers and relegated them solely to the courts. There was a wide variety in insurers' claims practices. Insurance Law § 2601 reflects the Legislature's concerns with the insurance claims practices of insurers. One particular concern noted by the Department in its memorandum was that insurers often failed to adequately communicate with insureds. In enacting the section, the Legislature authorized the Superintendent to monitor and regulate insurance claims practices in New York and to help ensure that insurers would not engage in unfair claims settlement practices.

3. Needs and benefits: On October 26, 2012, in anticipation of extensive power outages, loss of life and property, and ongoing harm to public health and safety expected to result from then-Hurricane Sandy, Governor Andrew M. Cuomo issued Executive Order 47, declaring a State of Disaster Emergency for all 62 counties within New York State. As anticipated, Storm Sandy struck New York State on October 29, 2012, causing extensive power outages, loss of life and property, and ongoing harm to public health and safety. In addition, a nor'easter struck New York just a week later, adding to the damage and dislocation. Many people still had not had basic services, such as electric power, restored before the second storm hit.

Insurers insuring property in areas that were hit the hardest by the storms, including Long Island and New York City, have not always investigated or resolved all claims, including by deploying insurance adjusters to adjust the claims, in a prompt manner. In addition, even though several months have now passed since the storms, claimants still are filing claims, and many claims previously filed are still pending with insurers. As a result, many homeowners and small business owners have not been able to start to repair or replace their damaged property. It is of the utmost importance that homeowners and small business owners be able to start to rebuild their homes and businesses right away, especially during this winter season.

Therefore, with respect to New York, Bronx, Kings, Richmond, Queens, Nassau, Suffolk, Westchester, Rockland, and Orange, the areas that suffered the greatest storm damage, this rule reduces the number of days within which an insurer must commence an investigation of a claim upon receiving notice of the claim and, if the insurer wishes its investigation to include an inspection of the damaged or destroyed property, requires that the inspection, whether performed by the insurer, an independent adjuster, or other representative of the insurer, occur within the prescribed time frames. In addition, the rule clarifies that, where necessary to protect health or safety, a claimant may commence immediate repairs to heating systems, hot water systems, and necessary electrical connections, as well as to exterior windows, exterior doors, and, for minor permanent repairs, exterior walls, in order to enable property to retain heat. The rule also clarifies that a policyholder may satisfy any policy requirement that the policyholder exhibit the remains of the property by submitting proof of loss documentation of the damaged or destroyed property, including photographs or video recordings; material samples, if applicable; and inventories, as well as receipts for any repairs to or replacement of property. The clarification regarding repairs does not apply to claims made under flood policies issued pursuant to the national flood insurance program.

Furthermore, the rule addresses concerns where claims remain open for an extended period of time. Under existing Insurance Regulation 64, if a claim remains unsettled, an insurer must, every 90 days, send to the claimant, or the claimant's representative, a letter setting forth the reasons additional time is needed for investigation. This rule requires an insurer to send a claimant a letter every 30 days, rather than 90 days, with regard to any claim for loss, damage, or liability for loss, damage, or injury, occurring from October 26, 2012 through November 15, 2012 in certain counties, thereby providing the claimant with more timely updates. The update shall also indicate the anticipated date that a determination will be provided. If a first-party claim for property damage is rejected, the insurer shall notify the claimant of any applicable policy provision limiting the

claimant's right to sue the insurer. In addition, the rule requires the insurer to file weekly with the Superintendent a report whenever the insurer has not advised the claimant of the insurer's acceptance or rejection of the claim within 15 days of receipt of proof of loss (or 30 days where the insurer suspects arson.)

4. Costs: This rule does not impose compliance costs on state or local governments. The rule may increase costs for insurers, because they may need to hire additional staff to comply with the reduced time period within which they must commence an investigation. Moreover, insurers will have to provide more frequent updates to claimants and submit a weekly report to the Superintendent if they do not advise a claimant of acceptance or rejection of his or her claim in a timely manner. However, because of the magnitude of the storms and the extraordinary degree of damage, it is hard to quantify the cost impact. This rule should, though, speed up the claims process and thereby may reduce costs for homeowners and small business owners who will be able to repair or replace their damaged or destroyed property sooner.

5. Local government mandates: This rule does not impose any program, service, duty, or responsibility upon any county, city, town, village, school district, fire district, or other special district.

6. Paperwork: If a claim remains unsettled, this rule requires an insurer to send certain claimants in certain counties a letter every 30 days instead of every 90 days, as is currently the case. Further, the rule requires an insurer to submit a weekly report to the Superintendent whenever the insurer has not advised the claimant of the insurer's acceptance or rejection of the claimant's claim within 15 days of receipt of proof of loss (or 30 days where the insurer suspects arson). If a first-party claim for property damage is rejected, the insurer shall notify the claimant of any applicable policy provision limiting the claimant's right to sue the insurer.

7. Duplication: This rule does not duplicate any existing state or federal rule or other legal requirement.

8. Alternatives: The Department considered making this rule applicable to the entire state. However, since the concerns appeared to be localized, the applicability of the amendment is limited to those counties most impacted by the storms.

9. Federal standards: There are no minimum standards of the federal government for the same or similar subject areas. The rule is consistent with federal standards or requirements.

10. Compliance schedule: Insurers must comply with this rule upon the Superintendent's filing the rule with the Secretary of State.

#### **Regulatory Flexibility Analysis**

1. Small businesses: The Department of Financial Services ("Department") finds that this rule will not impose any adverse economic impact on small businesses and will not impose any reporting, recordkeeping, or other compliance requirements on small businesses. The basis for this finding is that this rule is directed at insurers authorized to do business in New York State, none of which fall within the definition of a "small business" as found in State Administrative Procedure Act § 102(8). The Department has monitored annual statements and reports on examination of authorized insurers subject to this rule, and believes that none of the insurers falls within the definition of "small business" because no insurer is both independently owned and has fewer than 100 employees.

2. Local governments: The rule does not impose any impact, including any adverse impact, or reporting, recordkeeping, or other compliance requirements on any local governments. The basis for this finding is that this rule is directed at authorized insurers, which are not local governments.

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

1. Types and estimated numbers of rural areas: "Rural areas", as used in the State Administrative Procedure Act ("SAPA") § 102(10), means the counties within the state having less than 200,000 population, and the municipalities, individuals, institutions, communities, programs and such other entities or resources as are found therein. In counties with a population of 200,000 or greater, "rural areas" means towns with population densities of 150 persons or less per square mile, and the villages, individuals, institutions, communities, programs, and such other entities or resources as are found therein. While insurers affected by this rule may be headquartered in rural areas, the rule itself applies only within the counties of New York, Bronx, Kings, Richmond, Queens, Nassau, Suffolk, Westchester, Rockland, and Orange. None of these counties are rural areas, and the Department does not believe that there are any towns within any of those counties that would be considered to be rural areas within the SAPA definition.

2. Reporting, recordkeeping and other compliance requirements, and professional services: The rule would not impose any additional reporting or recordkeeping requirements in rural areas. However, the rule would impose other compliance requirements on insurers that may be headquartered in rural areas by reducing the number of days within which an insurer must commence an investigation of a claim upon receiving notice of the claim and, if the insurer wishes its investigation to include an inspection

of the damaged or destroyed property, by requiring that the inspection, whether performed by the insurer, an independent adjuster, or other representative of the insurer, occur within the prescribed time frames. In addition, if a claim remains unsettled, this rule requires an insurer to send certain claimants in certain counties a letter every 30 days instead of every 90 days, as is currently the case. In addition, if a first-party claim for property damage is rejected, the insurer shall notify the claimant of any applicable policy provision limiting the claimant's right to sue the insurer. Further, the rule requires an insurer to submit a weekly report to the Superintendent whenever the insurer has not advised the claimant of the insurer's acceptance or rejection of the claimant's claim within 15 days of receipt of proof of loss (or 30 days where the insurer suspects arson).

It is unlikely that professional services would be needed in rural areas to comply with this rule.

3. Costs: The rule may result in additional costs to insurers headquartered in rural areas, because they may need to hire additional staff to comply with the reduced time period within which they must commence an investigation. Moreover, insurers will have to provide more frequent updates to claimants and submit a weekly report to the Superintendent if they do not advise a claimant of acceptance or rejection of his or her claim in a timely manner. As a result of the magnitude of the storms and the extraordinary degree of damage, it is hard to quantify the cost impact. However, this rule should speed up the claims process and thereby may reduce costs for homeowners and small business owners who will be able to repair or replace their damaged or destroyed property sooner.

4. Minimizing adverse impact: The Department of Financial Services considered the approaches suggested in SAPA § 202-bb(2) for minimizing adverse economic impacts. Since the public health, safety, or general welfare has been endangered, establishment of differing compliance or reporting requirements or timetables based upon whether a claimant is in a rural area is not appropriate. However, the rule applies only in the counties of New York, Bronx, Kings, Richmond, Queens, Nassau, Suffolk, Westchester, Rockland, and Orange, the areas that suffered the greatest storm damage, and thus the impact of the rule on rural areas is minimized, since none of those counties are rural areas.

5. Rural area participation: Due to the short timeframe to promulgate the amendment, participation with the industry was limited to discussion of the provisions of the amendment with industry trade groups. Public and private interests in rural areas will have a fuller opportunity to participate in the rule making process once the rule is published in the State Register and posted on the Department's website.

#### **Job Impact Statement**

The Department of Financial Services ("Department") finds that this rule will not have any substantial adverse impact on jobs and employment opportunities. This rule reduces the number of days within which an insurer must commence an investigation of a claim upon receiving notice of the claim, and, where necessary to protect health or safety, permits a claimant to commence immediate repairs to certain of the claimant's property without awaiting an inspection. The rule also reduces from every 90 days to every 30 days the time within which an insurer must send to a claimant or the claimant's authorized representative the reasons additional time is needed for investigation, if the claim remains unsettled, and requires an insurer to file a weekly report with the Superintendent if the insurer has not notified the claimant of the insurer's acceptance or rejection of the claimant's claim within 15 days of receipt of proof of loss (or 30 days where the insurer suspects arson).

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

### **EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED**

#### **Unauthorized Providers of Health Services**

**I.D. No.** DFS-11-13-00008-EP

**Filing No.** 193

**Filing Date:** 2013-02-25

**Effective Date:** 2013-02-25

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

**Proposed Action:** Addition of Subpart 65-5 to Title 11 NYCRR.

**Statutory authority:** Financial Services Law, section 202 and arts. 3 and 4; and Insurance Law, sections 301, 5109 and 5221 and arts. 4 and 51

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

**Specific reasons underlying the finding of necessity:** This regulation concerns the de-authorization of certain providers of health services. Insurance Law § 5109(a) requires the Superintendent, in consultation with the Commissioner of Health and the Commissioner of Education, to promulgate standards and procedures for investigating and suspending or removing the authorization for providers of health services to demand or request payment for health services under Article 51 of the Insurance Law upon findings of certain unlawful conduct reached after investigation, notice, and a hearing pursuant to Insurance Law § 5109.

For years, certain owners and operators of professional service corporations and other types of corporations have abused the no-fault insurance system. These persons are involved in activities that include intentionally staging accidents and billing no-fault insurers for health services that were unnecessary or never in fact rendered. Indeed, recent federal indictments have demonstrated that organized crime has infiltrated and permeated the no-fault provider network. Such wide-scale criminal activity is estimated to have defrauded insurers of at least hundreds of millions of dollars, if not more. Insurers ultimately pass on these costs to New York consumers in the form of higher automobile premiums, and schemes such as the fraudulent staging of auto accidents endangers the innocent public. Furthermore, it places in peril the quality of care received by innocent auto accident victims and the public's health, safety, and welfare.

It is of the utmost importance that the Superintendent, Commissioner of Health, and Commissioner of Education be able, as soon as possible, to prohibit health service providers who engage in such activities from demanding or requesting payment from no-fault insurers.

For the reasons stated above, emergency action is necessary for the public health, public safety, and general welfare.

**Subject:** Unauthorized Providers of Health Services.

**Purpose:** Establish standards and procedures for the investigation and suspension or removal of a health service provider's authorization.

**Text of emergency/proposed rule:** Section 65-5.0 Preamble.

(a) For years, certain owners and operators of professional service corporations or other similar business entities have abused the no-fault insurance system. These persons are involved in activities that include intentionally staging accidents and billing no-fault insurers for health services that were unnecessary or never in fact rendered. This fraud costs no-fault insurers tens if not hundreds of millions of dollars, which insurers ultimately pass on to New York consumers in the form of higher automobile insurance premiums. It also threatens the affordability of health care and the public's health, safety, and welfare.

(b) Insurance Law section 5109 requires the Superintendent of Financial Services, in consultation with the Commissioner of Health and the Commissioner of Education, to establish standards and procedures for the investigation and suspension or removal of a provider of health services' authorization to demand or request payment for health services provided under Article 51 of the Insurance Law. This Subpart implements Insurance Law section 5109.

Section 65-5.1 Definitions.

As used in this Subpart, the following terms shall have the meaning ascribed to them:

(a) "Health services" or "medical services" means services, supplies, therapies, or other treatments as specified in Insurance Law section 5102(a)(1)(i), (ii), or (iv).

(b) "Insurer" shall have the meaning set forth in Insurance Law section 5102(g), and also shall include the motor vehicle accident indemnification corporation and any company or corporation providing coverage for basic economic loss, as defined in Insurance Law section 5102(a), pursuant to Insurance Law section 5103(g).

(c) "Noticing commissioner" means the Commissioner of Health or the Commissioner of Education, whomever sends a notice of hearing under this Subpart.

(d) "Provider of health services" or "provider" means a person or entity who or that renders health services.

(e) "Superintendent" means the Superintendent of Financial Services.

Section 65-5.2 Investigations.

(a) The superintendent may investigate any reports made pursuant to Insurance Law section 405, allegations, or other information in the superintendent's possession, regarding providers of health services engaging in any of the unlawful activities set forth in Insurance Law section 5109(b). After conducting an investigation, the superintendent will send to the Commissioner of Health and the Commissioner of Education a list of any providers who or that the superintendent believes may have engaged in any of the unlawful activities set forth in Insurance Law sec-

tion 5109(b), together with a description of the grounds for inclusion on the list. Within 45 days of receipt of the list, the Commissioner of Health and Commissioner of Education shall notify the superintendent in writing whether they confirm that the superintendent has a reasonable basis to proceed with notice and a hearing for determining whether any of the listed providers should be deauthorized from demanding or requesting any payment for medical services in connection with any claim under Article 51 of the Insurance Law.

(b) The Commissioner of Health and the Commissioner of Education also may investigate any reports, allegations, or other information in their possession, regarding providers engaging in any of the unlawful activities set forth in Insurance Law section 5109(b). If either commissioner conducts an investigation, then that commissioner, or the superintendent, if requested by the commissioner, shall be responsible for providing notice and an opportunity to be heard to the providers of health services that they are subject to deauthorization from demanding or requesting any payment for medical services in connection with any claim under Article 51 of the Insurance Law. Nothing in this section, however, shall preclude the superintendent, Commissioner of Health, or Commissioner of Education from conducting joint investigations and hearings, or the Commissioner of Health or Commissioner of Education from conducting professional misconduct proceedings against the providers of health services pursuant to the Public Health Law or Title VIII of the Education Law.

Section 65-5.3 Notice; how given.

(a)(1) The superintendent, Commissioner of Health, or Commissioner of Education shall give notice of any hearing to a provider at least 30 days prior to the hearing, in writing, either by delivering it to the provider or by depositing the same in the United States mail, postage prepaid, registered or certified, and addressed to the last known place of business of the provider or if no such address is known, then to the residence address of the provider.

(2) The notice shall refer to the applicable provisions of the law under which action is proposed to be taken and the grounds therefor, but failure to make such reference shall not render the notice ineffective if the provider to whom it is addressed is thereby or otherwise reasonably apprised of such grounds.

(3) It shall be sufficient for the superintendent or noticing commissioner to give to the provider:

(i) notice of the time and the place at which an opportunity for hearing will be afforded; and

(ii) if the person appears at the time and place specified in the notice or any adjourned date, a hearing.

(b) At least ten days prior to the hearing date fixed in the notice, the provider may file an answer to any charges with the superintendent or noticing commissioner.

(c) Any hearing of which such notice is given may be adjourned from time to time without other notice than the announcement thereof at such hearing.

(d) The statement of any regular salaried employee of the Department of Financial Services, Department of Health, or Department of Education, subscribed and affirmed by such employee as true under the penalties of perjury, stating facts that show that any notice referred to in this section has been delivered or mailed as hereinbefore provided, shall be presumptive evidence that such notice has been duly delivered or mailed, as the case may be.

Section 65-5.4 Hearings.

(a) Unless otherwise provided, any hearing may be held before the superintendent, Commissioner of Health or Commissioner of Education, any deputy, or any designated salaried employee of the Department of Financial Services, Department of Health, or Department of Education who is authorized by the superintendent or noticing commissioner for such purpose. The hearing shall be noticed, conducted, and administered in compliance with the State Administrative Procedure Act.

(b) The person conducting the hearing shall have the power to administer oaths, examine and cross-examine witnesses, and receive documentary evidence, and shall report his or her findings, in writing, to the superintendent or noticing commissioner with a recommendation. The report, if adopted by the superintendent or noticing commissioner, may be the basis of any determination made by the superintendent or noticing commissioner.

(c) Every such hearing shall be open to the public unless the superintendent or noticing commissioner, or the person authorized by the superintendent or noticing commissioner to conduct such hearing, shall determine that a private hearing would be in the public interest, in which case the hearing shall be private.

(d) Every provider affected shall be permitted to: be present during the giving of all the testimony; be represented by counsel; have a reasonable opportunity to inspect all adverse documentary proof; examine and cross-examine witnesses; and present proof in support of the provider's interest. A stenographic record of the hearing shall be made, and the witnesses shall testify under oath.

(e) Nothing herein contained shall require the observance at any such hearing of formal rules of pleading or evidence.

Section 65-5.5 Report of hearing and findings.

(a) Pending a final determination by the superintendent, Commissioner of Health, or Commissioner of Education, if the superintendent or noticing commissioner believes that the provider has engaged in any activity set forth in Insurance Law section 5109(b), then the superintendent or noticing commissioner may temporarily prohibit the provider from demanding or requesting any payment for medical services under Article 51 of the Insurance Law for up to 90 days from the date of the notice of such temporary prohibition pursuant to Insurance Law section 5109(e).

(b) The hearing officer shall issue to the superintendent or noticing commissioner the report described in Section 65-5.4(b) of this Subpart, with a recommendation. The superintendent or noticing commissioner may adopt, modify, remand, or reject the hearing officer's report and recommendation.

(c) Upon consideration of the hearing officer's report and recommendation, the superintendent or noticing commissioner may issue a final order prohibiting the provider from demanding or requesting any payment for medical services in connection with any claim under Article 51 of the Insurance Law and requiring the provider to refrain from subsequently treating, for remuneration, as a private patient, any person seeking medical treatment under Article 51.

**This notice is intended:** to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire May 25, 2013.

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

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

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

#### Regulatory Impact Statement

1. Statutory authority: Section 202 and Articles 3 and 4 of the Financial Services Law, and Sections 301, 5109, and 5221 and Articles 4 and 51 of the Insurance Law. Insurance Law § 301 and Financial Services Law § 202 and 302 authorize the Superintendent of Financial Services (the "Superintendent") to prescribe regulations interpreting the provisions of the Insurance Law and to effectuate any power granted to the Superintendent under the Insurance Law. Article 3 of the Financial Services Law sets forth administrative and procedural provisions, while Article 4 of the Financial Services Law confers certain powers and duties on the Superintendent with regard to financial frauds prevention. Insurance Law § 5109 requires the Superintendent to promulgate standards and procedures for investigating and suspending or removing, after notice and a hearing, the authorization of health service providers to bill no-fault insurance if they engage in certain unlawful conduct. Insurance Law § 5221 specifies the duties and obligations of the Motor Vehicle Accident Indemnification Corporation ("MVAIC") with regard to the payment of no-fault benefits to qualified persons. In addition, Article 4 of the Insurance Law sets forth requirements for reporting and preventing fraud, while Article 51 of the Insurance Law governs the no-fault insurance system.

2. Legislative objectives: Insurance Law § 5109 requires the Superintendent, in consultation with the Commissioner of Health and the Commissioner of Education, to promulgate standards and procedures for investigating and suspending or removing the authorization for health service providers to demand or request payment for health services under Article 51 of the Insurance Law upon findings of certain unlawful conduct reached after investigation, notice, and a hearing pursuant to § 5109. Furthermore, Insurance Law § 301 and Financial Services Law §§ 202 and 302 authorize the Superintendent to prescribe regulations interpreting the provisions of the Insurance Law and to effectuate any power granted to the Superintendent under the Insurance Law.

3. Needs and benefits: For years, certain owners and operators of professional service corporations and other business entities have abused the no-fault insurance system. These persons are involved in activities that include intentionally staging accidents and billing no-fault insurers for health services that were unnecessary or never in fact rendered. Indeed, recent federal indictments have demonstrated that organized crime has infiltrated and permeated the no-fault provider network. Such wide-scale criminal activity is estimated to have defrauded insurers of at least hundreds of millions of dollars, if not more. Insurers ultimately pass on these costs to New York consumers in the form of higher automobile insurance premiums, and schemes such as the fraudulent staging of auto accidents endanger the innocent public. Furthermore, these activities place in peril the quality of care received by innocent auto accident victims and the public's health, safety, and welfare.

It is of the utmost importance that the Superintendent, Commissioner of

Health, and Commissioner of Education be able, as soon as possible, to prohibit health service providers who engage in such activities from demanding or requesting payment from no-fault insurers.

Therefore, after consultation with the Commissioner of Health and the Commissioner of Education, the Superintendent drafted this rule to promulgate standards and procedures for investigating and suspending or removing the authorization for health service providers to demand or request payment for health services under Article 51 of the Insurance Law upon findings of certain unlawful conduct reached after investigation, notice, and a hearing pursuant to § 5109.

4. Costs: This rule does not impose compliance costs on state or local governments. The rule should reduce costs for no-fault insurers, which may include local governments who self-fund their no-fault insurance benefits, because it will permit the Superintendent, Commissioner of Health, or Commissioner of Education to prohibit, after notice and a hearing, health service providers who engage in certain unlawful conduct from demanding or requesting payment from no-fault insurers. The rule also should reduce costs for New York consumers in the form of reduced automobile insurance premiums.

5. Local government mandates: This rule does not impose any requirement upon a city, town, village, school district, or fire district.

6. Paperwork: This rule does not impose any additional paperwork.

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

8. Alternatives: There were no significant alternatives to consider.

9. Federal standards: There are no minimum standards of the federal government for the same or similar subject areas. The rule is consistent with federal standards or requirements.

10. Compliance schedule: Insurance Law § 5109(a) requires notice to all health service providers of the provisions of § 5109 and this rule at least 90 days in advance of the effective date of the rule. This rule was initially promulgated on an emergency basis on March 9, 2012, to take effect 95 days after filing with the Secretary of State, i.e., June 12, 2012, and was repromulgated on an emergency basis on June 6, 2012, to take effect on June 12, 2012, and also repromulgated on August 31, 2012 and on November 28, 2012. The Department provided the required notice by, among other things, posting a copy of the rule on its website on March 9, 2012; emailing notice of Insurance Law § 5109 and the rule on March 14, 2012 to health service provider organizations, such as the Medical Society of the State of New York, New York State Chiropractic Association, and Acupuncture Society of New York; and publishing the rule in the State Register on March 29, 2012.

#### Regulatory Flexibility Analysis

1. Effect of the rule: The Department of Financial Services ("Department") finds that this rule will generally not impose reporting, recordkeeping or other requirements on small businesses or local governments. The basis for this finding is that this rule does not impose any substantive requirements on small businesses or local governments. In addition, this rule affects no-fault insurers authorized to do business in New York State and self-insurers, none of which fall within the definition of "small business" because none are both independently owned and have less than one hundred employees. Self-insurers are typically large enough to have the financial ability to self-insure losses and the Department does not have any information to indicate that any self-insurers are small businesses.

This rule also affects health service providers, some of whom may be considered small businesses. However, this rule does not impose any substantive requirements on health service providers.

Some local governments self-insure their no-fault benefits. The Department has not been able to determine the number of local governments that are self-insured. However, this rule does not impose any substantive requirements on local governments, and any impact on local governments would be positive and should reduce their costs.

2. Compliance requirements: This rule does not impose any additional paperwork.

3. Professional services: This rule does not require anyone to use professional services. However, if a health service provider is subject to a hearing, the provider may be represented by counsel.

4. Compliance costs: This rule does not impose compliance costs on small businesses or local governments, because it does not impose any substantive requirements. The rule should reduce costs for no-fault insurers, which may include local governments who self-fund their no-fault insurance benefits, because it will permit the Superintendent, Commissioner of Health, or Commissioner of Education to prohibit, after notice and a hearing, health service providers who engage in certain unlawful conduct from demanding or requesting payment from no-fault insurers.

5. Economic and technological feasibility: This rule does not impose any substantive requirements on small businesses or local governments, so there should not be any issues pertaining to economic and technological feasibility.

6. Minimizing adverse impact: This rule affects uniformly health ser-

vice providers and no-fault insurers in all parts of New York State and the rule is mandated by statute. The Department does not believe that it will have an adverse impact.

7. Small business and local government participation: The Department issued a press release regarding the rule on March 8, 2012; posted a copy of the rule on its website on March 9, 2012; emailed notice of Insurance Law § 5109 and the rule on March 14, 2012 to health service provider organizations, such as the Medical Society of the State of New York, New York State Chiropractic Association, and Acupuncture Society of New York; and published the rule in the State Register on March 29, 2012. In addition, interested parties will have the opportunity to comment once the proposal is published in the State Register.

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

1. Types and estimated number of rural areas: Health service providers, insurers, and self-insurers affected by this regulation do business in every county in this state, including rural areas as defined under Section 102(10) of the State Administrative Procedure Act. Some of the home offices of these health service providers, insurers, and self-insurers lie within rural areas. Some government entities that are self-insurers for no-fault benefits may be located in rural areas.

2. Reporting, recordkeeping and other compliance requirements: This rule does not impose any additional paperwork.

3. Costs: This rule does not impose compliance costs on state or local governments. The rule should reduce costs for no-fault insurers, which may include local governments who self-fund their no-fault insurance benefits, because it will permit the Superintendent, Commissioner of Health, or Commissioner of Education to prohibit, after notice and a hearing, health service providers who engage in certain unlawful conduct from demanding or requesting payment from no-fault insurers. The rule also should reduce costs for New York consumers in the form of reduced automobile insurance premiums.

4. Minimizing adverse impact: This rule affects uniformly health service providers and no-fault insurers in both rural and non rural areas of New York State and the rule is mandated by statute. The Department of Financial Services does not believe that it will have an adverse impact on rural areas.

5. Rural area participation: The Department issued a press release regarding the rule on March 8, 2012; posted a copy of the rule on its website on March 9, 2012; emailed notice of Insurance Law § 5109 and the rule on March 14, 2012 to health service provider organizations, such as the Medical Society of the State of New York, New York State Chiropractic Association, and Acupuncture Society of New York; and published the rule in the State Register on March 29, 2012. In addition, interested parties will have the opportunity to comment once the proposal is published in the State Register.

#### **Job Impact Statement**

This rule will not have any adverse impact on jobs and employment opportunities of persons engaging in lawful conduct in New York State, because the rule only allows the Superintendent of Financial Services, Commissioner of Health, or Commissioner of Education to investigate and suspend or remove the authorization for health service providers to demand or request payment for health services under Article 51 of the Insurance Law upon findings of certain unlawful conduct reached after investigation, notice, and a hearing pursuant to Insurance Law § 5109.

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## Department of Health

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

#### **Limits on Executive Compensation and Administrative Expenses in Agency Procurements**

**I.D. No.** HLT-22-12-00012-RP

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

**Proposed Action:** Addition of Part 1002 to Title 10 NYCRR.

**Statutory authority:** Social Services Law, section 363-a(2); Public Health Law, sections 201(1)(o), (p), 206(3) and (6); and Not-For-Profit Corporation Law, section 508

**Subject:** Limits on Executive Compensation and Administrative Expenses in Agency Procurements.

**Purpose:** Ensure state funds and state authorized payments are expended in the most efficient manner and appropriate use of funds.

**Substance of revised rule:** The revised rule would add a new Part 1002 to 10 NYCRR titled Limits on Administrative Expenses and Executive Compensation.

Section 1002.1 Contains definitions for purposes of this Part, including definitions for administrative expenses, covered operating expenses, covered executive, covered provider, executive compensation, program services, program services expenses, related organization, reporting period, State-authorized payments, and State funds.

Section 1002.2 Limits on Administrative Expenses. Contains limits on the use of State funds or State-authorized payments for administrative expenses.

The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria.

The restriction will apply to covered providers receiving State funds or State-authorized payments from county or local governments, rather than directly from a State agency, pursuant to specified criteria.

The revised regulation addresses how the restriction will apply in the event that a covered provider has multiple sources of State funds or State-authorized payments.

Section 1002.3 Limits on Executive Compensation. Contains restrictions on executive compensation provided to covered executives.

The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria.

The restriction will apply to covered providers receiving State funds or State-authorized payments from county or local governments, rather than directly from a State agency, pursuant to specified criteria.

The revised rule addresses the application of this limit if the covered provider has multiple sources of State funds or State-authorized payments.

Section 1002.4 Waivers. Processes are established for covered providers to seek waivers of the limit on administrative expenses and the limits on executive compensation.

Section 1002.5 Reporting by Covered Providers. Covered providers are required to report information on an annual basis for each covered reporting period.

Section 1002.6 Penalties. A process is established for the imposition of penalties in the event of non-compliance with the limit on administrative expenses or the limits on executive compensation.

A copy of the full text of the regulatory proposal is available on the Department of Health website ([www.health.ny.gov](http://www.health.ny.gov)).

**Revised rule making(s) were previously published in the State Register on** October 31, 2012.

**Revised rule compared with proposed rule:** Substantial revisions were made in sections 1002.1, 1002.2, 1002.3, 1002.4, 1002.5 and 1002.6.

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

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

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

#### **Revised Regulatory Impact Statement**

**Statutory Authority:**

The authority for the promulgation of these regulations is contained section 363-a(2) of the Social Services Law and in sections 201(1)(o), 201(1)(p), 206(3) and 206(6) of the Public Health Law.

Additional support for the rationale underlying these regulations is section 508 of the Not-for-Profit Corporation Law. (Income from corporate activities), which provides:

A corporation whose lawful activities involve among other things the charging of fees or prices for its services or products shall have the right to receive such income and, in so doing, may make an incidental profit. All such incidental profits shall be applied to the maintenance, expansion or operation of the lawful activities of the corporation, and in no case shall be divided or distributed in any manner whatsoever among the members, directors, or officers of the corporation.

**Legislative Objectives:**

This rule furthers the proper use of funds in furtherance of the Department's oversight of the various programs and procurements for which it pays, or authorizes payment.

**Needs and Benefits:**

The New York State Department of Health is proposing to adopt the following regulation because the State of New York directly or indirectly funds with taxpayer dollars a large number of tax exempt organizations and for-profit entities that provide critical services to New Yorkers in need and the goal is to ensure that taxpayers' dollars are used properly, efficiently, and effectively to improve the lives of New Yorkers. In certain instances, providers of services that receive State funds or State-authorized payments have used such funds to pay for excessive administrative costs or inflated compensation for their senior executives, rather than devoting a

greater proportion of such funds to providing direct care or services to their clients. Such abuses involving public funds harm both the people of New York who are paying for such services, and those persons who must depend upon such services to be available and well-funded. These regulations, which are required by Executive Order No. 38, will ensure that State funds or State-authorized payments paid by this agency to providers are not used to support excessive compensation or unnecessary administrative costs.

#### Costs:

The costs of implementing this rule to affected providers is anticipated to be minimal as most, if not all, of the information that must be reported by such providers is already gathered or reported for other purposes. The costs to the agency of such implementation is expected to be very limited as well, and efforts to ensure efficient centralization of certain aspects of such implementation are underway.

#### Paperwork/Reporting Requirements:

The proposed regulatory amendments will require limited additional information to be reported to the agency by providers receiving State funds or State-authorized payments. To the extent feasible, such reporting shall be made electronically to avoid unnecessary paperwork costs.

#### Local Government Mandates:

The proposed regulatory amendments do not anticipate any additional mandates.

#### Duplication:

This proposed rule does not duplicate, overlap, or conflict with any State or federal statute or rule. However, the proposed rule seeks to minimize the reporting requirements faced by providers by building upon those requirements in the federal internal revenue code that require certain tax-exempt organizations to report information concerning their executive compensation and administrative costs.

#### Alternatives:

Executive Order #38 requires the adoption of this proposed regulation.

#### Federal Standards:

These amendments do not conflict with federal standards.

#### Compliance Schedule:

This rule will become effective upon adoption; the implementation date establishing the limits on administrative expenses and executive compensation will be July 1, 2013.

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

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

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

A Notice of Revised Rule Making was published in the State Register on October 31, 2012.

A number of comments objected generally to the underlying concept of the regulations, stating that the proposed regulation is overly broad in its authority and burdensome in its requirements. The Department believes that the proposed limitations in the regulation further the legitimate goal of ensuring that public funds are properly expended and the use of such funds is properly monitored.

Clarification was requested concerning certain defined terms in the proposed regulation, in particular with respect to their intended scope. Comments were provided with regard to the definitions of the following terms: "administrative expenses," "covered provider," "covered executive," "executive compensation," "program services expenses," "related entity," "State-authorized payments" and "State funds." Various clarifications and modifications were made to the definitions of "administrative expense," "covered executive," "covered provider," "executive compensation," "program services," "reporting period," "state authorized payments," and "state funds." A definition was added for "covered reporting period." The regulatory definitions were not further revised because the Department believes the definitions are otherwise sufficiently clear, descriptive, and supportive of the underlying policy goals of the regulations.

Some commenters stated that the proposed definition of and limits on "administrative expenses" were burdensome and unnecessary, because they would interfere with existing contracts, because they were possibly duplicative of existing state and federal rules, or they will not enhance the protections already provided by restrictions from State reimbursement rates. Further clarification was requested as to what will constitute "administrative expenses" and "program expenses." The definitions of "administrative expenses" and "program expenses" were clarified, as noted above. The Department made various technical changes and clarifications to section 1002.2 to delay the effective date of the limits to the first day of the covered provider's reporting period after July 1, 2013, to require reporting of subcontractors and agents upon request, rather than in all cases, to emphasize that the definition and interpretation of the

regulations control over any definitions or interpretations in other regulations or agreements, and to clarify that the covered provider will not be held responsible for a subcontractor's or agent's failure to abide by the regulations. The Department made no further changes to the regulations because it believes they strike a proper balance between supporting the underlying policy of the regulation while minimizing the impact on affected entities and providing sufficient guidance.

There were a wide range of comments and suggestions on the definition of, and proposed limits on, "executive compensation." They covered such topics as: (a) general concerns about application of the definition, (b) exclusions, (c) limitations and application of the definition, and (d) suggestions about surveys and their use. A summary of the comments and suggestions follows:

(a) General concerns regarding the regulation include that it: is too broad since it regulates use of funding sources not emanating from the state; is unrealistic, problematic and intrusive to operations; will adversely affect candidate pools, incumbents, service delivery and the ability of providers to meet the challenges and changes in the health care system; is intrusive to the for-profit sector where executive compensation is a private matter; and is duplicative as executive compensation is already controlled at the State and federal levels through rate setting, IRS rules and reporting, and the Not-For-Profit Corporation Law. Other comments stated that the regulation would encroach on the State Attorney General's regulation and enforcement; is arbitrary in its establishment of the thresholds of \$500,000 and 30%; was exclusive of larger corporations; and inappropriately used a percentile standard that will gradually diminish compensation levels and lead to the existence of two levels of compensation.

(b) Other comments sought elimination of the 75th percentile threshold.

(c) Still other comments related to limitations and application of the definition of "executive compensation." They suggested that executive compensation rules should only be applied to non-state funds or to state and state-authorized funds. The applicability of the rules with regard to contributions of other non-covered entities should be clarified. Also, letters received argued that the period covered by the limits on executive compensation should begin later than proposed in the regulations.

(d) Commenters recommended several approaches to determining reasonable compensation, such as the use of recognized surveys or independent commissioned surveys or identification and recognition of specific compensation surveys to establish comparisons. It was suggested that surveys should allow for regional and geographic variations. Further, commenters suggested that the regulation also should address instances where a board or governing body does not exist.

Section 1002.3 was revised to delete related organizations from its coverage, to extend the effective date of restrictions to the first day of the covered provider's reporting period after July 1, 2013, to clarify that the covered provider will not be held responsible for a subcontractor's or agent's failure to abide by the regulations, to require reporting of subcontractors and agents upon request, rather than in all cases, to emphasize that the definition and interpretation of the regulations control over any definitions or interpretations in other regulations or agreements, to apply the limits to the covered provider's contracts or other agreements with covered executives from July 1, rather than April 1, 2012, and to make other technical amendments and corrections. No further revisions were made with regard to the "executive compensation" provisions. The Department believes that the scope of the term adequately addresses the issue and ensures that public spending on health care services is efficient and appropriate. The regulation was not further revised to limit the rule to non-state funds, to exclude for-profits from being covered by the regulations, or to alter the 75th percentile threshold because these revisions would compromise the goal of the regulation. Eliminating the "executive compensation" requirements would eviscerate one of the key objectives of the executive order: limiting the extent of such compensation paid by covered providers that rely to a significant degree upon public funds for their program and administrative services funding. The Department is proposing to adopt this regulation because the State of New York directly or indirectly funds with taxpayer dollars a large number of tax exempt organizations and for-profit entities that provide critical services to New Yorkers in need, and the goal is to ensure that taxpayer dollars are used properly, efficiently and effectively to improve the lives of New Yorkers. In certain instances, service providers that receive state funds or state-authorized payments have used such funds to pay for excessive administrative costs or inflated compensation for their senior executives, rather than devoting a greater proportion of such funds to providing direct care or services to their clients. Such abuses involving public funds harm both the people of New York who are paying for such services and those persons who must depend upon such services to be available and well-funded. These regulations provide a benchmark to ensure that state funds or state-authorized payments paid by this agency to providers are not used to support excessive compensation or unnecessary administrative costs.

Some comments stated that the proposed waiver process is overly

complex and lacking objective criteria. The Department made various technical corrections to section 1002.4, amended the section to provide for waivers associated with one or more positions, rather than simply one or more covered executives, to acknowledge that not all entities have a board of directors or other governing body, to clarify when waiver requests must be filed, and to clarify the applicability of the Freedom of Information Law. Having considered the comments, the Department has determined that further revision to the regulation is unnecessary.

Comments received also criticized the proposed reporting requirements suggesting that they require providing information related to “administrative expenses” and “program expenses” in a manner inconsistent with other current reporting obligations. The Department has considered those comments. The reporting provisions were revised to clarify when reports must be filed. The Department believes the reporting required is necessary and as narrowly focused as possible to achieve the goals of the regulation.

Other submissions asked when penalties for excess compensation would be assessed, what the type of penalties would be imposed, and about the level of severity. The Department has considered those comments and intends to follow the routine enforcement process.

The full Assessment of Comments is available on the Department website at [www.health.ny.gov](http://www.health.ny.gov).

## Division of Housing and Community Renewal

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

#### Limits on State-Funded Administrative Costs and Executive Compensation

I.D. No. HCR-22-12-00018-RP

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

**Proposed Action:** Addition of Part 2658 to Title 9 NYCRR.

**Statutory authority:** Executive Order No. 38, dated January 18, 2012, as continued by Executive Order No. 43, dated April 13, 2012; Public Housing Law, section 19; Not-For-Profit Corporation Law, section 508

**Subject:** Limits on State-funded administrative costs and executive compensation.

**Purpose:** To ensure that State funds are not used to support excessive compensation or unnecessary administrative costs.

**Substance of revised rule:** The revised rule would add a new Part 2658 to 9 NYCRR titled Limits on Administrative Expenses and Executive Compensation.

Section 2658.1: Provides the background and intent of the revised rule, which is to implement Executive Order No. 38, issued by Governor Andrew Cuomo on January 18, 2012.

Section 2658.2: Sets forth the statutory authority for the promulgation of the rule by the New York State Division of Housing and Community Renewal (hereinafter the “Office”).

Section 2658.3: Contains definitions for purposes of this Part, including definitions for administrative expenses, covered operating expenses, covered executive, covered provider, covered reporting period, executive compensation, Office, program services, program services expenses, related organization, reporting period, State-authorized payments, and State funds.

Section 2658.4: Limits on Administrative Expenses. Contains limits on the use of State funds or State-authorized payments for administrative expenses.

The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria.

The restriction will apply to covered providers receiving State funds or State-authorized payments from county or local governments, rather than directly from a State agency, pursuant to specified criteria.

The revised regulation addresses how the restriction will apply in the event that a covered provider has multiple sources of State funds or State-authorized payments.

Section 2658.5: Limits on Executive Compensation. Contains restrictions on executive compensation provided to covered executives.

The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria.

The restriction will apply to covered providers receiving State funds or State-authorized payments from county or local governments, rather than directly from a State agency, pursuant to specified criteria.

The revised rule addresses the application of this limit if the covered provider has multiple sources of State funds or State-authorized payments.

Section 2658.6: Waivers. Processes are established for covered providers to seek waivers of the limit on administrative expenses and the limits on executive compensation.

Section 2658.7: Reporting by Covered Providers. Covered providers are required to report information on an annual basis.

Section 2658.8: Penalties. A process is established for the imposition of penalties in the event of non-compliance with the limit on administrative expenses or the limits on executive compensation.

A copy of the full text of the regulatory proposal is available on [www.nyshcr.org](http://www.nyshcr.org).

**Revised rule making(s) were previously published in the State Register on** October 31, 2012.

**Revised rule compared with proposed rule:** Substantial revisions were made in sections 2658.3, 2658.4, 2658.5, 2658.6 and 2658.7.

**Text of revised proposed rule and any required statements and analyses may be obtained from:** Brian P. McCartney, Division of Housing and Community Renewal, 38-40 State Street, Albany, NY 12207, (518) 473-1007, email: [bmccartney@nyshcr.org](mailto:bmccartney@nyshcr.org)

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

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

#### Revised Regulatory Impact Statement

Statutory Authority: Executive Order No. 38, dated January 18, 2012, as continued by Executive Order No. 43, dated April 13, 2012; N.Y. Public Housing Law, section 19; N.Y. Not-For-Profit Corporation Law, section 508.

Legislative Objectives: To limit administrative expenses and executive compensation of providers of program services in order to meet the State’s ongoing obligation to ensure the proper use of taxpayer dollars and the most effective provision of such services to the public.

Needs and Benefits: The Division of Housing and Community Renewal is proposing to adopt the following regulation because the State of New York directly or indirectly funds with taxpayer dollars a large number of tax exempt organizations and for-profit entities that provide critical services to New Yorkers in need, and the goal is to ensure that taxpayers’ dollars are used properly, efficiently, and effectively to improve the lives of New Yorkers. In certain instances, providers of services that receive State funds or State-authorized payments have used such funds to pay for excessive administrative costs or inflated compensation for their senior executives, rather than devoting a greater proportion of such funds to providing direct care or services to their clients. Such abuses involving public funds harm both the people of New York who are paying for such services, and those persons who must depend upon such services to be available and well-funded. These regulations, which are required by Executive Orders No. 38 and 43, will ensure that State funds or State-authorized payments paid by this agency to providers are not used to support excessive compensation or unnecessary administrative costs.

Costs: The costs of implementing this rule to affected providers is anticipated to be minimal since most, if not all, of the information that must be reported by such providers is already gathered or reported for other purposes. The agency cost of such implementation is expected to be very limited as well, and efforts to ensure efficient centralization of certain aspects of such implementation are underway.

Local Government Mandates: The proposed regulation does not anticipate any additional mandates.

Paperwork/Reporting Requirements: The proposed regulation will require limited additional information to be reported to the agency by providers receiving State funds or State-authorized payments. To the extent feasible, such reporting shall be made electronically in order to avoid unnecessary paperwork costs.

Duplication: This proposed rule does not duplicate, overlap, or conflict with any State or federal statute or rule. However, the proposed rule seeks to minimize the reporting requirements faced by providers by building upon those requirements in the federal internal revenue code that require certain tax-exempt organizations to report information concerning their executive compensation and administrative costs.

Alternatives: Executive Orders No. 38 and No. 43 require the adoption of this proposed regulation.

Federal Standards: This proposed regulation does not conflict with federal standards.

Compliance Schedule: This rule will become effective upon adoption. The implementation date establishing the limits on administrative expenses and executive compensation will be July 1, 2013.

#### Revised Regulatory Flexibility Analysis

A Revised Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this notice because the

changes to the proposed rule will not impose any adverse economic impact on small businesses, nor will it impose new reporting, recordkeeping or other compliance requirements on small businesses or local governments.

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

A Revised Rural Area Flexibility Analysis is not being submitted with this notice because the changes to the proposed rule will not impose any adverse economic impact on rural areas.

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

A Revised Job Impact Statement is not being submitted with this notice because it is evident from the subject matter of the regulation that it will have no impact on jobs and employment opportunities.

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

A Notice of Revised Rule Making was published in the New York State Register on October 31, 2012. The Division of Housing and Community Renewal received several sets of comments during the public comment period associated with the revised rulemaking. The issues and concerns raised in these comments are set forth below. Issues and concerns have been grouped according to the part of the revised rule they address because they are related or for convenience in providing an efficient response. Because many commenters addressed concerns that applied to all of the participating State agencies that are implementing Executive Order No. 38, the responses to comments provided by each of those agencies are incorporated by reference into these responses. The Division of Housing and Community Renewal's response is provided for each issue.

A number of comments objected generally to the underlying concept of the regulations, stating that the proposed regulation is overly broad in its authority and burdensome in its requirements. The Division of Housing and Community Renewal believes that the proposed limitations in the regulation further the legitimate goal of ensuring that public funds are properly expended and the use of such funds is properly monitored.

Clarification was requested concerning certain defined terms in the proposed regulation, in particular with respect to their intended scope. In response, and taking into account suggestions submitted, changes were made to the definitions of the following terms: administrative expenses, covered executive, covered provider, covered reporting period, executive compensation, program services expenses, reporting period, State-authorized payments and State funds.

Some commenters stated that the proposed limits on administrative expenses were burdensome and unnecessary, because they would interfere with existing contracts, because they were possibly duplicative of existing state and federal rules, or they will not enhance the protections already provided by restrictions from State reimbursement rates. Clarification was requested as to what will constitute administrative and program expenses. The proposed regulation has been further revised to clarify which administrative expenses are not included.

The definition of covered provider has been amended to address the individual or entity that has received State funds or State-authorized payments during the covered reporting period and the year prior to the covered reporting period. The definition of "covered provider" requires a contract or other agreement to render program services.

The regulation was not revised to alter the 75th percentile threshold because these revisions would compromise the goal of the regulation. Eliminating the executive compensation requirements would remove one of the key objectives of Executive Order No. 38: limiting the extent of such compensation paid by covered providers that rely to a significant degree upon public funds for their program and administrative services funding. These regulations provide a benchmark to ensure that State funds or State-authorized payments paid by this agency to providers are not used to support excessive compensation or unnecessary administrative costs.

Public comments tended to focus on executive compensation, stating the 75th percentile will drive salaries down as the outliers and reduce salaries in order to comply with the regulation. Implying this will depress the maximum salary permitted under the regulation. In addition, the State agencies' authority to deny all waivers related to executive compensation calls into question the integrity and the reasonableness of the entire process of reviewing executive compensation. The goal of the proposed regulation is to ensure that taxpayer dollars are used to provide critical services to New Yorkers in need.

The effective dates of provisions in the proposed regulations have been revised to clarify: (a) covered reporting period; (b) submission of waiver applications regarding executive compensation; (c) submission of waiver applications regarding administrative expenses; and (d) reporting periods.

The full Assessment of Comments is available on the Division of Housing and Community Renewal's website at [www.nyshcr.org](http://www.nyshcr.org).

## Long Island Power Authority

### PROPOSED RULE MAKING HEARING(S) SCHEDULED

#### **LIPA's Tariff for Electric Service, Including Service Classification No. 16**

**I.D. No.** LPA-11-13-00019-P

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

**Proposed Action:** The Long Island Power Authority is considering a proposal to modify its Tariff for Electric Service to change the on-peak energy delivery charge for residential and small commercial service under Service Classification No. 16 and make other revisions.

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

**Subject:** LIPA's Tariff for Electric Service, including Service Classification No. 16.

**Purpose:** To change the on-peak energy delivery charge and make other miscellaneous revisions.

**Public hearing(s) will be held at:** 10:00 a.m., April 30, 2013 at H. Lee Dennison Bldg., 100 Veteran's Memorial Hwy., Hauppauge, NY; and 2:00 p.m., April 30, 2013 at Long Island Power Authority, 333 Earle Ovington Blvd., 4th Fl., Uniondale, NY.

**Interpreter Service:** Interpreter services will be made available to hearing impaired persons, at no charge, upon written request submitted within reasonable time prior to the scheduled public hearing. The written request must be addressed to the agency representative designated in the paragraph below.

**Accessibility:** All public hearings have been scheduled at places reasonably accessible to persons with a mobility impairment.

**Substance of proposed rule:** The Long Island Power Authority ("Authority") is considering a proposal to modify its Tariff for Electric Service ("Tariff") to change the on-peak energy delivery charge for residential and small commercial service to encourage participants to reduce consumption during peak hours under Service Classification No. 16 Advanced Metering Initiative ("AMI") Pilot Service. Staff also proposes to clarify that certain recovery rates within the Tariff are applicable to the AMI Pilot Service and to remove reference within the Tariff to Service Classification No. 2-VRTP. The Authority may approve, modify, or reject, in whole or part, the proposal.

**Text of proposed rule and any required statements and analyses may be obtained from:** Andrew McCabe, Long Island Power Authority, 333 Earle Ovington Blvd., Suite 403, Uniondale, NY 11553, (516) 222-7700, email: [amccabe@lipower.org](mailto:amccabe@lipower.org)

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

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

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

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

## Office of Mental Health

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

#### **Limits on Administrative Expenses and Executive Compensation**

**I.D. No.** OMH-22-12-00019-PP

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

**Proposed Action:** Addition of Part 513 to Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.09, 7.15(a) and (b),

31.04, 31.05(a), 41.03, 41.15, 41.18, 41.44 and 43.02; Executive Order No. 38; and Not for Profit Corporation Law, section 508

**Subject:** Limits on Administrative Expenses and Executive Compensation.

**Purpose:** To implement Executive Order No. 38 to limit administrative expenses and executive compensation of providers of services.

**Substance of revised rule:** The State of New York directly or indirectly funds with taxpayer dollars a large number of tax exempt organizations and for-profit entities that provide critical services to New Yorkers in need. The goal of this proposed rule is to ensure that taxpayers' dollars are used properly, efficiently, and effectively to improve the lives of New Yorkers. It is imperative that New York State and the New York State Office of Mental Health ensure that State funds and State-authorized funds are optimized for the purpose of providing services to those individuals who are in need of them. Utilizing State funds and State-authorized funds primarily for the provision of direct care and services helps to guarantee that such funds are providing the greatest benefit to persons in New York State who are in need of mental health services. These regulations, which are required by Executive Order No. 38, will ensure that State funds or State-authorized payments paid to providers of services by the New York State Office of Mental Health are used predominantly to provide direct care and services to persons in need of mental health services.

The New York State Office of Mental Health has twice previously proposed a new 14 NYCRR Part 513 titled Limits on Administrative Expenses and Executive Compensation. After receiving and reviewing public comment on the most recently proposed rule, the New York State Office of Mental Health is now issuing a revised rule titled Limits on Administrative Expenses and Executive Compensation as follows:

Section 513.1 provides the background and intent of the revised rule, which is to implement Executive Order No. 38, issued by Governor Andrew Cuomo on January 18, 2012.

Section 513.2 sets forth the statutory authority for the promulgation of the rule by the Office of Mental Health (hereinafter the "Office"), including a new reference to Section 508 of the Not-For-Profit Corporation Law.

Section 513.3 contains definitions for purposes of this Part, including revised definitions of administrative expenses, covered executive, covered provider, executive compensation, program services expenses, reporting period, State-authorized payments and State funds, and a new definition of covered reporting period.

Section 513.4 contains limits on the use of State funds or State-authorized payments for administrative expenses. The revised regulation provides that both the restriction and the reporting requirements in section 513.7 will apply to subcontractors and agents of covered providers which meet the specified criteria, but that a covered provider will not be held responsible for a subcontractor's or agent's failure to comply. The regulation also addresses the responsibility of the Office or its designee to obtain reporting and compliance from covered providers receiving State funds or State-authorized payments from county or local governments or entities contracting on their behalf, and how the restriction will apply in the event that a covered provider has multiple sources of State funds or State-authorized payments.

Section 513.5 contains limits on executive compensation provided to covered executives. The revised regulation provides that both the restriction and the reporting requirements in section 513.7 will apply to subcontractors and agents of covered providers which meet the specified criteria, but that a covered provider will not be held responsible for a subcontractor's or agent's failure to comply. The regulation also addresses the responsibility of the Office or its designee to obtain reporting and compliance from covered providers receiving State funds or State-authorized payments from county or local governments or entities contracting on their behalf, and how the restriction will apply in the event that a covered provider has multiple sources of State funds or State-authorized payments.

Section 513.6 sets forth the process and criteria for covered providers to seek waivers of the limit on administrative expenses and the limits on executive compensation. The revised regulation provides that applications for waiver must be filed no later than concurrent with the timely submission of the covered provider's E.O. 38 Disclosure Form pursuant to section 513.7 for the reporting period for which the waiver is requested.

Section 513.7 specifies the annual reporting requirements for covered providers, revising the submission date for the E.O. 38 Disclosure Form to no later than one hundred eighty (180) days following the reporting period, unless otherwise authorized.

Section 513.8 establishes the process for the imposition of penalties in the event of non-compliance with the limit on administrative expenses or the limits on executive compensation.

The complete text of the regulatory proposal is available at: [http://www.omh.ny.gov/omhweb/policy\\_and\\_regulations/](http://www.omh.ny.gov/omhweb/policy_and_regulations/).

**Revised rule making(s) were previously published in the State Register on October 31, 2012.**

**Revised rule compared with proposed rule:** Substantial revisions were made in Part 513.

**Text of revised proposed rule and any required statements and analyses may be obtained from:** Sue Watson, NYS Office of Mental Health, 44 Holland Avenue, Albany, NY 12229, (518) 474-1331, email: Sue.Watson@omh.ny.gov

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

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

#### **Revised Regulatory Impact Statement**

1. Statutory Authority: Sections 7.09 and 31.04 of the Mental Hygiene Law grant the Commissioner of the Office of Mental Health the power and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction, and to set standards of quality and adequacy of facilities, equipment, personnel, services, records and programs for the rendition of services for adults diagnosed with mental illness or children diagnosed with emotional disturbance, pursuant to an operating certificate.

Section 7.15(a) of the Mental Hygiene Law charges the Commissioner with the responsibility for promoting, establishing, developing, coordinating and conducting programs and services for the benefit of persons with mental illness within the funding available for such purposes.

Section 7.15(b) of the Mental Hygiene Law provides the Commissioner with the authority to cooperate and enter into agreements with other state, local and federal departments or agencies in fulfilling his or her responsibilities.

Section 31.05(a) of the Mental Hygiene Law establishes the criteria for the issuance of an operating certificate, including that the premises, equipment, personnel, records, and program are adequate and appropriate to provide services for persons with mental illness.

Section 41.03 of the Mental Hygiene Law provides that the meaning of operating costs shall be in accordance with and subject to the regulations of the Commissioner of Mental Health.

Sections 41.15 and 41.18 of the Mental Hygiene Law provide that the Commissioner of Mental Health has the authority to approve the net operating costs of programs incurred pursuant to an approved local services plan that are eligible for state aid.

Section 41.44 provides that the Commissioner may provide state aid to local governments and to voluntary agencies within amounts available therefor and subject to regulations established by him or her.

Section 43.02 of the Mental Hygiene Law provides that the Commissioner has the power to establish standards and methods for determining rates of payment made by government agencies pursuant to Title 11 of Article 5 of the Social Services Law for services, other than inpatient services, provided by facilities, including hospitals, licensed by the Office of Mental Health.

Section 43.02(b) of the Mental Hygiene Law requires operators of facilities licensed by the Office of Mental Health to furnish such financial, statistical and program information as the Commissioner may determine to be necessary.

Executive Order No. 38 directs the Commissioner of each Executive State Agency that provides State financial assistance or State-authorized payments to providers of services, including the Office of Mental Health, to promulgate regulations and take any other actions within the agency's authority, including amending agreements with such providers, to address the extent and nature of a provider's administrative costs and executive compensation that shall be eligible to be reimbursed with State financial assistance or State-authorized payments for operating expenses. Executive Order No. 43 extends the time for agencies to comply with Executive Order No. 38.

Section 508 of the Not-For-Profit Corporation Law provides that a corporation whose lawful activities involve among other things the charging of fees or prices for its services or products shall have the right to receive such income and, in so doing, may make an incidental profit but that all such incidental profits must be applied to the maintenance, expansion or operation of the lawful activities of the corporation, and in no case shall be divided or distributed in any manner whatsoever among the members, directors, or officers of the corporation.

2. Legislative Objectives: Article 7 of the Mental Hygiene Law provides that the Office of Mental Health and its Commissioner shall plan and work with local governments, voluntary agencies and all providers and consumers of mental health services in order to develop an effective, integrated, comprehensive system for the delivery of all services to persons with mental illness and to create financing procedures and mechanisms to support such a system of services to ensure that persons with mental illness in need of services received appropriate care and treatment.

This regulation serves to comply with Executive Order No. 38 and furthers the legislative policy of providing high quality mental health services to individuals with mental illness in a cost-effective manner.

3. Needs and Benefits: The Office of Mental Health is proposing to adopt the following regulation because the State of New York directly or

indirectly funds with taxpayer dollars a large number of tax exempt organizations and for-profit entities that provide critical services to New Yorkers in need. The goal of this regulation is to ensure that taxpayers' dollars are used properly, efficiently, and effectively to improve the lives of New Yorkers. In certain instances, providers of services that receive State funds or State-authorized payments have used such funds to pay for excessive administrative costs or inflated compensation for their senior executives, rather than devoting a greater proportion of such funds to providing direct care or services to their clients. Such abuses involving public funds harm both the people of New York who are paying for such services, and those persons who must depend upon such services to be available and well-funded. These regulations, which are required by Executive Order No. 38, will ensure that State funds or State-authorized payments paid by this agency to providers are not used to support excessive compensation or unnecessary administrative costs.

4. Costs:

(a) cost to State government: The costs to State government are expected to be very limited, and efforts to ensure efficient centralization of certain aspects of such implementation are underway.

(b) cost to local government: There are no costs anticipated to local government.

(c) cost to regulated parties: The costs to regulated parties are anticipated to be minimal as most, if not all, of the information that must be reported by such providers is already gathered or reported for other purposes.

5. Local Government Mandates: These regulatory amendments will not result in any additional imposition of duties or responsibilities upon county, city, town, village, school or fire districts.

6. Paperwork: The proposed regulatory amendments will require limited additional information to be reported to the agency by providers receiving State funds or State-authorized payments. To the extent feasible, such reporting shall be made electronically to avoid unnecessary paperwork costs.

7. Duplication: The proposed rule does not duplicate, overlap or conflict with any State or Federal statute or rule. However, the proposed rule seeks to minimize the reporting requirements faced by providers by building upon those requirements in the Federal Internal Revenue Code that require certain tax-exempt organizations to report information concerning their executive compensation and administrative costs.

8. Alternatives: No alternatives were considered. Executive Order No. 38 requires the adoption of this proposed regulation.

9. Federal Standards: The regulatory amendments do not conflict with Federal standards.

10. Compliance Schedule: The rule will become effective upon adoption. The implementation date establishing the limits on administrative expenses and executive compensation will be July 1, 2013.

**Revised Regulatory Flexibility Analysis**

A Revised Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this notice because the changes to the proposed rule will not impose any adverse economic impact on small businesses, nor will it impose new reporting, recordkeeping or other compliance requirements on small businesses or local governments.

**Revised Rural Area Flexibility Analysis**

A Revised Rural Area Flexibility Analysis is not being submitted with this notice because the changes to the proposed rule will not impose any adverse economic impact on rural areas.

**Revised Job Impact Statement**

A Revised Job Impact Statement is not being submitted with this notice because it is evident from the subject matter of the regulation that it will have no impact on jobs and employment opportunities.

**Assessment of Public Comment**

A Notice of Revised Rule Making was published in the State Register on October 31, 2012. The Office of Mental Health (OMH) received comments associated with the revised rule making during the public comment period. The issues and concerns raised in the comments are fully set forth in OMH's Assessment of Public Comments, which is available at OMH's website at [www.omh.ny.gov/omhweb/policy\\_and\\_regulations/](http://www.omh.ny.gov/omhweb/policy_and_regulations/), and have been grouped according to the part of the revised proposed rule they address. Because many commenters addressed concerns that applied to all of the agencies that proposed regulations to implement Executive Order 38 (the "Participating Agencies"), the responses to comments provided by each of those agencies are incorporated by reference into OMH's responses. OMH's response is provided for each issue or concern.

Commenters objected to the intended scope of the regulations, as well as to the applicability of the regulations to specific payment streams, such as State funds (as opposed to State-authorized payments) and payments through municipal or county contracts. OMH believes that the scope and applicability of the regulations is appropriate to address the targeted problems of excessive administrative costs and inflated compensation.

Clarification was requested concerning certain defined terms in the proposed regulation. In response, and taking into account suggestions submitted, changes were made to the definitions of the following terms: administrative expenses, covered executive, covered provider, executive compensation, program services expenses, reporting period, State-authorized payments and State funds. For purposes of determining whether an entity or individual is a covered provider, each quantitative threshold is now based on the covered reporting period and the year prior to the covered reporting period. A new definition was added for covered reporting period.

Some commenters stated that the proposed limits on administrative expenses were burdensome and unnecessary, could interfere with effective and efficient administration of covered providers, and could result in underinvestment in organizational growth. Commenters were concerned that the revised regulations create complicated new definitions and reporting requirements which could significantly increase administrative costs. Commenters requested that the State periodically re-evaluate the impact of the limitation on administrative expenses to guard against these and other adverse effects. With respect to executive compensation, commenters expressed concern that the \$199,000 salary cap and 75th percentile limitation will adversely affect providers' ability to recruit quality leadership and will eventually depress the maximum salary permitted under the regulations.

OMH believes that the limits in the regulations provide a necessary and appropriate benchmark to ensure that State funds or State-authorized payments paid by OMH to providers are not used to support excessive compensation or unnecessary administrative costs. The Participating Agencies and the Division of the Budget (DOB) plan to monitor and assess the impact of the regulations and make periodic adjustments as needed. In addition, the Participating Agencies will maintain online guidance to assist providers in complying with the new regulations.

Numerous comments concerned the availability and identification of acceptable compensation surveys on which providers could rely. The Participating Agencies are developing with DOB a list of acceptable compensation surveys.

The effective dates of provisions in the proposed regulations have been revised to clarify: (a) covered reporting period; (b) submission of waiver applications regarding executive compensation; (c) submission of waiver applications regarding administrative expenses; and (d) reporting periods.

The full Assessment of Comments is available on the OMH website at: [www.omh.ny.gov/omhweb/policy\\_and\\_regulations/](http://www.omh.ny.gov/omhweb/policy_and_regulations/).

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## Department of Motor Vehicles

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### NOTICE OF EMERGENCY ADOPTION AND REVISED RULE MAKING NO HEARING(S) SCHEDULED

**Drinking Driver Program**

**I.D. No.** MTV-41-12-00012-ERP

**Filing No.** 189

**Filing Date:** 2013-02-22

**Effective Date:** 2013-02-22

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

**Action Taken:** Amendment of sections 134.7, 134.10 and 134.11 of Title 15 NYCRR.

**Statutory authority:** Vehicle and Traffic Law, sections 215(a), 1196(5) and (7)(a)

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

**Specific reasons underlying the finding of necessity:** It is necessary to adopt this amendment on an emergency basis, to protect the health, safety and general welfare of the citizens of New York State, effective immediately upon filing with the Department of State.

This amendment is adopted as an emergency measure to protect the safety and general welfare of the motoring public. This regulation would provide that the completion of the Drinking Driver Program (DDP) would not serve to terminate any suspension or revocation or-

der if the individual has been convicted of any provision of Vehicle and Traffic Law (VTL) section 1192 or has found to have consumed alcohol under the age of 21 (known as the “Zero Tolerance Law”) in violation of VTL section 1192-a, unless the individual has only one alcohol violation on his or her driving record. Most individuals would have to serve the full period of suspension or revocation, and persons whose licenses are revoked and have three or more alcohol- or drug-related offenses on their records would apply to the Commissioner, pursuant to 15 NYCRR Part 134, for a new license. These individuals would be subject to a full review of their driving records to determine whether they pose a danger to the motoring public. In addition, persons would not be eligible for a conditional license if such persons have, within the preceding 25 years, three or more alcohol- or drug-related offenses on their record. By further screening motorists whose licenses have been revoked, the Department will be significantly enhancing highway safety in this State.

**Subject:** Drinking Driver Program.

**Purpose:** Restrict conditional license eligibility and require persons who complete Drinking Driver Program to serve the full period of suspension or revocation.

**Text of emergency/revised rule:** Paragraph (8) of subdivision (a) of section 134.7 is amended to read as follows:

(8) The person has been penalized under section 1193(1)(d)[(1)] of the Vehicle and Traffic Law for any violation of subdivision 2, 2-a, 3, 4, or 4-a of section 1192 of such law.

Subparagraph (i) of paragraph (11) of subdivision (a) of section 134.7 is amended to read as follows:

(i) The person has three or more alcohol- or drug-related driving convictions or incidents within the last [ten] *twenty-five* years. For the purposes of this paragraph, a conviction for a violation of section 1192 of the Vehicle and Traffic Law, and/or a finding of a violation of section 1192-a of such law and/or a finding of refusal to submit to a chemical test under section 1194 of such law arising out of the same incident shall only be counted as one conviction or incident. The date of the violation or incident resulting in a conviction or a finding as described herein shall be used to determine whether three or more convictions or incidents occurred within a [10] 25 year period.

Subdivision (b) of section 134.10 is amended to read as follows:

(b) Results of satisfactory completion of a rehabilitation program. Upon satisfactory completion of a program, any unexpired suspension or revocation which was issued as a result of the conviction for which the person was eligible for enrollment in the program may be terminated by the commissioner unless the termination is prohibited under section 1193 of the Vehicle and Traffic Law or this Subchapter, or if the termination is based upon enrollment in the program pursuant to the plea bargaining provisions of Vehicle and Traffic Law section 1192(10)(a)(ii) and 1192(10)(d), or if such person would not otherwise be eligible for enrollment in the program pursuant to section 1196(4) of such law, or if the person has two or more alcohol- or drug-related driving convictions or incidents within the 25 year look back period from the date of the violation which resulted in enrollment in the program. For the purposes of this subdivision, the 25 year look back period means the period commencing upon the date that is 25 years before the date of the violation that resulted in enrollment in the program and ending on and including the date of such violation.

Section 134.11 is amended to read as follows:

134.11 Issuance of unconditional driver’s license.

Satisfactory completion of a rehabilitation program or expiration of the term of suspension, whichever occurs first, will initiate the necessary action to provide for the termination of the suspension or revocation which was the basis for entry into the rehabilitation program, *provided however, no such suspension or revocation shall be terminated prior to the expiration of the term of suspension or revocation if the applicant for the unconditional license has two or more alcohol- or drug-related driving convictions or incidents within the preceding 25 years. For the purposes of this section, the preceding 25 years means the period commencing upon the date that is 25 years before the date of the violation that resulted in enrollment in the program and ending on and including the date of such violation.* Upon a determination of satisfactory completion of the rehabilitation program or the term of suspension, and unless otherwise determined by the commissioner, as provided for in subdivision (b) of section 134.10 of this Part, a notice of termination of the suspension or revocation and an unconditional license will be issued. However, no such license will be issued until all civil penalties due the department are paid or if there are any outstanding suspensions, revocations, or bars against such license until such suspensions, revocations, or bars are satisfactorily disposed of by the applicant. Any conditional license which is still valid will be terminated concurrently with the return of the unconditional driver’s license and must

be returned to the department. A conditional license shall not be renewed more than one year after the issuance of the conditional license if a revocation is issued for a chemical test refusal and the holder of the conditional license has not paid the civil penalty required by section 1194 of the Vehicle and Traffic Law.

**This notice is intended** to serve as both a notice of emergency adoption and a notice of revised rule making. The notice of proposed rule making was published in the *State Register* on October 10, 2012, I.D. No. MTV-41-12-00012-EP. The emergency rule will expire May 22, 2013.

**Emergency rule compared with proposed rule:** Substantial revisions were made in sections 134.10(b) and 134.11.

**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

**Data, views or arguments may be submitted to:** Ida L. Traschen, Department of Motor Vehicles, 6 Empire State Plaza, Rm. 522A, Albany, NY 12228, (518) 474-0871, email: ida.traschen@dmv.ny.gov

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

#### Revised Regulatory Impact Statement

1. Statutory authority: Vehicle and Traffic Law (VTL) section 215(a) provides that the Commissioner of Motor Vehicles may enact rules and regulations that regulate and control the exercise of the powers of the Department. VTL section 1196(5) authorizes the Commissioner, in his or her discretion, to determine that the completion of the Drinking Driver Program (DDP) shall not serve to terminate a suspension or revocation arising from an alcohol- or drug-related offense. VTL section 1196(7)(a) authorizes the Commissioner to establish criteria for the issuance of a conditional license.

2. Legislative objectives: Section 1196(5) of the VTL authorizes the Commissioner, in his or her discretion, to determine that the completion of the DDP shall not serve to terminate a suspension or revocation order arising from an alcohol- or drug-related offense.

In accordance with the objective of enhancing highway safety, this regulation, as amended, would provide that the completion of the DDP would not serve to terminate any period of suspension or revocation if the individual has, two or more times within the preceding 25 years, been convicted of violating any provision of VTL section 1192 or has been found to have consumed alcohol under the age of 21 (known as the “Zero Tolerance Law”) in violation of VTL section 1192-a. Such persons would have to serve the full period of suspension or revocation and, consistent with current procedure, would apply to the Commissioner, pursuant to 15 NYCRR Part 136, for a new license. Such persons would be subject to a full review of their driving record to determine whether their license should be restored.

VTL section 1196(7)(a) authorizes the Commissioner to issue a conditional license in his or her discretion. In accordance with the legislative objective of issuing a conditional license only to persons who do not pose a highway safety risk, this proposed rule narrows the pool of persons who are eligible for a conditional license.

3. Needs and benefits: The amendments to section 134.10(b) and section 134.11 would provide that the completion of the DDP would not serve to terminate any suspension or revocation order if the individual has, within the preceding 25 years, been convicted of any provision of VTL section 1192 or has been found to have violated the Zero Tolerance Law.

The current regulation provides that when a person completes the DDP, with certain exceptions, such completion serves to terminate the suspension or revocation arising out of the alcohol- or drug-related offense. These offenders can have their full licenses restored in as few as seven weeks, the duration of the DDP course. This is not a significant hardship to many individuals, particularly those who are eligible for a conditional license, which enables them to drive to work, to an accredited school, to medical to appointments, and to day care. (VTL section 1196(7)(a)). By requiring multiple offenders to serve the full period of suspension or revocation, the consequences of committing these serious offenses will be consistently applied.

This proposal will offer a second highway safety benefit: persons whose licenses are revoked and who have two or more alcohol- or drug-related offenses on their record will have to reapply to the Department of Motor Vehicles for a new license. They will be subject to a full record review pursuant to 15 NYCRR Part 136. Currently, in most cases, if a person completes the DDP, he or she does not apply for relicensure through the Department. In addition, upon completion of the record review, the Department will, when appropriate, impose the “A2 Problem Driver Restriction,” which restricts a driver’s privileges and requires such person to install an ignition interlock device in motor vehicles she or he owns or operates.

Approximately 25,000 drivers enroll in DDP each year, so this proposal

would have a significant beneficial impact on highway safety in New York State.

The amendment to section 134.7(a)(11) further promotes highway safety by strengthening the criteria for conditional license eligibility. Upon relicensing, drivers whose licenses were revoked for an alcohol- or drug-related conviction or incident are issued a conditional license for a period of time prior to having their full driving privileges restored. Currently, persons with three or more alcohol- or drug-related convictions or incidents within the last 10 years are ineligible for a conditional license. This proposal extends that period so that persons with three or more alcohol- or drug-related convictions or incidents within the last 25 years will not be eligible for even a conditional license.

The amendment to section 134.7(a)(8) ensures that persons who commit an alcohol- or drug-related offense in a commercial motor vehicle will not be eligible for a conditional license. This rule is consistent with current procedures, which prohibits the issuance of a conditional license if the offense was committed in a commercial motor vehicle.

In response to comments on the proposed rule, the Commissioner has made one change to sections of Part 134. The scope of the 25 year look back period has been revised in sections 134.10(b) and 134.11 to make clear that the violation that resulted in enrollment in the DDP is included in such period.

4. Costs: There are no costs associated with this proposal to the State or local governments. Applicants for relicensure, who have two or more alcohol- or drug-related incidents on their driving record, will be required to pay the \$100 application fee (VTL section 503(2)(h)).

5. Local government mandates: The proposal does not impose any mandates on local governments.

6. Paperwork: The proposal does not impose any additional paper requirements on the Department.

7. Duplication: This proposal does not duplicate, overlap or conflict with any relevant rule or legal requirement of the State and federal governments.

8. Alternatives: The Department assessed whether the proposed rule should apply to all drivers with multiple offenses. In the interest of highway safety, the Department concluded that all multiple offenders should be required to serve the full period of suspension or revocation. A no action alternative was not considered.

9. Federal standards: The proposal does not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule: Compliance is immediate.

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

A Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement are not attached because changes made to this rule do not necessitate revision to the previously published Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement.

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

Comment: Several commenters state that the regulations are unduly harsh and do not warrant an emergency rulemaking.

Response: Driving while intoxicated continues to be a serious highway safety concern that requires strong and immediate action. Every year, more than 300 people are killed and over 6,000 are injured on New York's highways as the direct result of alcohol-related crashes. In 2010, 29% of fatal crashes were alcohol-related. Most telling is the increase in the number of crashes involving individuals with three or more alcohol-related convictions. In 2010, 28% of the alcohol-related crashes that resulted in injuries involved a driver with three or more alcohol-related convictions. Approximately, 17,500 drivers who had three or more such convictions were involved in crashes resulting in death or injury.

The data is compelling that recidivist DWI offenders pose a significant risk to the motoring public. Immediate action was necessary to prevent additional deaths and injuries to innocent motorists. The Commissioner of Motor Vehicles, in a rational exercise of discretion, adopted emergency regulations that will deny relicensure to persistently dangerous offenders who pose the highest risk to the general population.

Comment: The New York State Defenders Association states that the regulation is not clear about how to calculate what constitutes convictions or incidents within 25 years preceding the date of the revocable offense, the look back period referenced in amendments to both Section 136.5 and Part 134.

Response: Section 136.5 and Part 134 have been revised to make clear that the 25 year look back period includes the offense that led to the license revocation that is the basis for the application for relicensing.

## **NOTICE OF EMERGENCY ADOPTION AND REVISED RULE MAKING NO HEARING(S) SCHEDULED**

### **Problem Driver Restriction and Relicensing After Permanent Revocation**

**I.D. No.** MTV-41-12-00013-ERP

**Filing No.** 190

**Filing Date:** 2013-02-22

**Effective Date:** 2013-02-22

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

**Action Taken:** Amendment of sections 136.4, 136.5 and 136.10 of Title 15 NYCRR.

**Statutory authority:** Vehicle and Traffic Law, sections 215(a), 501(2)(c), 510(6), 1193(2)(b)(12), (c)(2)(1) and 1194(2)(d)(1)

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

**Specific reasons underlying the finding of necessity:** It is necessary to adopt this amendment on an emergency basis, to protect the health, safety and general welfare of the citizens of New York State, effective immediately upon filing with the Department of State.

This amendment is adopted as an emergency measure to protect the motoring public from drivers who may pose a highway safety risk. The proposed rule would permit the Commissioner to assign the A2-Problem Driver restriction on the driver's license or permit of an applicant for relicensure who is deemed a problem driver by the Commissioner. The problem driver restriction will limit the driving activities of the motorist and, if appropriate, require such motorist to install an ignition interlock device in all motor vehicles owned or operated by the motorist. The regulation is vital to protect the public from recidivist drunk drivers who pose a real threat to highway safety. This regulation is necessary to protect the safety and welfare of the motoring public.

**Subject:** Problem Driver Restriction and Relicensing after Permanent Revocation.

**Purpose:** To establish strict criteria for relicensing after permanent revocation.

**Text of emergency/revised rule:** Paragraph (3) of subdivision (b) of section 136.1 is amended to read as follows:

(3) History of abuse of alcohol or drugs. A history of abuse of alcohol or drugs shall consist of a record of two or more incidents, within a [10] 25 year period, of operating a motor vehicle while under the influence of alcoholic beverages and/or drugs or of refusing to submit to a chemical test not arising out of the same incident, whether such incident was committed within or outside of this state.

Subdivision (b) of section 136.4 is amended and a new subdivision (b-1) is added to read as follows:

(b)(1) An [applicant] application for a driver's license [shall] may be denied if a review of the entire driving history provides evidence that the applicant constitutes a problem driver, as defined in section 136.1(b)(1) of this Part. If an application is denied pursuant to this paragraph, no application shall be considered for a minimum of one year from the date of denial. *In lieu of such denial, the applicant may be issued a license or permit with a problem driver restriction, as set forth in section 3.2(c)(4) of this Chapter and paragraph (2) of this subdivision.*

(2) *Upon the approval of an application for relicensing of a person who is deemed a problem driver under this subdivision, the Commissioner may impose a problem driver restriction on such person's license or permit, as set forth in section 3.2(c)(4) of this Title. As a component of this restriction, the Commissioner may require such person to install an ignition interlock device in any motor vehicle owned or operated by such person. The ignition interlock requirement will be noted on the attachment to the driver license or permit held by such person. Such attachment must be carried at all times with the driver license or permit.*

(3) *Revocation of license or permit with problem driver restriction. A license or permit that contains a problem driver restriction shall be revoked (i) upon the holder's conviction of a traffic violation or combination of violations, committed while such restriction is in effect, which the Commissioner deems serious in nature; or (ii) for the holder's failure to install and maintain an ignition interlock device in motor vehicles owned or operated by the holder, when required to do so under such restriction. The attachment, provided for in paragraph (2) of this subdivision, shall*

set forth the violation or violations that will result in such a revocation. A revocation for any of the above reasons shall be issued without a hearing based upon receipt of a certificate or certificates of conviction. The Commissioner may also revoke a license or permit with a problem driver restriction, without a hearing, upon receipt of a certificate of conviction that indicates that the applicant has driven in violation of the conditions of such restriction.

(4) *Employer vehicle.* A person required to operate a motor vehicle owned by such person's employer in the course and scope of his or her employment may operate that vehicle without installation of an ignition interlock device only in the course and scope of such employment and only if such person carries in the motor vehicle written documentation indicating the employer has knowledge of the restriction imposed and has granted permission for the person to operate the employer's vehicle without the device only for business purposes. Such documentation shall display the employer's letterhead and have an authorized signature of the employer. A motor vehicle owned by a business entity that is wholly or partly owned or controlled by a person subject to the problem driver restriction is not a motor vehicle owned by the employer for purposes of the exemption provided in this paragraph and shall be deemed to be owned by the person subject to the problem driver restriction.

(b-1) An application for a driver's license may be denied if the applicant has been convicted of a violation of section 125.10, 125.12, 125.13, 125.14, 125.15, 125.20, 125.22, 125.25, 125.26 or 125.27 of the Penal Law arising out of the operation of a motor vehicle, or if the applicant has been convicted of a violation of section 1192 of the Vehicle and Traffic Law where death or serious physical injury, as defined in section 10.00 of the Penal Law, has resulted from such offense.

Section 136.5 is amended to read as follows:

136.5 [Miscellaneous grounds for denial.] *Special rules for applicants with multiple alcohol- or drug-related driving convictions or incidents.*

(a) Notwithstanding any other provision of this Part, two convictions for driving while intoxicated, with personal injury involvement in each, regardless of the extent of such injury, shall result in a denial of an application.

(b) Notwithstanding any other provision of this Part, the Commissioner may deny an application where the revocation sought to be terminated was imposed as a result of a conviction for a violation of section 125.10, 125.12, 125.13, 125.14, 125.15, 125.20, 125.22, 125.25, 125.26 or 125.27 of the Penal Law arising out of the operation of a motor vehicle, or a conviction for a violation of section 1192 of the Vehicle and Traffic Law which resulted in a death or serious injury, as defined in section 10.00 of the Penal Law. The ground for such denial shall be set forth in writing and a copy shall be made available to the applicant.]

(a) For the purposes of this section:

(1) "Alcohol- or drug-related driving conviction or incident" means any of the following, not arising out of the same incident: (i) a conviction of a violation of section 1192 of the Vehicle and Traffic Law; (ii) a finding of a violation of section 1192-a of the Vehicle and Traffic Law; provided, however, that no such finding shall be considered after the expiration of the retention period contained in paragraph (k) of subdivision 1 of section 201 of the Vehicle and Traffic Law; (iii) a conviction of an offense under the Penal Law for which a violation of section 1192 of the Vehicle and Traffic Law is an essential element; or (iv) a finding of refusal to submit to a chemical test under section 1194 of the Vehicle and Traffic Law.

(2) "Serious driving offense" means (i) a fatal accident; (ii) a driving-related Penal Law conviction; (iii) conviction of two or more violations for which five or more points are assessed on a violator's driving record pursuant to Section 131.3 of this subchapter; or (iv) 20 or more points from any violations.

(3) "25 year look back period" means the period commencing upon the date that is 25 years before the date of the revocable offense and ending on and including the date of the revocable offense.

(4) "Revocable offense" means the violation, incident or accident that results in the revocation of the person's drivers license and which is the basis of the application for relicensing. Upon reviewing an application for relicensing, the Commissioner shall review the applicant's entire driving record and evaluate any offense committed between the date of the revocable offense and the date of application as if it had been committed immediately prior to the date of the revocable offense. For purposes of this section, "date of the revocable offense" means the date of the earliest revocable offense that resulted in a license revocation for which the revocation has not been terminated by the Commissioner's subsequent approval of an application for relicensing.

(b) Upon receipt of a person's application for relicensing, the Commissioner shall conduct a lifetime review of such person's driving record. If the record review shows that:

(1) the person has five or more alcohol- or drug-related driving convictions or incidents in any combination within his or her lifetime, then the Commissioner shall deny the application.

(2) the person has three or four alcohol- or drug-related driving convictions or incidents in any combination within the 25 year look back period and, in addition, has one or more serious driving offenses within the 25 year look back period, then the Commissioner shall deny the application.

(3)(i) the person has three or four alcohol- or drug-related driving convictions or incidents in any combination within the 25 year look back period but no serious driving offenses within the 25 year look back period and (ii) the person is currently revoked for an alcohol- or drug-related driving conviction or incident, then the Commissioner shall deny the application for at least five years, after which time the person may submit an application for relicensing. After such waiting period, the Commissioner may in his or her discretion approve such application, provided that upon such approval, the Commissioner shall impose the A2 restriction on such person's license for a period of five years and shall require the installation of an ignition interlock device in any motor vehicle owned or operated by such person for such five-year period. If such license with an A2 restriction is later revoked for a subsequent alcohol- or drug-related driving conviction or incident, such person shall thereafter be ineligible for any kind of license to operate a motor vehicle.

(4)(i) the person has three or four alcohol- or drug-related driving convictions or incidents in any combination within the 25 year look back period but no serious driving offenses within the 25 year look back period and (ii) the person is not currently revoked as the result of an alcohol- or drug-related driving conviction or incident, then the Commissioner shall deny the application for at least two years, after which time the person may submit an application for relicensing. After such waiting period, the Commissioner may in his or her discretion approve the application after the minimum statutory revocation period is served, provided that upon such approval, the Commissioner shall impose an A2 restriction, with no ignition interlock requirement, for a period of two years. If such license with an A2 restriction is later revoked for a subsequent alcohol- or drug-related driving conviction or incident, such person shall thereafter be ineligible for any kind of license to operate a motor vehicle.

(5) the person has two alcohol- or drug-related driving convictions or incidents in any combination within the 25 year look back period, then the Commissioner may in his or her discretion approve the application after the minimum statutory revocation period is served.

(6) the person has been twice convicted of a violation of subdivision three, four or four-a of section 1192 of the Vehicle and Traffic Law or of driving while intoxicated or of driving while ability is impaired by the use of a drug or of driving while ability is impaired by the combined influence of drugs or of alcohol and any drug or drugs where physical injury, as defined in section 10.00 of the Penal Law, has resulted from such offense in each instance, then the Commissioner shall deny the application.

(c) The grounds for any denial shall be set forth in writing and a copy shall be made available to the person making the application for relicensing.

(d) While it is the Commissioner's general policy to act on applications in accordance with this section, the Commissioner shall not be foreclosed from consideration of unusual, extenuating and compelling circumstances that may be presented for review and which may form a valid basis to deviate from the general policy, as set forth above, in the exercise of discretionary authority granted under sections 510 and 1193 of the Vehicle and Traffic Law. If an application is approved based upon the exercise of such discretionary authority, the reasons for approval shall be set forth in writing and recorded.

(e) If, after an application for relicensing is approved, the Commissioner receives information that indicates that such application should have been denied, the Commissioner shall rescind such approval and the license granted shall be revoked.

Section 136.10 is amended to read as follows:

136.10 Application for relicensing.

(a) Application by the holder of a post-revocation conditional license. Upon the termination of the period of probation set by the court, the holder of a post-revocation conditional license may apply to the Commissioner for restoration of a license or privilege to operate a motor vehicle. An application for licensure [shall] may be approved if the applicant demonstrates that he or she:

[(a)](1) has a valid post-revocation conditional license; and

[(b)](2) has demonstrated evidence of rehabilitation as required by this Part.

(b) Application after permanent revocation. The Commissioner may waive the permanent revocation of a driver's license, pursuant to Vehicle and Traffic Law section 1193(2)(b)(12)(b) and (e), only if the statutorily required waiting period of either five or eight years has expired since the imposition of the permanent revocation and, during such period, the applicant has not been found to have refused to submit to a chemical test pursuant to Vehicle and Traffic Law section 1194 and has not been convicted of any violation of section 1192 or section 511 of such law or a

violation of the Penal Law for which a violation of any subdivision of such section 1192 is an essential element. In addition, the waiver shall be granted only if:

(1) The applicant presents proof of successful completion of a rehabilitation program approved by the Commissioner within one year prior to the date of the application for the waiver; provided, however, if the applicant completed such program before such time, the applicant must present proof of completion of an alcohol and drug dependency assessment within one year of the date of application for the waiver; and

(2) The applicant submits to the Commissioner a certificate of relief from civil disabilities or a certificate of good conduct pursuant to Article 23 of the Correction Law; and

(3) The application is not denied pursuant to section 136.4 or section 136.5 of this Part; and

(4) There are no incidents of driving during the period prior to the application for the waiver, as indicated by accidents, convictions or pending tickets. The consideration of an application for a waiver when the applicant has a pending ticket shall be held in abeyance until such ticket is disposed of by the court or tribunal.

**This notice is intended** to serve as both a notice of emergency adoption and a notice of revised rule making. The notice of proposed rule making was published in the *State Register* on October 10, 2012, I.D. No. MTV-41-12-00013-EP. The emergency rule will expire May 22, 2013.

**Emergency rule compared with proposed rule:** Substantial revisions were made in sections 136.4(b-1), 136.5(b), (e) and 136.1(b)(3).

**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

**Data, views or arguments may be submitted to:** Ida L. Traschen, Department of Motor Vehicles, 6 Empire State Plaza, Rm. 522A, Albany, NY 12228, (518) 474-0871, email: ida.traschen@dmv.ny.gov

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

#### Revised Regulatory Impact Statement

1. Statutory authority: Vehicle and Traffic Law (VTL) section 215(a) provides that the Commissioner of Motor Vehicles may enact rules and regulations that regulate and control the exercise of the powers of the Department. VTL Section 501(2)(c) authorizes the Commissioner to provide for driver's license restrictions based upon the types of vehicles or other factors deemed appropriate by the Commissioner. Section 510(6) of such law provides that where revocation is mandatory no new license shall be issued except in the discretion of the Commissioner. VTL section 1193(2)(b)(12) authorizes the Commissioner to waive the permanent revocation of a driver's license, where such revocation arises out of multiple alcohol- or drug-related offenses, if the applicant for the waiver meets certain criteria. Section 1193(2)(c)(1) provides that where a license is revoked as the result of a mandatory revocation arising out of an alcohol- or drug-related offense, no new license shall be issued except in the discretion of the Commissioner. Section 1194(2)(d)(1) provides that where a license is revoked arising out of a chemical test refusal, no new license shall be issued except in the discretion of the Commissioner.

2. Legislative objectives: Chapter 732 of the Laws of 2006 added a new subparagraph twelve to paragraph (b) of subdivision two of section 1193 of the Vehicle and Traffic Law to provide for the permanent revocation of a driver's license or privilege if the driver is convicted and/or adjudicated of multiple alcohol- or drug-related offenses within a specific time period. The law provides that the Commissioner may waive the permanent revocation after a minimum of five years (or eight years, depending on the number of prior offenses) if the driver meets certain criteria. The statute establishes specific criteria for waiver eligibility, but also provides that the Commissioner may refuse to restore a license if, on a case by case basis, the Commissioner determines that the applicant poses a risk to public safety. The proposed rule accords with these legislative objectives by identifying highway safety factors that would justify the denial of a waiver and by granting the Commissioner of Motor Vehicles broad discretion to determine whether a motorist should be relicensed after revocation. As noted above, three sections of the Vehicle and Traffic Law provide that no person shall be re-issued a license except in the Commissioner's discretion.

In accordance with the objective of protecting the motoring public, this proposal strengthens the standards used to evaluate a motorist's lifetime record, with a particular focus on alcohol- or drug-related convictions and incidents and serious driving offenses. The proposal is consistent with the current "problem driver" review conducted under Part 136, but specifies in detail the scope of such review. In addition, if such review concludes that the applicant is a problem driver, this proposal would permit the Commissioner to assign the A2-Problem Driver restriction on the driver's license or permit. The problem driver restriction will limit the driving activities of the motorist and, if appropriate, require such motorist to install

an ignition interlock device in all motor vehicles owned or operated by the motorist. This restriction strikes a balance between protecting the public and allowing the motorist to engage in certain essential activities involving his or her employment, medical care, child care and educational opportunities.

3. Needs and benefits: The amendments to section 136.4 would create a new A2-Problem Driver restriction that would limit the driving privileges of certain persons who are approved for relicensure after revocation but who may present highway safety concerns.

A person whose driver's license is revoked must apply to the Department of Motor Vehicles for relicensure. Such person's driving record is subject to a review pursuant to Part 136 of the Commissioner's regulations. The Department reviews the applicant's entire driving history in order to assess his or her risk to the motoring public. Under current regulations, an application will be denied, for example, if a motorist has numerous alcohol- or drug-related offenses with insufficient rehabilitative effort or if the applicant has 25 or more negative units on the driving record. In addition, an application may be denied if the motorist is deemed a "problem driver" as defined in section 136.1(b)(1) of this Part: that is, the motorist's driving record indicates a "series of convictions, incidents and/or accidents or has a medical or mental condition, which in the judgment of the commissioner or his or her designated agent, upon review of the applicant's entire driving history, establishes that the person would be an unusual and immediate risk upon the highways."

Although a person may have convictions and incidents on his or her driving record, such person may raise safety concerns without meriting denial of the application. In such cases, it would be appropriate to relicense the applicant but restrict his or her driving privileges. The amendments to section 136.4 provide for a "problem driver" restriction that would restrict the person's privileges to those currently allowed for the holder of a restricted use license. This restriction allows the person to drive only for particular activities, such as driving to and from work, doctor's appointments, and classes at an accredited school or university. When appropriate, the Commissioner, as part of this restriction, would require the applicant to install an ignition interlock device in motor vehicles owned or operated by such person. The interlock device prevents a motorist from starting the vehicle if such motorist has consumed alcohol. The device is a useful tool in dealing with the recidivist drunk driver, as it prevents such driver from operating while intoxicated on the State's highways.

The proposed amendments to section 136.5 would, consistent with the current regulation regarding "problem drivers," establish specific rules for relicensure of applicants who have multiple alcohol- or drug-related convictions and incidents on their driving records. For example, the proposed rule provides that an application will be denied if the applicant has five or more such convictions or incidents on his or her entire record or if such person has three or four such convictions or incidents plus one or more serious driving offense within the 25 year period prior to the date of the revocable offense. If a person has three or four alcohol- or drug-related offenses within 25 years and no serious driving offense, such person's application shall be denied and the person may re-apply after five years. At such time the Commissioner may approve the application, impose the A2 Problem Driver restriction and require the installation of an ignition interlock device in all motor vehicles owned or operated by the applicant. These proposals will provide a critical step in protecting the motoring public from recidivist alcohol- and drug-related offenders.

The proposed amendments to section 136.10 are also necessary to inform motorists whose licenses have been permanently revoked, pursuant to Vehicle and Traffic Law section 1193(2)(b)(12), about the criteria to obtain a waiver of such permanent revocation. This regulation is also necessary to ensure that drivers who pose a risk to the motoring public do not have their licenses restored.

Chapter 732 of the Laws of 2006 provided for the permanent revocation of a driver's license or privilege if the driver is convicted and/or adjudicated of multiple alcohol- or drug-related offenses within a specified time period. The law provides that the Commissioner may waive the permanent revocation after five years (or after 8 years if the applicant for the waiver has more prior offenses) if the driver meets certain criteria.

The proposed rule, in part, tracks statutory language by requiring the applicant for the waiver to produce proof of rehabilitation and a certificate of relief from disabilities or certificate of good conduct. In addition, pursuant to the statute, the applicant must, during the period of revocation, have not been found to have refused a chemical test, or been convicted of aggravated unlicensed operation or certain alcohol- or drug-related offenses set forth in the Vehicle and Traffic Law and the Penal Law.

In terms of the discretionary review criteria, the Commissioner may deny an application for a waiver if the applicant is deemed a problem driver, as defined in section 136.4(b) or had any incidents of driving during the revocation period. As part of the review of the applicant's entire driving record, the Department shall also consider: the number of Penal Law or Vehicle and Traffic Law convictions that are misdemeanors or

felonies offenses involving the operation of a motor vehicle; fatal accidents; if the applicant accumulated 20 or more points within 25 years; or if the person had two five-point convictions within 25 years.

The Commissioner shall impose the A2-Problem Driver restriction for applicants approved for the waiver and for drivers whose licenses are restored but whom the Commissioner determines should have limited driving privileges. In cases where the license was revoked for an alcohol- or drug-related offense, the driver must install an ignition interlock device in motor vehicles that he or she owns or operates.

By denying an application for a waiver based upon these criteria and imposing the Problem Driver restriction, the Department would take a major step to ensure that high-risk drivers do not operate on our roads and highways, an important safety benefit for the general motoring public.

This regulation is both necessary and beneficial to the general motoring public because it will restrict the driving privileges of persons who may pose a significant highway safety threat.

In response to comments on the proposed rule, the Commissioner has made four non-substantive changes to the revised rule. First, section 136.5(a)(1) has been revised to make clear that a zero tolerance finding (VTL section 1192-a) will not be considered after the expiration of the retention period contained in VTL section 201(1)(k). Second, a new paragraph (e) has been added to section 136.5(a) in order to define the term "25 year look back period." Third, the 25 year look back period is now used as the measuring period in section 136.5(b) to evaluate whether the Commissioner shall approve or deny an application for relicensing. Fourth, a technical amendment is made to section 136.10(b) to clarify that the waiver of permanent revocation applies to revocations issued to Vehicle and Traffic Law section 1193(2)(b)(12)(b) and (e). The original amendment did not reference subparagraph (e).

The revised rule makes three substantive changes. First, the original language in section 136.5(b), which was deleted in the proposed rule, is reinstated in a new subdivision (b-1) of section 136.4. This provision authorizes the Commissioner to deny an application based upon a single conviction of certain Penal Law violations or if the applicant has been convicted of a violation of section 1192 of the Vehicle and Traffic Law where death or serious injury has resulted from such offense. Second, a new subdivision (e) is added to section 136.5 to provide that if after an application for relicensing is approved, the Commissioner receives information that indicates that such application should have been denied, the Commissioner shall rescind such approval and the license granted shall be revoked. Occasionally, the Commissioner is notified of a finding or conviction after an application is approved. If the notification had been made prior to such approval, the application would have been denied. This amendment authorizes the Commissioner to rescind approval upon such a notification and reinstate the license revocation. A similar provision already exists in relation to the issuance of conditional licenses in section 134.7(b). Finally, section 136.1(b)(3) is amended to provide that a "history of abuse of alcohol or drugs" shall be defined as two or more alcohol/drug related incidents within a 25 year period. Currently, if an applicant has two or more incidents within a 10 year period, such applicant must produce proof of rehabilitation. As a result of this amendment, applicants will have to produce proof of rehabilitation if their record indicates two or more alcohol/drug related incidents within 25 years of the date of application. An application is denied under section 136.4(a)(2) if there is insufficient proof of rehabilitative effort.

4. Costs: a. Cost to regulated parties and customers: Motorists with a history of driving while intoxicated who qualify for a license with the problem driver restriction will be required to install and maintain an ignition interlock device in vehicles that they own or operate. There are various models of available interlock devices. The average cost of installation and monthly maintenance is slightly over \$1,000 a year.

b. Costs to the agency and local governments: There is no cost to local governments. There will be minimal costs to the Department in developing the problem driver restriction. The Department must design and produce an attachment that will designate the limitations of the problem driver restriction and, when appropriate, indicate the ignition interlock requirement.

5. Local government mandates: There are no local government mandates.

6. Paperwork: The Department must design and produce an attachment that will designate the limitations of the problem driver restriction and, when appropriate, indicate the ignition interlock requirement.

7. Duplication: This proposal does not duplicate, overlap or conflict with any relevant rule or legal requirement of the State and federal governments.

8. Alternatives: The Department deliberated extensively about how to restrict the driving privileges of persons who are eligible for relicensure but who might continue to present highway safety concerns. Imposing a new problem driver restriction was deemed the most expeditious, effective and fair alternative. A no action alternative was not considered.

9. Federal standards: The proposal does not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule: The Department would begin compliance immediately.

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

A Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement is not attached because changes made to the rule do not necessitate to the previously published Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement.

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

NOTE: This is a brief summary. The full assessment is posted on the Department of Motor Vehicles website at [www.dmv.ny.gov](http://www.dmv.ny.gov).

Comment: Several commenters state that the regulations are unduly harsh and do not warrant an emergency rulemaking.

Response: Driving while intoxicated continues to be a serious highway safety concern that requires strong and immediate action. Every year, more than 300 people are killed and over 6,000 are injured on New York's highways as the direct result of alcohol-related crashes. Approximately, 17,500 drivers who had three or more such convictions were involved in crashes resulting in death or injury.

Comment: Several commenters question the constitutionality of the proposed rule, stating that the rule is being "applied retroactively." These commenters argue that persons charged with alcohol- and drug-related offenses entered guilty pleas and/or consented to plea bargain agreements based upon the regulatory scheme at the time of the plea.

Response: At the beginning of 2012, the Department began an extensive review of the processes and criteria used when making relicensing decisions, particularly as they apply to persons applying for relicensing after being revoked for an alcohol- or drugged-driving related offense. In the interest of ensuring that drivers with similar records would be treated uniformly, the Department did not make relicensing decisions (either to approve or deny) with respect to drivers whose records contained multiple alcohol-related violations of the Vehicle and Traffic Law, committed over an extended period of time.

The Department has no statutory or regulatory obligation to review applications immediately upon receipt.

Comment: Several commenters assert that the emergency regulations represent "an end run around the legislative process." The New York State Defender's Association ("NYSDA") maintains that the legislative process is more conducive to comment, debate, and revision than the regulatory process. NYSDA states that most members of the public do not read the State Register.

Response: The Department's adoption of these regulations is not a usurpation of the legislative process, but rather, the appropriate exercise of the Commissioner's discretion.

The Department believes that the regulatory process is conducive to public input.

Comment: An attorney in private practice suggests that attorneys would need instant access to their clients' entire driving record in order to properly advise them of appropriate action and the consequences of a plea. NYSDA states that the fee for a lifetime record is burdensome and raises questions about the retention period for certain convictions on the lifetime record and whether such retentions are in accordance with Vehicle and Traffic Law section 201.

Response: A motorist or an authorized representative may request his or her extended record through the Department's Freedom of Information Office. Contrary to NYSDA's comment, the cost of the "lifetime" record is \$10, not \$10 plus \$1 per page.

Comment: An attorney in private practice commented that a zero tolerance finding (Vehicle and Traffic Law section 1192-a) should not be included in the consideration of lifetime offenses because such offenses are expunged from a motorist's record after three years and because such a finding requires a lower standard of proof.

Response: Section 136.5(a)(1) of the emergency regulations has been revised to make clear that the Department's review of the applicant's record will only consider zero tolerance findings that fall within the statutory retention period.

Comment: Three ignition interlock device companies, LifeSafer.com, Consumer Safety Technology, Inc., and SmartStart Inc. predict that the amended regulations will not make the highways safer for the motoring public, because the extended revocation periods set forth in the regulations will result in a new class of unlicensed, uninsured drivers in New York State that will drive drunk, resulting in injuries and deaths on our public highways.

Response: The Department recognizes that a certain number of persons with revoked licenses will continue to drive, just as a certain number will circumvent the use of an ignition interlock device. However, this concern is outweighed by the strong deterrent presented by a lengthy revocation

period; the hardship on the motorist should serve to deter drunk and drugged driving. To help ensure that the multiple offender does not present a danger to the motoring public after license restoration, the proposed regulation requires the installation of the interlock device in all motor vehicles owned or operated by the motorist.

Finally, the Department lacks the statutory authority to require the installation of the interlock device in motor vehicles owned or operated by a person whose application has been denied. The Commissioner is authorized to promulgate regulations regarding restrictions on a valid driver's license.

Comment: The three ignition interlock device companies recommend an amendment to Part 134 to provide that a person who has two or more alcohol- or drug-related convictions within 25 years from the date of enrollment in the DDP may be issued conditional driving privileges with an A2 restriction and be required to install the ignition interlock device in one or more vehicles operated by such person during the revocation period.

Response: The Department does not believe the recommendation is warranted.

Comment: The three ignition interlock device companies recommend that monitoring be an essential element of the new regulatory scheme.

Response: The Department will require all persons subject to the A2 restriction with interlock to produce proof that the interlock device has been installed in vehicles they own and operate. Such persons must present a DMV form, signed by the interlock installer, at the DMV issuing office that certifies that the device has been installed in their motor vehicles.

Comment: The three ignition interlock device companies recommend that if the "revocation, upon which the reapplication is required, is not based upon an alcohol/drug related event," that the Commissioner have discretion to require the interlock device based upon a review of the entire driving record.

Response: The Department does not believe a non-alcohol related revocation warrants the imposition of the ignition interlock device.

Comment: The three ignition interlock device companies suggest there is an inconsistency between the amendments to Sections 3.2(c)(4) and Section 136.5(b)(3) and (4).

Response: There is no inconsistency among the regulatory amendments.

Comment: The three ignition interlock device companies recommend that if a person is denied an application for relicensure because he or she is deemed a problem driver, the Commissioner should have the authority to relicense such person with an A2 restriction with the interlock requirement.

Response: Section 136.4(b)(1) of the emergency regulations expressly grants the Commissioner such discretion.

Comment: The three ignition interlock device companies comment on the situation where the person's license, with an A2 restriction, is revoked because such person fails to install the interlock device or violates the terms of the restriction. They suggest that the Commissioner may, in addition to revoking the license, require the installation of the interlock device during the period of revocation.

Response: As noted above, the Department lacks the statutory authority to require the installation of the interlock device in motor vehicles owned or operated by a person whose application has been denied.

Comment: The Department received comments from two individuals about a particular applicant for relicensure after revocation.

Response: It would not be appropriate to comment on an individual's application for relicensing.

Comment: A mental health specialist states that the extended revocation periods set forth in the amendments to Part 136 would cause "terrible hardship."

Response: The Commissioner will consider any "unusual, compelling and extenuating circumstances."

Comment: Diageo, a company involved in the spirits, wine and beer industry, expressed support for the recently adopted regulations.

Response: The Department appreciates Diageo's support.

Comment: NYSDA states that the regulations impose a disproportionate impact on the poor.

Response: The Department has no authority to waive mandatory fees.

Comment: NYSDA asks the basis for the time periods set forth in the regulations, i.e., the two-year vs. five-year extended waiting period, the two-year vs. five-year A2 restriction and the 25 year look back.

Response: As noted above, the Department has documented that recidivist drunk drivers pose a serious threat to the motoring public. In selecting the length of time for the waiting periods, the A2 restriction, and the look back period, the Department considered shorter and longer time periods. Ultimately, the Department concluded that the time periods selected are reasonable based on the incidence of repeated offenses and the goal of protecting the motoring public.

Comment: NYSDA states that the regulation is not clear about how to calculate what constitutes convictions or incidents within 25 years preceding the date of the revocable offense, the look back period referenced in amendments to both Section 136.5 and Part 134.

Response: Section 136.5 and Part 134 have been revised to make clear that the 25 year look back period includes the offense that led to the license revocation that is the basis for the application for relicensing.

Comment: NYSDA requests clarification of certain terms used in Parts 132 and 136.

Response: Fatal accident: This refers to an accident that results in a fatality. Driving-related Penal Law offenses: These are Penal Law offenses where operation of a motor vehicle is essential to the offense but is not necessarily needed to be an essential element of the offense.

Calculation of points: In assessing whether two five-point violations or 20 or more points should be counted as serious driving offenses, the Department will not "reduce" points if a motorist has completed the Point Insurance Reduction Program. Completion of a PIRP course serves to reduce the number of points to determine whether someone is deemed a persistent violator (accumulates 11 or more points within 18 months) and, therefore, is subject to permissive administrative action by the Department.

High-point driving violation: The high-point driving violation is assessed for one violation of the law. Although such violations will generally involve New York State offenses, the Department has compacts with both Ontario and Quebec. As part of those compacts, the Department assigns points for certain violations committed by New York State licensees in those provinces, such as speeding, passing a stopped school bus, reckless operation, and proceeding through a red light or stop sign.

Comment: NYSDA asks if the Department will consider out of state alcohol-related offenses.

Response: Yes. The Department will consider out of state alcohol-related offenses.

Comment: NYSDA comments that the interlock device must be installed in any vehicle owned or operated by the applicant and requests a definition of "operated."

Response: In addition to a long line of case law that define "operated," the Department is using the same language used in Leandra's Law, in relation to the interlock requirement. That is, the device must be installed in all motor vehicles owned or operated by the individual.

Comment: NYSDA asks if the interlock device must be approved by the Department of Health and must be made by qualified manufacturers as defined in 9 NYCRR Part 358.

Response: The Department will refer applicants required to install the device to the DCJS website, where applicants will find devices approved for installation by DCJS. In other words, applicants will be required to install the same device that persons must install pursuant to Leandra's Law.

Comment: NYSDA states that the regulations, and not just the A2 restriction attachment, should define "serious violations" that would trigger the revocation of the license with the A2 restriction.

Response: The Department wishes to retain some flexibility about what constitutes a serious violation and, therefore, confined the notice of the specific violations to the attachment, which is easily revised.

Comment: NYSDA asks about the length of the revocation period imposed pursuant to Part 132.

Response: Pursuant to section 510(6)(g) of the Vehicle and Traffic Law, the license would be revoked for a minimum of 30 days, after which the person could reapply for relicensure pursuant to Part 136. Such person's application would be subject to the criteria set forth in Part 136.

## NOTICE OF ADOPTION

### Vision Testing

**I.D. No.** MTV-01-13-00015-A

**Filing No.** 187

**Filing Date:** 2013-02-20

**Effective Date:** 2013-03-13

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

**Action taken:** Amendment of section 5.4 of Title 15 NYCRR.

**Statutory authority:** Vehicle and Traffic Law, sections 215(a), 502(4), (6) and 508(4)

**Subject:** Vision testing.

**Purpose:** Provides for electronic validation of a vision test by certain providers.

**Text or summary was published** in the January 2, 2013 issue of the Register, I.D. No. MTV-01-13-00015-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 for People with Developmental Disabilities

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

#### Limits on Administrative Expenses and Executive Compensation

**I.D. No.** PDD-22-12-00020-RP

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

**Proposed Action:** Addition of Part 645 to Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 13.09(b) and 43.02; and Not-for-Profit Corporation Law, section 508

**Subject:** Limits on administrative expenses and executive compensation.

**Purpose:** To curb abuses in executive compensation and administrative expenses and ensure that taxpayer dollars are used to help persons in need.

**Substance of revised rule:** The proposed regulations add a new Part 645 to 14 NYCRR, titled Limits on Administrative Expenses and Executive Compensation.

Section 645.1 contains definitions for purposes of this Part, including definitions for administrative expenses, covered operating expenses, covered executive, covered provider, covered reporting period, executive compensation, program services, program services expenses, related organization, reporting period, State-authorized payments, and State funds.

Section 645.2. Limits on Administrative Expenses. Contains limits on the use of State funds or State-authorized payments for administrative expenses.

The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria.

The restriction will apply to covered providers receiving State funds or State-authorized payments from county or local governments, rather than directly from a State agency, pursuant to specified criteria.

The revised regulation addresses how the restriction will apply in the event that a covered provider has multiple sources of State funds or State-authorized payments.

Section 645.3. Limits on Executive Compensation. Contains restrictions on executive compensation provided to covered executives.

The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria.

The restriction will apply to covered providers receiving State funds or State-authorized payments from county or local governments, rather than directly from a State agency, pursuant to specified criteria.

The revised rule addresses the application of this limit if the covered provider has multiple sources of State funds or State-authorized payments.

Section 645.4. Waivers. Processes are established for covered providers to seek waivers of the limit on administrative expenses and the limits on executive compensation.

Section 645.5. Reporting. Covered providers are required to report information on an annual basis.

Section 645.6. Penalties. A process is established for the imposition of penalties in the event of non-compliance with the limit on administrative expenses or the limits on executive compensation.

A copy of the full text of the regulatory proposal is available on the OPWDD website at [www.opwdd.ny.gov](http://www.opwdd.ny.gov).

**Public hearing(s) will be held at:** 10:30 a.m., April 29, 2013 at Office for People with Developmental Disabilities, Counsel's Office Conference Rm., 44 Holland Ave., Albany, NY; and 10:30 a.m., May 1, 2013 at Office for People with Developmental Disabilities, Counsel's Office Conference Rm., 44 Holland Ave., Albany, NY.

**Interpreter Service:** Interpreter services will be made available to hearing impaired persons, at no charge, upon written request submitted within reasonable time prior to the scheduled public hearing. The written request must be addressed to the agency representative designated in the paragraph below.

**Accessibility:** All public hearings have been scheduled at places reasonably accessible to persons with a mobility impairment.

**Revised rule making(s) were previously published in the State Register** on October 31, 2012.

**Revised rule compared with proposed rule:** Substantial revisions were made in Part 645.

**Text of revised proposed rule and any required statements and analyses may be obtained from:** Barbara Brundage, Director, Regulatory Affairs Unit, Office for People With Developmental Disabilities, 44 Holland Ave., 3rd floor, Albany, NY 12229, (518) 474-1830, email: [barbara.brundage@opwdd.ny.gov](mailto:barbara.brundage@opwdd.ny.gov)

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

**Public comment will be received until:** May 6, 2013.

**Additional matter required by statute:** Pursuant to the requirements of the State Environmental Quality Review Act, OPWDD, as lead agency, has determined that the action described herein will have no effect on the environment, and an E.I.S. is not needed.

#### Revised Regulatory Impact Statement

##### 1. Statutory Authority:

a. OPWDD has the statutory authority to adopt rules and regulations necessary and proper to implement any matter under its jurisdiction as stated in the New York State Mental Hygiene Law Section 13.09(b).

b. OPWDD has the statutory authority to adopt rules and regulations relating to reports concerning costs of providing services, as stated in section 43.02(c) of the Mental Hygiene Law.

c. Section 508 of the Not-for-Profit Corporation Law limits the use of incidental profits to the maintenance, expansion or operation of the lawful activities of the corporation, and states that in no case shall (the incident profits) be divided or distributed in any manner whatsoever among the members, directors, or officers of the corporation.

##### 2. Legislative Objectives:

These proposed amendments further the legislative objectives embodied in sections 13.09(b) and 43.02 of the Mental Hygiene Law and Section 508 of the Not-for-Profit Corporation Law. The proposed amendments establish limits on administrative expenses and executive compensation.

##### 3. Needs and Benefits:

In January of 2012, Governor Cuomo issued Executive Order 38, which directed each Executive State agency that provides State financial assistance or State-authorized payments to providers of services to promulgate regulations to address the extent and nature of a provider's administrative expenses and executive compensation that are eligible to be reimbursed with State financial assistance or State-authorized payments for operating expenses.

State Government in New York directly or indirectly funds, or authorizes reimbursements with taxpayer dollars, to a large number of tax exempt organizations and for-profit entities that provide critical services to New Yorkers in need. State Government in New York also has an ongoing obligation to ensure that taxpayers' dollars are used properly, efficiently and effectively to improve the lives of New Yorkers and our communities.

In certain instances, providers of services that receive State funds or State-authorized payments have used such funds to pay for excessive administrative expenses and outsized compensation for their senior executives, rather than devoting a greater proportion of such funds to providing direct care or services to individuals. Such abuses involving public funds harm both the people of New York who are paying for such services, and those persons who must depend upon such services to be available and well-funded.

These regulations are being proposed to curb such abuses in executive compensation and administrative costs and ensure that taxpayer dollars are used first and foremost to help New Yorkers in need.

##### 4. Costs:

a. Costs to the Agency and to the State and its local governments: The amendments do not make any changes in the overall amount of State funds and State-authorized payments which are provided to private agencies. Therefore, no changes are expected in costs to OPWDD, New York State or local governments.

b. Costs to private regulated parties: There will be no overall changes in the level of State funds or State-authorized payments received by agencies. In certain instances providers of services that receive State funds or State-authorized payments which currently use such funds to pay for excessive administrative expenses and outsized compensation for their senior executives will be required to redirect the expenditure of funds to the programs that serve individuals with developmental disabilities.

##### 5. Local Government Mandates:

There are no new requirements imposed by the rule on any county, city, town, village; or school, fire, or other special district.

##### 6. Paperwork:

The proposed amendments require covered providers to submit a new form to OPWDD on an annual basis in order to submit data necessary for OPWDD to monitor compliance with the requirements and for New York State to assess the impact of the requirements on the use of public funds to support excessive executive compensation and administrative costs among providers. Providers that pay executives over \$199,000 will have to document that they meet the 75th percentile and governing body review criteria

set forth in regulation. Paperwork will also be needed in the event that the provider seeks a waiver for the limit on executive compensation or the limit on administrative costs.

7. Duplication:

The proposed amendments do not duplicate any existing State or Federal requirements that are applicable to services for persons with developmental disabilities.

8. Alternatives:

OPWDD was required to propose these regulations pursuant to Executive Order 38 and did not consider any alternatives.

9. Federal Standards:

The proposed amendments do not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance Schedule:

The rule will become effective upon adoption. The implementation date establishing the limits on administrative expenses and executive compensation will be July 1, 2013.

**Revised Regulatory Flexibility Analysis**

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this notice because the proposed rule will not impose any adverse economic impact on small businesses, nor will it impose new reporting, record keeping or other compliance requirements on small businesses or local governments.

**Revised Rural Area Flexibility Analysis**

A Rural Area Flexibility Analysis is not being submitted with this notice because the proposed rule will not impose any adverse economic impact on rural areas.

**Revised Job Impact Statement**

A Job Impact Statement is not being submitted with this notice because it is evident from the subject matter of the regulation that it will have no impact on jobs and employment opportunities.

**Assessment of Public Comment**

A Notice of Revised Rule Making was published in the New York State Register on October 31, 2012. OPWDD received several sets of comments during the public comment period associated with the revised rulemaking. A summary of the issues and concerns raised in these comments are set forth below.

Some comments supported the goals of the proposed regulations, and others objected to the underlying concept of the proposed regulations. Those objecting stated the regulations are overly broad, and should exclude certain State funds and payments through local governments. Comments also stated the regulations are incompatible with IRS rules and burdensome. Other comments wanted the regulation broadened to cover for-profit providers and State employees. OPWDD's response is that for-profit organizations are covered, and that the proposed limitations in the regulation further the legitimate goal of ensuring that public funds are properly expended and the use of such funds is properly monitored.

Clarification was requested concerning certain defined terms in the proposed regulation, in particular with respect to their intended scope. In response, and taking into account suggestions submitted, changes were made to the definitions of the following terms: administrative expenses, covered executive, covered provider, covered reporting period, executive compensation, program services expenses, reporting period, State-authorized payments and State funds.

The definition of covered provider has been amended to address the individual or entity that has received State funds or State-authorized payments during the covered reporting period and the year prior to the covered reporting period. The definition of "covered provider" requires a contract or other agreement to render program services.

Comments asked for a list identifying employees considered "program service employees" and lists of "State funds" and "State-authorized payments". OPWDD is not planning to create a list of program services employees, but will develop lists of government programs whose funds will be considered State-authorized payments or State funds.

Comments stated that the definition of "covered provider" should be based on total revenues, not in-State revenues, and that the provision regarding the 30% test should be revised to change "contributions by out-of-State individuals or entities" to "revenues from out-of-State individuals or entities". OPWDD believes that the regulations appropriately focus on New York State and that "contributions" in meant to include any monies paid by individuals or entities.

Comments asked whether "reportable on a covered executive's W-2 form" in the definition of "executive compensation" is applicable to non-salary benefits other than personal use of the organization's property. OPWDD's response is yes; "reportable on the covered executive's W-2 or 1099 form" applies to all the listed examples of non cash compensation.

Comments asked that the regulations allow providers to allocate property rental, mortgage and maintenance expenses between "program ser-

vices" and "administrative expenses" based on the actual use of the property. OPWDD's response is that, other than housing to members of the public receiving program services, for purposes of Executive Order No. 38, property rental, mortgage and maintenance expenses are not program services expenses or administrative expenses.

Comments asked that "State-authorized payments" and "State funds" exclude funds provided by the State Education Department (SED) or authorized by SED. These payments are excluded.

One comment asked for a clearer definition of covered executive than the IRS instructions accompanying Form 990, Part VII. In response, OPWDD points out that the Form 990 instructions will only be used to determine if someone is a director, trustee, officer or key employee.

Some comments stated that the proposed limits on administrative expenses were burdensome and unnecessary, because they would interfere with existing contracts, because they were possibly duplicative of existing state and federal rules, or they will not enhance the protections already provided through limitations incorporated into State reimbursement rates. Clarification was requested as to what will constitute administrative and program expenses. The proposed regulation has been further revised to clarify which administrative expenses are not included.

There was a comment that "or administrative" should be removed from the following language: "...if and to the extent that such a subcontractor or agent has received State funds or State-authorized payments from the covered provider to provide program or administrative services during the reporting period and would otherwise meet the definition of a covered provider but for the fact that it has received State funds or State-authorized payments from the covered provider rather than directly from a governmental agency." The comment stated that it is unclear whether a subcontractor or agent providing purely administrative services would be subject to the limitations. OPWDD does not believe that "or administrative" needs to be removed, because to be subject to the regulatory limitations, a subcontractor or agent would need to meet the definition of a "covered provider."

Comments stated that the limits on administrative expenses should require Generally Accepted Accounting Principles as the allocation methodology for differentiating between administrative expenses and program expenses. OPWDD disagrees. The regulation's distinction between administrative and program expenses are clear and sufficient to meet the purposes of the regulation.

Comments stated that the limits on administrative expenses do not allow for program expansion and will result in an underinvestment in organizational growth. OPWDD disagrees. The regulations do not limit program services or program services expenses, and administrative expenses are limited to a percentage.

Public comments tended to focus on executive compensation, stating the 75th percentile will drive salaries down as the outliers reduce salaries in order to comply with the regulation; implying this will depress the maximum salary permitted under the regulation. In addition, public comments stated that the State agencies' authority to deny all waivers related to executive compensation calls into question the integrity and the reasonableness of the entire process of reviewing executive compensation. The goal of the proposed regulation is to ensure that taxpayer dollars are used to provide critical services to New Yorkers in need.

The regulation was not revised to alter the 75th percentile threshold because these revisions would compromise the goal of the regulation. Eliminating the executive compensation requirements would remove one of the key objectives of Executive Order No. 38: limiting the extent of such compensation paid by covered providers that rely to a significant degree upon public funds for their program and administrative services funding. These regulations provide a benchmark to ensure that State funds or State-authorized payments paid by this agency to providers are not used to support excessive compensation or unnecessary administrative costs.

Providers also commented that they may need to pay more than \$199,000 per annum. OPWDD's response is that the regulations allow for a waiver of this limit.

One provider wanted confirmation that if it is subject to a cap on executive compensation that is lower than \$199,000 per annum, that if the lower cap is deemed "more stringent" than the Executive Order No. 38 cap; the lower cap supersedes the Executive Order No. 38 cap; and the provider is not subject to the provisions regarding executive compensation or the requirement to obtain a waiver. OPWDD's response is that, to determine if another limit is more stringent, consideration would need to be given not only to the dollar amount of the annual limit, but also to what payments or benefits are defined as executive compensation.

Another comment was that the regulations should allow for the delegation of the approval of executive compensation by a committee of the Board of Directors. In response, OPWDD states that it is appropriate that the ultimate review and approval of executive compensation be at the level of the Board of Directors.

There were several comments on compensation surveys. Commenters

asked how surveys will be “identified, provided or recognized” and asked that OPWDD approve compensation surveys as soon as possible in order to allow providers sufficient time to review the surveys. OPWDD’s response is that the implementation process will address these issues.

Another comment was that instead of utilizing currently available compensation surveys, providers should be allowed to develop and maintain a record of their own comparable salary information or use of surveys based on information about compensation that has been reported on the IRS Form 990. In response, OPWDD points out that the regulations allow for new surveys to be developed.

Another comment was that definitions of “executive compensation” under Form 990 and the regulations vary, and that this may cause comparability data necessary to assess compensation under the regulations to be unavailable. OPWDD recognizes the differences in the definitions and will give guidance in implementation.

In response to comments, the regulation has been revised to allow a waiver to be for a covered executive position rather than for a particular individual.

The effective date of the regulations has been changed to July 1, 2013. The effective dates of provisions in the proposed regulations have been revised to clarify: (a) covered reporting period; (b) submission of waiver applications regarding executive compensation; (c) submission of waiver applications regarding administrative expenses; and (d) reporting periods. The revised proposed regulations also exempt executive compensation contracts agreed to prior to July 1, 2012 until April 1, 2015.

Comments said that the regulation should state that waiver applications shall be deemed to be granted if OPWDD does not render a decision within 60 days. The regulations were not revised to make this change. OPWDD expects to make decisions within the 60 day timeframe.

Another comment was that OPWDD should respond to a waiver application within 30 days so a provider can hire an executive in a timely manner. Because waiver applications may be lengthy and complex, OPWDD may need 60 days to thoroughly and properly review the application and make a decision. The application deadlines in the regulation are the latest dates the provider can file an application; the provider has the option of filing an application earlier.

Comments asked what constitutes “other agreements” for executive compensation. The response is that “other agreements” acknowledges that not all employment conditions are finalized in a contract. For instance, “other agreement” could encompass a letter of employment setting forth a job offer and its general terms, if accepted.

One comment asked for clarification of the provision stating that submitting a request for reconsideration “shall stay any action to enter into a contract or other agreement.” OPWDD believes that the plain meaning of the word “stay” in the context of this regulation is sufficiently clear.

OPWDD received comments concerning implementation of the regulations. These comments requested coordination among the various State agencies implementing these regulations, use of a lead agency for reporting, waivers and appeals, and periodic re-evaluation of the regulation. These are not comments on the language of the regulation itself. OPWDD appreciates the comments and will take them into consideration when implementing the regulation.

The full Assessment of Public Comments is available on OPWDD’s website at [www.opwdd.ny.gov](http://www.opwdd.ny.gov).

## Power Authority of the State of New York

### NOTICE OF ADOPTION

#### Rates for the Sale of Power and Energy

**I.D. No.** PAS-41-12-00009-A

**Filing Date:** 2013-02-26

**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:** Decrease in production rates.

**Statutory authority:** Public Authorities Law, section 1005(5)

**Subject:** Rates for the sale of power and energy.

**Purpose:** To recover the Authority’s costs.

**Text or summary was published** in the October 10, 2012 issue of the Register, I.D. No. PAS-41-12-00009-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Karen Delince, Corporate Secretary, Power Authority of the State of New York, 123 Main Street, 11-P, White Plains, New York 10601, email: [karen.delince@nypa.gov](mailto:karen.delince@nypa.gov)

#### Revised Regulatory Impact Statement

A revised regulatory impact statement is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

#### Revised Regulatory Flexibility Analysis

A revised regulatory flexibility analysis is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

#### Revised Rural Area Flexibility Analysis

A revised rural area flexibility analysis is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

#### Revised Job Impact Statement

A revised job impact statement is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

#### Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

### NOTICE OF ADOPTION

#### Rates for the Sale of Power and Energy

**I.D. No.** PAS-41-12-00010-A

**Filing Date:** 2013-02-26

**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:** Decrease production rates.

**Statutory authority:** Public Authorities Law, section 1005(6)

**Subject:** Rates for the sale of power and energy.

**Purpose:** To align rates and costs.

**Text or summary was published** in the October 10, 2012 issue of the Register, I.D. No. PAS-41-12-00010-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Karen Delince, Corporate Secretary, Power Authority of the State of New York, 123 Main Street, 11-P, White Plains, New York 10601, 9143908085, email: [karen.delince@nypa.gov](mailto:karen.delince@nypa.gov)

#### Revised Regulatory Impact Statement

A revised regulatory impact statement is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

#### Revised Regulatory Flexibility Analysis

A revised regulatory flexibility analysis is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

#### Revised Rural Area Flexibility Analysis

A revised rural area flexibility analysis is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

#### Revised Job Impact Statement

A revised job impact statement is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

#### Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

## Public Service Commission

### NOTICE OF ADOPTION

#### Approval of Capital Investments and Rate Plan

**I.D. No.** PSC-35-12-00015-A

**Filing Date:** 2013-02-20

**Effective Date:** 2013-02-20

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

**Action taken:** On 2/13/13, the PSC adopted an order authorizing capital investments and rate plan of Dutchess Estates Water Co., Inc.

**Statutory authority:** Public Service Law, sections 4(1), 5(1)(f), 89-c(1) and (10)

**Subject:** Approval of capital investments and rate plan.

**Purpose:** To approve a capital investment and rate plan.

**Substance of final rule:** The Commission, on February 13, 2013 adopted an order authorizing capital investments and rate plan for Dutchess Estates Water Co., Inc., subject to the terms and conditions set forth in the order.

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

**Text of rule may be obtained from:** Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: [deborah.swatling@dps.ny.gov](mailto:deborah.swatling@dps.ny.gov) An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

#### Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(12-W-0362SP1)

### NOTICE OF ADOPTION

#### Approval to Authorize Commercial Submetering and On-Line Bill Calculator

**I.D. No.** PSC-37-12-00008-A

**Filing Date:** 2013-02-20

**Effective Date:** 2013-02-20

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

**Action taken:** On 2/13/13, the PSC adopted an order approving the elimination of the requirement that all New York commercial properties seek PSC approval to submeter and requiring Consolidated Edison to provide an on-line bill calculator for use by customers.

**Statutory authority:** Public Service Law, sections 4, 65 and 66

**Subject:** Approval to authorize commercial submetering and on-line bill calculator.

**Purpose:** To approve authorization of commercial submetering and an on-line bill calculator.

**Substance of final rule:** The Commission, on February 13, 2013 adopted an order authorizing commercial submetering to occur without approval in Consolidated Edison Company of New York, Inc.'s (Con Edison) territory and for Con Edison to provide an on-line bill calculator available for use by residential submeterers and residential submetered end-users, subject to terms and conditions set forth in the order.

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

**Text of rule may be obtained from:** Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: [deborah.swatling@dps.ny.gov](mailto:deborah.swatling@dps.ny.gov) An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

#### Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(12-E-0381SA1)

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

#### Temporary State Assessment

**I.D. No.** PSC-11-13-00010-P

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

**Proposed Action:** The Commission is considering a filing by Consolidated Edison Company of New York, Inc. proposing a modification of the tariff language regarding the implementation of the Temporary State Assessment in its electric, gas and steam tariff schedules.

**Statutory authority:** Public Service Law, sections 66(12) and 18-a

**Subject:** Temporary State Assessment.

**Purpose:** To modify tariff language regarding the implementation of the Temporary State Assessment.

**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. (Con Edison) to modify its electric, gas and steam tariff schedules, P.S.C. Nos. 10 and 11–Electricity, P.S.C. No. 9 - Gas, and P.S.C. No. 4 – Steam. Con Edison proposes to modify the tariff language regarding the implementation of the Temporary State Assessment. The Commission's June 19, 2009 Order Implementing Temporary State Assessment allows each utility to maintain the prior year's surcharge, but does not require it. Con Edison's current tariff language states that "...the Company will maintain the prior year's surcharge..." Con Edison proposes to change the word "will" to "may" to recognize that it is able to reduce collections the subsequent year if warranted and to better reflect the intent of the Order. 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](mailto:deborah.swatling@dps.ny.gov)

**Data, views or arguments may be submitted to:** Jeffrey C. Cohen, Acting Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: [secretary@dps.ny.gov](mailto:secretary@dps.ny.gov)

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

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

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

(09-M-0311SP4)

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

#### Temporary State Assessment

**I.D. No.** PSC-11-13-00011-P

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

**Proposed Action:** The Commission is considering a filing by Orange and Rockland Utilities, Inc. proposing a modification of the tariff language regarding the implementation of the Temporary State Assessment in its electric and gas tariff schedules.

**Statutory authority:** Public Service Law, sections 66(12) and 18-a

**Subject:** Temporary State Assessment.

**Purpose:** To modify tariff language regarding the implementation of the Temporary State Assessment.

**Substance of proposed rule:** The Commission is considering whether to approve, modify or reject, in whole or in part, a proposal filed by Orange and Rockland Utilities, Inc. (O&R) to modify its electric and gas tariff schedules, P.S.C. No. 3–Electricity and P.S.C. No. 4 - Gas. O&R proposes to modify the tariff language regarding the implementation of the Temporary State Assessment. The Commission's June 19, 2009 Order

Implementing Temporary State Assessment allows each utility to maintain the prior year's surcharge, but does not require it. O&R's current tariff language states that "...the Company will maintain the prior year's surcharge..." O&R proposes to change the word "will" to "may" to recognize that it is able to reduce collections the subsequent year if warranted and to better reflect the intent of the Order. 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](mailto:deborah.swatling@dps.ny.gov)

**Data, views or arguments may be submitted to:** Jeffrey C. Cohen, Acting Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: [secretary@dps.ny.gov](mailto:secretary@dps.ny.gov)

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

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

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

(09-M-0311SP5)

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

**Recovery of Incremental Expense**

**I.D. No.** PSC-11-13-00012-P

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

**Proposed Action:** The Commission is considering whether to approve or reject, in whole or in part, the petition of St. Lawrence Gas Company, Inc. to defer approximately \$132,670 of incremental expenses related to In-Line Inspection of St. Lawrence Gas' 12" Pipe.

**Statutory authority:** Public Service Law, sections 5, 65(1) and 66(12)

**Subject:** Recovery of incremental expense.

**Purpose:** To consider petition for recovery of incremental expense.

**Substance of proposed rule:** The Commission is considering whether to adopt, modify, or reject, in whole or in part, the proposals set forth by St. Lawrence Gas Company, Inc., in a petition dated February 12, 2013, to defer incremental expenses related to the In-Line Inspection of 12" high pressure pipe installed in 1962.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact:** Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: [Deborah.Swatling@dps.ny.gov](mailto:Deborah.Swatling@dps.ny.gov)

**Data, views or arguments may be submitted to:** Jeffrey C. Cohen, Acting Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 408-1978, email: [secretary@dps.ny.gov](mailto:secretary@dps.ny.gov)

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

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

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

(13-G-0076SP1)

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

**Transportation Service Under Service Classification (SC) Nos. 7 and 14**

**I.D. No.** PSC-11-13-00013-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 KeySpan Gas East Corporation d/b/a National Grid proposing modifications to add and clarify provisions related to electric generators that take transportation service under Service Classification Nos. 7 and 14.

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

**Subject:** Transportation service under Service Classification (SC) Nos. 7 and 14.

**Purpose:** To modify and clarify provisions related to electric generators that take transportation service under SC Nos. 7 and 14.

**Substance of proposed rule:** The Commission is considering whether to approve, modify or reject, in whole or in part, a proposal filed by KeySpan Gas East Corporation d/b/a National Grid (the Company) to modify its gas tariff schedule, P.S.C. No. 1 – Gas. The Company proposes to make modifications to add and clarify provisions related to electric generators that take transportation service under Service Classification No. 7 – Inter-ruptible Transportation Service (SC 7) and Service Classification No. 14 – Non-Core Transportation Service for Electric Generation (SC 14). Specifically, the Company proposes to: (1) modify its tariff to enable a customer taking transportation service under SC 7 and/or SC 14 to balance gas deliveries on an aggregated basis to one or more of the customer's electric generating facilities to mitigate daily imbalances and the associated daily balancing charge; (2) modify the SC 14 daily balancing charges and provisions to use published indices to set cash out prices and to revise the cash out tolerances and percentages of the cash out tiers; and (3) clarify provisions regarding the applicability of a \$100 per dth penalty charge for unauthorized overruns following an operational flow order. The filing has a proposed effective date of June 1, 2013. The Commission may resolve related matters and may apply its decision here to other companies.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact:** Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: [deborah.swatling@dps.ny.gov](mailto:deborah.swatling@dps.ny.gov)

**Data, views or arguments may be submitted to:** Jeffrey C. Cohen, Acting Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: [secretary@dps.ny.gov](mailto:secretary@dps.ny.gov)

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

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

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

(13-G-0063SP1)

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

**Request Authorization to Defer Incremental Expenses Incurred Related to Tropical Storm Sandy**

**I.D. No.** PSC-11-13-00014-P

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

**Proposed Action:** The PSC is considering a petition filed by Central Hudson Gas & Electric Corporation seeking authority to defer incremental electric storm restoration expenses incurred related to Tropical Storm Sandy on October 29, 2012.

**Statutory authority:** Public Service Law, section 66(9)

**Subject:** Request authorization to defer incremental expenses incurred related to Tropical Storm Sandy.

**Purpose:** To consider allowing Central Hudson Gas & Electric Corporation to defer incremental expenses incurred in storm restoration work.

**Substance of proposed rule:** The Commission is considering a petition filed by Central Hudson Gas & Electric Corporation (Central Hudson or Company) has requested permission to defer for future rate recovery, with carrying charges, \$9.7 million in incremental electric storm restoration expense related to Tropical Storm Sandy on October 29, 2012. The Company proposes to defer such expenses and the associated deferred income taxes as a regulatory asset in Account 182.xx. The Commission may adopt, reject or modify, in whole or in part, Central Hudson's request, and may also consider any related matters. The Commission may also apply its decision here to other utilities.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact:** Deborah Swatling, Public Service Commission, 3 Empire State Plaza,

Albany, New York 12223-1350, (518) 486-2659, email: Deborah.Swatling@dps.ny.gov

**Data, views or arguments may be submitted to:** Jeffrey C. Cohen, Acting Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 408-1978, email: secretary@dps.ny.gov

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

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

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

(13-E-0048SP1)

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

**Recovery of Certain Transmission-Related Expenses to a Non-Bypassable Tariff Rider**

**I.D. No.** PSC-11-13-00015-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 Pennsylvania Electric Company proposing modifications to its tariff schedule, P.S.C. No. 6 — Electricity, regarding the recovery of certain transmission-related expenses to a non-bypassable tariff rider.

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

**Subject:** Recovery of certain transmission-related expenses to a non-bypassable tariff rider.

**Purpose:** To shift the recovery mechanism of certain transmission-related expenses to a non-bypassable tariff rider.

**Substance of proposed rule:** The Commission is considering whether to approve, modify or reject, in whole or in part, a proposal filed by Pennsylvania Electric Company (Penelec) to modify its electric tariff schedule, P.S.C. No. 6 — Electric. Penelec proposes to make modifications to shift the recovery of two non-market-based (NMB) charges imposed by the PJM from the bypassable Price to Compare (PTC) Rider to the non-bypassable Default Service Support (DSS) Rider. The filing has a proposed effective date of June 1, 2013. The Commission may resolve related matters and may apply its decision here to other companies.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact:** Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: deborah.swatling@dps.ny.gov

**Data, views or arguments may be submitted to:** Jeffrey C. Cohen, Acting Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: secretary@dps.ny.gov

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

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

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

(13-E-0067SP1)

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**Department of State**

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

**Administrative Expenses and Executive Compensation of Providers of Services to New Yorkers**

**I.D. No.** DOS-22-12-00017-RP

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

**Proposed Action:** Addition of Part 144 to Title 19 NYCRR.

**Statutory authority:** Executive Law, section 91

**Subject:** Administrative expenses and executive compensation of providers of services to New Yorkers.

**Purpose:** To address limits on the use of State funds/State-authorized payments for administrative expenses and executive compensation.

**Substance of revised rule:** The revised rule would add a new Part 144 to 19 NYCRR titled Limits on Administrative Expenses and Executive Compensation.

Section 144.1 provides the Background and Intent of the revised rule, which is to implement Executive Order No. 38, issued by Governor Andrew Cuomo on January 18, 2012.

Section 144.2 sets forth the Legal Basis for the promulgation of the rule by the Department of State (hereinafter the "Department").

Section 144.3 contains Definitions for purposes of this Part, including definitions for administrative expenses, covered executive, covered operating expenses, covered provider, covered reporting period, department, executive compensation, program services, program services expenses, related organization, reporting period, state-authorized payments, and state funds.

Section 144.4, titled Limits on Administrative Expenses, contains limits on the use of State funds or State-authorized payments for administrative expenses. The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria. The restriction will apply to covered providers receiving State funds or State-authorized payments from county or local governments, as well as to those receiving such funds directly from a State agency, pursuant to specified criteria. The revised regulation addresses how the restriction will apply in the event that a covered provider has multiple sources of State funds or State-authorized payments. The effective date for this section shall commence no earlier than July 1, 2013.

Section 144.5, titled Limits on Executive Compensation, contains restrictions on executive compensation provided to covered executives. The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria. The restriction will apply to covered providers receiving State funds or State-authorized payments from county or local governments, as well as to those receiving such funds directly from a State agency, pursuant to specified criteria. The revised rule addresses the application of this limit if the covered provider has multiple sources of State funds or State-authorized payments. The effective date for this section shall commence no earlier than July 1, 2013.

Section 144.6, titled Waivers, establishes processes for covered providers to seek waivers of the limit on administrative expenses and the limits on executive compensation.

Section 144.7 pertains to Reporting by covered providers. Covered providers are required to report information on an annual basis.

Section 144.8 discusses Penalties. A process is established for the imposition of penalties in the event of non-compliance with the limit on administrative expenses or the limits on executive compensation.

Section 144.9, titled Severability, declares that if any provision in this Part is deemed invalid, such invalidity shall not affect other provisions of this Part that can be given effect without the invalid portions.

A copy of the full text of the revised regulatory proposal is available on the DOS website at: [http://www.dos.ny.gov/info/regulatory\\_activity/index.html](http://www.dos.ny.gov/info/regulatory_activity/index.html).

**Revised rule making(s) were previously published in the State Register on** October 31, 2012.

**Revised rule compared with proposed rule:** Substantial revisions were made in sections 144.2, 144.3, 144.4, 144.5 and 144.6.

**Text of revised proposed rule and any required statements and analyses may be obtained from:** David Treacy, Department of State, One Commerce Plaza, Albany, NY 12231, (518) 474-6740, email: David.Treacy@dos.ny.gov

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

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

**Revised Regulatory Impact Statement**

Statutory Authority: Executive Law, § 91; Executive Order No. 38; Executive Order No. 43; Not-For-Profit Corporation Law, § 508.

Legislative Objectives: Executive Law, § 91 authorizes the Secretary of State to promulgate rules to regulate and control the exercise of the powers of the Department of State and the performance of the duties of officers, agents and other employees thereof. Not-For-Profit Corporation Law, § 508 provides that a corporation whose lawful activities involve among other things the charging of fees or prices for its services or products shall have the right to receive such income and, in doing so, may make an incidental profit. All such incidental profits shall be applied to the maintenance, expansion or operation of the lawful activities of the

corporation, and in no case shall be divided or distributed in any manner whatsoever among the members, directors or officers of the corporation.

**Needs and Benefits:** The Secretary of State is proposing to adopt the following revised regulation because the State of New York directly or indirectly funds with taxpayer dollars a large number of tax-exempt organizations and for-profit entities that provide critical services to New Yorkers in need, and the goal is to ensure that taxpayers' dollars are used properly, efficiently, and effectively to improve the lives of New Yorkers. In certain instances, providers of services that receive State funds or State-authorized payments have used such funds to pay for excessive administrative expenses or inflated compensation for their senior executives, rather than devoting a greater proportion of such funds to providing direct care or services to their clients. Abuses involving such public funds harm both the people of New York, who are paying for the services, and those who must depend on such services being available and well-funded. This regulation, which is required by Executive Order No. 38, will ensure that State funds or State-authorized payments paid by this agency to providers are not used to support excessive compensation or unnecessary administrative expenses.

**Costs:** The costs of implementing this rule to affected providers is anticipated to be minimal since most, if not all, of the information that must be reported by such providers is already gathered or reported for other purposes. The agency cost of such implementation is expected to be very limited as well, and efforts to ensure efficient centralization of certain aspects of such implementation are underway.

**Local Government Mandates:** The revised regulation does not anticipate any additional mandates.

**Paperwork/Reporting Requirements:** The revised regulation will require limited additional information to be reported to the agency by providers receiving State funds or State-authorized payments. To the extent feasible, such reporting shall be made electronically in order to avoid unnecessary paperwork costs.

**Duplication:** This revised rule does not duplicate, overlap, or conflict with any State or federal statute or rule. The regulation seeks to minimize the reporting requirements faced by providers by building upon those requirements in the federal internal revenue code that require certain tax-exempt organizations to report information concerning their executive compensation and administrative expenses.

**Alternatives:** The alternative of not proposing this regulation was considered, but Executive Order No. 38 requires its promulgation.

**Federal Standards:** This revised rule does not conflict with federal standards.

**Compliance Schedule:** The rule will become effective upon adoption. The implementation date establishing the limits on administrative expenses and executive compensation shall be no earlier than July 1, 2013.

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

A Revised Regulatory Flexibility Analysis for Small Businesses and Local Governments is not required with this revised rulemaking notice because changes made to the last published rule would neither impose any adverse economic impact on small businesses nor impose new reporting, record keeping or other compliance requirements on small businesses or local governments. The revised regulation is designed to address executive compensation and administrative expenses of program-service providers that receive State funds or State-authorized payments paid by the Department of State.

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

A Revised Rural Area Flexibility Analysis is not required with this revised rulemaking notice because changes made to the last published rule would neither impose any adverse economic impact on rural areas nor impose new reporting, record keeping or other compliance requirements on public or private entities in rural areas. The revised regulation is designed to address executive compensation and administrative expenses of program-service providers that receive State funds or State-authorized payments paid by the Department of State.

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

A Revised Job Impact Statement is not required with this revised rulemaking notice; it is evident from the subject matter of the revised regulation, including changes made to the last published rule, that it would have no impact on jobs and employment opportunities. The revised regulation is designed to address executive compensation and administrative expenses of program-service providers that receive State funds or State-authorized payments paid by the Department of State.

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

A Notice of Revised Rule Making was published in the New York State Register on October 31, 2012. The Department of State received several sets of comments during the public comment period associated with the revised rulemaking. The issues and concerns raised in these comments are

set forth below. Issues and concerns have been grouped according to the part of the revised rule they address because they are related or for convenience in providing an efficient response. Because many commenters addressed concerns that applied to all of the participating State agencies that are implementing Executive Order No. 38, the responses to comments provided by each of those agencies are incorporated by reference into these responses. The Department of State response is provided for each issue.

A number of comments objected generally to the underlying concept of the regulations, stating that the proposed regulation is overly broad in its authority and burdensome in its requirements. The Department of State believes that the proposed limitations in the regulation further the legitimate goal of ensuring that public funds are properly expended and the use of such funds is properly monitored.

Clarification was requested concerning certain defined terms in the proposed regulation, in particular with respect to their intended scope. In response, and taking into account suggestions submitted, changes were made to the definitions of the following terms: administrative expenses, covered executive, covered provider, covered reporting period, executive compensation, program services expenses, reporting period, State-authorized payments and State funds.

Some commenters stated that the proposed limits on administrative expenses were burdensome and unnecessary, because they would interfere with existing contracts, because they were possibly duplicative of existing state and federal rules, or they would not enhance the protections already provided by restrictions from State reimbursement rates. Clarification was requested as to what would constitute administrative and program expenses. The proposed regulation has been further revised to clarify which administrative expenses are not included.

The definition of covered provider has been amended to address the individual or entity that has received State funds or State-authorized payments during the covered reporting period and the year prior to the covered reporting period. The definition of "covered provider" requires a contract or other agreement to render program services.

The regulation was not revised to alter the 75th percentile threshold because these revisions would compromise the goal of the regulation. Eliminating the executive compensation requirements would remove one of the key objectives of Executive Order No. 38: limiting the extent of such compensation paid by covered providers that rely to a significant degree upon public funds for their program and administrative services funding. These regulations provide a benchmark to ensure that State funds or State-authorized payments paid by this agency to providers are not used to support excessive compensation or unnecessary administrative costs.

Public comments tended to focus on executive compensation, stating the 75th percentile will drive down salaries in order to comply with the regulation, implying this will depress the maximum salary permitted under the regulation. In addition, the State agencies' authority to deny all waivers related to executive compensation calls into question the integrity and the reasonableness of the entire process of reviewing executive compensation. The goal of the proposed regulation is to ensure that taxpayer dollars are used to provide critical services to New Yorkers in need.

The effective dates of provisions in the proposed regulations have been revised to clarify: (a) covered reporting period; (b) submission of waiver applications regarding executive compensation; (c) submission of waiver applications regarding administrative expenses; and (d) reporting periods. The effective dates of the limitations on administrative expenses and the limitations on executive compensation were amended from commencing on April 1, 2013 to commencing on or after July 1, 2013.

The full Assessment of Public Comments is available on the Department of State website at [http://www.dos.ny.gov/info/regulatory\\_activity/index.html](http://www.dos.ny.gov/info/regulatory_activity/index.html).

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## Department of Taxation and Finance

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### NOTICE OF ADOPTION

#### **Fuel Use Tax on Motor Fuel and Diesel Motor Fuel and the Art. 13-A Carrier Tax Jointly Administered Therewith**

**I.D. No.** TAF-48-12-00007-A

**Filing No.** 191

**Filing Date:** 2013-02-22

**Effective Date:** 2013-02-22

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

**Action taken:** Amendment of section 492.1(b)(1) of Title 20 NYCRR.  
**Statutory authority:** Tax Law, sections 171, subd. First, 301-h(c), 509(7), 523(b) and 528(a)  
**Subject:** Fuel use tax on motor fuel and diesel motor fuel and the art. 13-A carrier tax jointly administered therewith.  
**Purpose:** To set the sales tax component and the composite rate per gallon for the period January 1, 2013 through March 31, 2013.  
**Text or summary was published** in the November 28, 2012 issue of the Register, I.D. No. TAF-48-12-00007-P.  
**Final rule as compared with last published rule:** No changes.

**Text of rule and any required statements and analyses may be obtained from:** John W. Bartlett, Tax Regulations Specialist 4, Department of Taxation and Finance, Taxpayer Guidance Division, Building 9, W.A. Harriman Campus, Albany, NY 12227, (518) 457-2254, email: tax.regulations@tax.ny.gov

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

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

**Fuel Use Tax on Motor Fuel and Diesel Motor Fuel and the Art. 13-A Carrier Tax Jointly Administered Therewith**

**I.D. No.** TAF-11-13-00006-P

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

**Proposed Action:** Amendment of section 492.1(b)(1) of Title 20 NYCRR.  
**Statutory authority:** Tax Law, sections 171, subd. First, 301-h(c), 509(7), 523(b) and 528(a)  
**Subject:** Fuel use tax on motor fuel and diesel motor fuel and the art. 13-A carrier tax jointly administered therewith.

**Purpose:** To set the sales tax component and the composite rate per gallon for the period April 1, 2013 through June 30, 2013.

**Text of proposed rule:** Pursuant to the authority contained in subdivision First of section 171, subdivision (c) of section 301-h, subdivision 7 of section 509, subdivision (b) of section 523, and subdivision (a) of section 528 of the Tax Law, the Commissioner of Taxation and Finance hereby proposes to make and adopt the following amendment to the Fuel Use Tax Regulations, as published in Article 3 of Subchapter C of Chapter III of Title 20 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

Section 1. Paragraph (1) of subdivision (b) of section 492.1 of such regulations is amended by adding a new subparagraph (lxx) to read as follows:

Motor Fuel			Diesel Motor Fuel		
Sales Tax Component	Composite Rate	Aggregate Rate	Sales Tax Component	Composite Rate	Aggregate Rate
(lxx) January-March 2013					
16.0	24.0	42.6	16.0	24.0	40.85
(lxx) April-June 2013					
16.0	24.0	42.6	16.0	24.0	40.85

**Text of proposed rule and any required statements and analyses may be obtained from:** John W. Bartlett, Tax Regulations Specialist 4, Department of Taxation and Finance, Taxpayer Guidance Division, Building 9, W.A. Harriman Campus, Albany, NY 12227, (518) 457-2254, email: tax.regulations@tax.ny.gov

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

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

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

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

**Office of Temporary and Disability Assistance**

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

**Limits on Administrative Expenses and Executive Compensation**

**I.D. No.** TDA-22-12-00021-RP

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

**Proposed Action:** Addition of Part 315 to Title 18 NYCRR.

**Statutory authority:** Social Services Law, section 20(3)(d) and Not-For-Profit Corporation Law, section 508

**Subject:** Limits on administrative expenses and executive compensation.

**Purpose:** Established limits on the use of State funds or State-authorized payments for administrative expenses and executive compensation by covered providers.

**Substance of revised rule:** The revised rule would add a new Part 315 to 18 NYCRR titled Limits on Administrative Expenses and Executive Compensation.

Section 315.1 Provides the background and intent of the revised rule, which is to implement Executive Order No. 38, issued by Governor Andrew Cuomo on January 18, 2012.

Section 315.2 Sets forth the statutory authority for the promulgation of the rule by the Office of Temporary and Disability Assistance (hereinafter the "Office").

Section 315.3 Contains definitions for purposes of this Part, including definitions for administrative expenses, covered executive, covered operating expenses, covered provider, covered reporting period, executive compensation, Office, program services, program services expenses, related organization, reporting period, State-authorized payments, and State funds.

Section 315.4 Limits on Administrative Expenses. Contains limits on the use of State funds or State-authorized payments for administrative expenses.

The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria.

The restriction will apply to covered providers receiving State funds or State-authorized payments from county or local governments, rather than directly from a State agency, pursuant to specified criteria.

The revised regulation addresses how the restriction will apply in the event that a covered provider has multiple sources of State funds or State-authorized payments.

Section 315.5 Limits on Executive Compensation. Contains restrictions on executive compensation provided to covered executives.

The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria.

The restriction will apply to covered providers receiving State funds or State-authorized payments from county or local governments, rather than directly from a State agency, pursuant to specified criteria.

The revised rule addresses the application of this limit if the covered provider has multiple sources of State funds or State-authorized payments.

Section 315.6 Waivers. Processes are established for covered providers to seek waivers of the limit on administrative expenses and the limit on executive compensation.

Section 315.7 Reporting by Covered Providers. Covered providers are required to report information on an annual basis.

Section 315.8 Penalties. A process is established for the imposition of penalties in the event of non-compliance with the limit on administrative expenses or the limits on executive compensation.

A copy of the full text of the regulatory proposal is available on the Office of Temporary and Disability Assistance's website at [www.otda.ny.gov/legal](http://www.otda.ny.gov/legal)

**Revised rule making(s) were previously published in the State Register on** October 31, 2012.

**Revised rule compared with proposed rule:** Substantial revisions were made in sections 315.2, 315.3, 315.4, 315.5, 315.6 and 315.7.

**Text of revised proposed rule and any required statements and analyses may be obtained from:** Jeanine S. Behuniak, New York State Office of Temporary and Disability Assistance, 40 North Pearl Street, 16C, Albany, New York 12243-0001, (518) 474-9779, email: Jeanine.Behuniak@otda.ny.gov

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

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

#### **Revised Regulatory Impact Statement**

##### 1. Statutory authority:

Social Services Law (SSL) § 20(3)(d) authorizes the Office of Temporary and Disability Assistance (hereinafter "agency") to promulgate regulations to carry out its powers and duties.

Not-For-Profit Corporation Law (N-PCL) § 508 provides that a corporation, as defined in N-PCL § 102(a)(5), may make an incidental profit. All such incidental profits are to be applied to the maintenance, the expansion or the operation of the lawful activities of the corporation, and shall not be divided or distributed in any manner whatsoever among the members, the directors or the officers of the corporation.

##### 2. Legislative objectives:

It was the intent of the Legislature in enacting SSL § 20(3)(d) that the agency establish rules, regulations and policies to carry out its powers and duties, and it was the intent of Governor Andrew Cuomo in signing Executive Orders No. 38 and No. 43 that this agency promulgate regulations to establish limits on the use of State funds or State-authorized payments for administrative costs and executive compensation by covered providers.

##### 3. Needs and benefits:

This agency is proposing to adopt the regulations because the State of New York directly or indirectly funds with taxpayer dollars a large number of tax exempt organizations and for-profit entities that provide critical services to New Yorkers in need and the goal is to ensure that taxpayers' dollars are used properly, efficiently, and effectively to improve the lives of New Yorkers. In certain instances, providers of services that receive State funds or State-authorized payments have used such funds to pay for excessive administrative costs or inflated compensation for their senior executives, rather than devoting a greater proportion of such funds to providing direct care or services to their clients. Such abuses involving public funds harm both the people of New York who are paying for such services, and those persons who must depend upon such services to be available and well-funded. These regulations, which are required by Executive Order No. 38, are intended to prevent providers from using State funds or State-authorized payments paid by this agency to support excessive compensation or unnecessary administrative costs.

##### 4. Costs:

The costs of implementing this rule to affected providers are anticipated to be minimal as most, if not all, of the information that must be reported by such providers is already gathered or reported for other purposes. The costs to this agency of such implementation are expected to be mitigated by efforts that are underway to ensure efficient centralization of certain aspects of such implementation.

##### 5. Local government mandates:

The social services districts will be required to provide minimal information to the agency concerning service providers with which the social services districts have contractual relationships. The administrative functions required by the proposed regulations will be carried out by the agency.

##### 6. Paperwork:

The proposed regulatory amendments will require limited additional information to be reported to the agency by covered providers receiving State funds or State-authorized payments. To the extent feasible, such reporting shall be made electronically to avoid unnecessary paperwork costs.

##### 7. Duplication:

This proposed rule does not duplicate, overlap, or conflict with any State or federal statute or rule. However, the proposed rule seeks to minimize the reporting requirements faced by covered providers by building upon those requirements in the federal internal revenue code that require certain tax-exempt organizations to report information concerning their executive compensation and administrative costs.

##### 8. Alternatives:

Executive Orders No. 38 and No. 43 require the adoption of this proposed rule.

##### 9. Federal standards:

This proposed rule does not conflict with federal standards.

##### 10. Compliance schedule:

The rule will become effective upon adoption. The implementation date establishing the limits on administrative expenses and executive compensation will be July 1, 2013.

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

The Office of Temporary and Disability Assistance has determined that changes made to the last published rule do not necessitate revision to the previously published Statement in Lieu of a Rural Area Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement.

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

A Notice of Revised Rule Making was published in the New York State Register on October 31, 2012. The Office of Temporary and Disability Assistance (OTDA) received several sets of comments during the public comment period associated with the revised rulemaking. The issues and concerns raised in these comments are summarized by OTDA below. The issues and concerns have been grouped according to the part of the revised rule they address because they are related or for convenience in providing an efficient response. Because many commenters addressed concerns that applied to all of the participating State agencies that are implementing Executive Order No. 38, the responses to comments provided by each of those agencies are incorporated by reference into these responses.

A number of comments objected generally to the underlying concept of the regulations, stating that the proposed regulation is overly broad in its authority and burdensome in its requirements. OTDA believes that the proposed limitations in the regulation further the legitimate goal of ensuring that public funds are properly expended and the use of such funds is properly monitored.

Clarification was requested concerning certain defined terms in the proposed regulation, in particular with respect to their intended scope. In response, and taking into account suggestions submitted, changes were made to the definitions of the following terms: administrative expenses, covered executive, covered provider, covered reporting period, executive compensation, program services expenses, reporting period, State-authorized payments and State funds.

Some commenters stated that the proposed limits on administrative expenses were burdensome and unnecessary, because they would interfere with existing contracts, because they were possibly duplicative of existing state and federal rules, or they will not enhance the protections already provided by restrictions from State reimbursement rates. Clarification was requested as to what will constitute administrative and program expenses. The proposed regulation has been further revised to clarify which administrative expenses are not included.

The definition of covered provider has been amended to address the individual or entity that has received State funds or State-authorized payments during the covered reporting period and the year prior to the covered reporting period. The definition of "covered provider" requires a contract or other agreement to render program services.

The regulation was not revised to alter the 75th percentile threshold because these revisions would compromise the goal of the regulation. Eliminating the executive compensation requirements would remove one of the key objectives of Executive Order No. 38: limiting the extent of such compensation paid by covered providers that rely to a significant degree upon public funds for their program and administrative services funding. These regulations provide a benchmark to ensure that State funds or State-authorized payments paid by this agency to providers are not used to support excessive compensation or unnecessary administrative costs.

Public comments tended to focus on executive compensation, stating the 75th percentile will drive salaries down as the outliers reduce salaries in order to comply with the regulation. Implying this will depress the maximum salary permitted under the regulation. In addition, a comment stated that the State agencies' authority to deny all waivers related to executive compensation calls into question the integrity and the reasonableness of the entire process of reviewing executive compensation. The goal of the proposed regulation is to ensure that taxpayer dollars are used to provide critical services to New Yorkers in need.

The effective dates of provisions in the proposed regulations have been revised to clarify: (a) covered reporting period; (b) submission of waiver applications regarding executive compensation; (c) submission of waiver applications regarding administrative expenses; and (d) reporting periods.

The full Assessment of Comments is available on the OTDA website at [www.otda.ny.gov/legal](http://www.otda.ny.gov/legal)

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## Office of Victim Services

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

#### **Limits on Administrative Expenses and Executive Compensation**

**I.D. No.** OVS-22-12-00009-RP

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

**Proposed Action:** Amendment of section 525.22 and addition of section 525.24 to Title 9 NYCRR.

**Statutory authority:** Executive Law, subdivision 3, section 623; Not-For-Profit Corporation Law, section 508; and Executive Order No. 38

**Subject:** Limits on administrative expenses and executive compensation.

**Purpose:** To establish limitations on administrative expenses and executive compensation for those programs funded by the Office.

**Substance of revised rule:** The revised, proposed regulations amend section 525.22 of Title 9 NYCRR and adds a new section 525.24 to Title 9 NYCRR, related to Victim Assistance Programs and Limits on Administrative Costs and Executive Compensation, respectively.

Section 525.22 is amended to state that Victim Assistance Programs receiving state funds or state-authorized payments from the Office of Victim Services (OVS or Office) pursuant to the terms of a contract or memorandum of understanding shall comply with all applicable federal and state laws and regulations and any applicable contractual or memorandum of understanding language entered into with the office. Applicable state regulations shall include, but not be limited to this section and the newly added section 525.24 of this part.

Section 525.24, subdivision (a) provides for the background and intent of the revised rule, which is to implement Executive Order No. 38, issued by Governor Andrew Cuomo on January 18, 2012.

Subdivision (b) contains definitions for purposes of this section, including definitions for administrative expenses, covered operating expenses, related organization, covered executive, covered provider, executive compensation, office, program services, program services expenses, reporting period, state-authorized payments, and state funds.

Subdivision (c) relates to limits on administrative expenses. This subdivision contains limits on the use of state funds or state-authorized payments for administrative expenses. The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria. The restriction will apply to covered providers receiving state funds or state-authorized payments from county or local governments, rather than directly from a state agency, pursuant to specified criteria. The revised regulation addresses how the restriction will apply in the event that a covered provider has multiple sources of state funds or state-authorized payments.

Subdivision (d) relates to limits on executive compensation. This subdivision contains restrictions on executive compensation provided to covered executives. The restriction will apply to subcontractors and agents of covered providers which meet the specified criteria. The restriction will apply to covered providers receiving state funds or state-authorized payments from county or local governments, rather than directly from a state agency, pursuant to specified criteria. The revised rule addresses the application of this limit if the covered provider has multiple sources of state funds or state-authorized payments.

Subdivision (e) relates to waivers for the limit on executive compensation and the processes are established for covered providers to seek such waivers.

Subdivision (f) relates to waivers for the limit on reimbursement for administrative expenses and the processes are established for covered providers to seek such waivers.

Subdivision (g) relates to denials of waiver requests, notice to the impacted parties and the Office's reconsideration of the waiver requests.

Subdivision (h) relates to the reporting by covered providers. Covered providers are required to report information on an annual basis.

Subdivision (i) establishes a process for the imposition of penalties in the event of non-compliance with the limits on administrative expenses or the limits on executive compensation.

A copy of the full text of this regulatory proposal is available on the Office of Victim Services website: <http://www.ovs.ny.gov>

**Revised rule making(s) were previously published in the State Register on** October 31, 2012.

**Revised rule compared with proposed rule:** Substantial revisions were made in section 525.24.

**Text of revised proposed rule and any required statements and analyses may be obtained from:** John Watson, General Counsel, Office of Victim Services, A.E. Smith State Office Building, 80 South Swan St., 2nd Fl, Albany, New York 12210-8002, (518) 457-8066, e-mail: [john.watson@ovs.ny.gov](mailto:john.watson@ovs.ny.gov)

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

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

#### Revised Regulatory Impact Statement

1. Statutory authority: Subdivision 3 of section 623 of the Executive Law provides that the Office of Victim Services (OVS or Office) shall have the power and duty to adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions and purposes of Article 22 of the Executive Law. Section 508 of the Not-For-Profit Corporation Law provides that a corporation whose lawful activities involve among other

things the charging of fees or prices for its services or products shall have the right to receive such income and, in so doing, may make an incidental profit. All such incidental profits, however, shall be applied to the maintenance, expansion or operation of the lawful activities of the corporation, and in no case shall be divided or distributed in any manner whatsoever among the members, directors, or officers of the corporation. Other authorities for enacting these rules include Executive Order No. 38, enacted January 18, 2012.

2. Legislative objectives: Pursuant to Executive Order No. 38, enacted January 18, 2012, the OVS recognizes its fiduciary duties related to any State funds or State-authorized payments made by the Office via competitive grants for the provision of services to victims of crimes and others impacted by such victimization. This section is meant to establish the minimum expectations and requirements pursuant to Executive Order No. 38.

3. Needs and benefits: The OVS is proposing to adopt the following regulation because the State of New York directly or indirectly funds with State and federal monies a large number of tax exempt organizations and for-profit entities that provide critical services to New Yorkers in need and the goal is to ensure that such funds are used properly, efficiently, and effectively to improve the lives of New Yorkers. In certain instances, providers of services that receive State funds or State-authorized payments have used such funds to pay for excessive administrative costs or inflated compensation for their senior executives, rather than devoting a greater proportion of such funds to providing direct care or services to their clients. Such abuses involving public funds harm both the people of New York who are paying for such services, and those persons who must depend upon such services to be available and well-funded. These regulations, which are required by Executive Order No. 38, will ensure that State funds or State-authorized payments paid by the Office to providers are not used to support excessive compensation or unnecessary administrative costs.

4. Costs: a. Costs to regulated parties. The costs of implementing this rule to affected providers is anticipated to be minimal as most, if not all, of the information that must be reported by such providers is already gathered or reported for other purposes. The costs to the OVS of such implementation are expected to be very limited as well, and efforts to ensure efficient centralization of certain aspects of such implementation are underway.

b. Costs to local governments. These proposed regulations do not apply to local governments and would not impose any additional costs on local governments.

c. Costs to private regulated parties. The proposed regulations would impose minimal any additional costs on private regulated parties.

5. Local government mandates: These proposed regulations do not impose any program, service duty or responsibility upon any local government.

6. Paperwork: The proposed regulatory amendments will require limited additional information to be reported to the OVS by providers receiving State funds or State-authorized payments. To the extent feasible, such reporting shall be made electronically to avoid unnecessary paperwork costs.

7. Duplication: This proposed rule does not duplicate, overlap, or conflict with any State or federal statute or rule. However, the proposed rule seeks to minimize the reporting requirements faced by providers by building upon those requirements in the federal internal revenue code that require certain tax-exempt organizations to report information concerning their executive compensation and administrative costs.

8. Alternatives: Executive Order No. 38 requires the adoption of this proposed regulation.

9. Federal standards: These amendments do not conflict with federal standards.

10. Compliance schedule: This rule will become effective when adopted and the Notice of Adoption is published in the State Register. The implementation date establishing the limits on administrative expenses and executive compensation will be July 1, 2013.

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

The Office of Victim Services has determined that changes made to the last published rule do not necessitate revision to the previously published Statement in Lieu of a Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement.

#### Assessment of Public Comment

A Notice of Revised Rule Making was published in the New York State Register on October 31, 2012.

The Office of Victim Services (OVS or Office) received several sets of comments during the public comment period associated with the revised rulemaking. The issues and concerns raised in these comments are set forth below. Issues and concerns have been grouped according to the part of the revised rule they address because they are related or for convenience in providing an efficient response. Because many of those who submitted comments addressed concerns that applied to all of the

participating State agencies that are implementing Executive Order No. 38, the responses to comments provided by each of those agencies are incorporated by reference into these responses. The OVS response is provided for each issue.

A number of comments objected generally to the underlying concept of the regulations, stating that the proposed regulation is overly broad in its authority and burdensome in its requirements. The OVS believes that the proposed limitations in the regulation further the legitimate goal of ensuring that public funds are properly expended and the use of such funds is properly monitored.

Clarification was requested concerning certain defined terms in the proposed regulation, in particular with respect to their intended scope. In response, and taking into account suggestions submitted, changes were made to the definitions of the following terms: administrative expenses, covered executive, covered provider, covered reporting period, executive compensation, program services expenses, reporting period, State-authorized payments and State funds.

Some of those who submitted comments stated that the proposed limits on administrative expenses were burdensome and unnecessary - because they would interfere with existing contracts, because they were possibly duplicative of existing state and federal rules, or because they will not enhance the protections already provided by restrictions from State reimbursement rates. Clarification was requested as to what will constitute administrative and program expenses. The proposed regulation has been further revised to clarify which administrative expenses are not included.

The definition of covered provider has been amended to address the individual or entity that has received State funds or State-authorized payments during the covered reporting period and the year prior to the covered reporting period. The definition of covered provider requires a contract or other agreement to render program services.

The regulation was not revised to alter the 75th percentile threshold because these revisions would compromise the goal of the regulation. Eliminating the executive compensation requirements would remove one of the key objectives of Executive Order No. 38: limiting the extent of such compensation paid by covered providers that rely to a significant degree upon public funds for their program and administrative services funding. These regulations provide a benchmark to ensure that State funds or State-authorized payments paid by this agency to providers are not used to support excessive compensation or unnecessary administrative costs.

Public comments tended to focus on executive compensation, stating the 75th percentile will drive salaries down as the outliers and reduce salaries in order to comply with the regulation. This implied the maximum salary permitted under the regulation would be depressed. In addition, the State agencies' authority to deny all waivers related to executive compensation calls into question the integrity and the reasonableness of the entire process of reviewing executive compensation. The goal of the proposed regulation is to ensure that taxpayer dollars are used to provide critical services to New Yorkers in need.

The effective dates of provisions in the proposed regulations have been revised to clarify: (a) covered reporting period; (b) submission of waiver applications regarding executive compensation; (c) submission of waiver applications regarding administrative expenses; and (d) reporting periods.

The full Assessment of Comments is available on the OVS website at <http://www.ovs.ny.gov>.