

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.

Office of Alcoholism and Substance Abuse Services

NOTICE OF ADOPTION

Repeal of Outdated Forms and Conforming Amendments

I.D. No. ASA-01-13-00004-A

Filing No. 243

Filing Date: 2013-03-05

Effective Date: 2013-03-20

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

Action taken: Repeal of Appendix 1; and amendment of section 15.1(c) of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 19.07(c), 19.09(b), 19.40, 32.02 and 32.07(a)

Subject: Repeal of outdated forms and conforming amendments.

Purpose: To eliminate antiquated and irrelevant forms.

Text or summary was published in the January 2, 2013 issue of the Register, I.D. No. ASA-01-13-00004-P.

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

Text of rule and any required statements and analyses may be obtained from: Sara Osborne, Senior Attorney, NYS Office of Alcoholism and Substance Abuse Services, 1450 Western Ave., Albany, NY 12203, (518) 485-2371, email: SaraOsborne@oasas.ny.gov

Assessment of Public Comment

The agency received no public comment.

Education Department

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Doctor of Acupuncture and Oriental Medicine (D.A.O.M.) Degree

I.D. No. EDU-12-13-00005-P

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

Proposed Action: Amendment of section 3.47(d)(2); and addition of section 3.50(b)(36) to Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 210 (not subdivided), 218(1), 224(4), 305(1) and (2)

Subject: Doctor of Acupuncture and Oriental Medicine (D.A.O.M.) Degree.

Purpose: To authorize the conferral in New York State of the degree of Doctor of Acupuncture and Oriental Medicine (D.A.O.M.).

Text of proposed rule: 1. Paragraph (2) of subdivision (d) of section 3.47 of the Rules of the Board of Regents is amended, effective June 5, 2013, as follows:

(2) Professional degrees. Graduate professional degree programs must be comprised of advanced studies in professional or vocational fields. While they may have strong theoretical underpinnings, they must have as their primary purpose knowledge for application in professional practice. Master's degree programs of this type are primarily terminal in nature. They may serve as preparation for advanced studies at the doctoral level, but they shall not be designed primarily for this purpose. The doctorate in such studies is likewise practical, insofar as it prepares the student to train or supervise others in the field, to discover new knowledge that has practical application in the field, or to prepare the student for a life of practice in the student's particular profession. Only the following degrees may be conferred upon the completion of a professionally oriented graduate program:

Bachelor of Divinity (B.D.)

Bachelor of Laws (LL.B.)

-----Engineer (-- -- E.)

Master of Architecture (M.Arch.)

Master of Arts in Teaching (M.A.T.)

Master of Business Administration (M.B.A.)

Master of Comparative Jurisprudence (M.C.J.)

Master of Comparative Law (M.C.L.)

Master of Divinity (M.Div.)

Master of Education (Ed.M. or M.Ed.)

Master of Engineering (M.E.)

Master of Fine Arts (M.F.A.)

Master of Food Science (M.F.S.)

Master of Forestry (M.F.)

Master of Health Administration (M.H.A.)

Master of Hebrew Literature (M.H.L.)

Master of Industrial and Labor Relations (M.I.L.R.)

Master of Industrial Design (M.I.D.)

Master of International Affairs (M.I.A.)

Master of Landscape Architecture (M.L.A.)

Master of Laws (LL.M.)

Master of Library Science (M.L.S.)

Master of Management in Hospitality (M.M.H.)

Master of Music (Mus.M.)
 Master of Nutritional Science (M.N.S.)
 Master of Physical Therapy (M.P.T.)
 Master of Professional Studies (M.P.S.)
 Master of Public Administration (M.P.A.)
 Master of Public Health (M.P.H.)
 Master of Regional Planning (M.R.P.)
 Master of Religious Education (M.R.E.)
 Master of Sacred Music (S.M.M.)
 Master of Sacred Theology (S.T.M.)
 Master of Science for Teachers (M.S.T.)
 Master of Science in Education (M.S. in Ed.)
 Master of Science in Pharmacy (M.S. in Pharm.)
 Master of Social Science (M.S.Sc.)
 Master of Social Work (M.S.W.)
 Master of Studies in Law (M.S.L.)
 Master of Theology (Th.M.)
 Master of Urban Planning (M.U.P.)
Doctor of Acupuncture and Oriental Medicine (D.A.O.M.)
 Doctor of Arts (D.A.)
 Doctor of Audiology (Au.D.)
 Doctor of Chiropractic (D.C.)
 Doctor of Dental Surgery (D.D.S.)
 Doctor of Education (Ed.D.)
 Doctor of Engineering (D.Eng.)
 Doctor of Engineering Science (Eng.Sc.D.)
 Doctor of Hebrew Literature (D.H.L.)
 Doctor of Juridical Science (S.J.D.)
 Doctor of Law (J.D.)
 Doctor of Library Science (L.S.D.)
 Doctor of Medical Science (Med. Sc.D.)
 Doctor of Medicine (M.D.)
 Doctor of Ministry (D.Min.)
 Doctor of Musical Arts (D.M.A.)
 Doctor of Nursing Practice (D.N.P.)
 Doctor of Nursing Science (D.N.S.)
 Doctor of Optometry (O.D.)
 Doctor of Osteopathic Medicine (D.O.)
 Doctor of Pharmacy (Pharm.D.)
 Doctor of Podiatric Medicine (D.P.M.)
 Doctor of Physical Therapy (D.P.T.)
 Doctor of Professional Studies (D.P.S.)
 Doctor of Psychology (Psy.D.)
 Doctor of Public Administration (D.P.A.)
 Doctor of Public Health (D.P.H.)
 Doctor of Religious Education (D.R.E.)
 Doctor of Sacred Music (S.M.D.)
 Doctor of Science in Veterinary Medicine (D.Sc. in V.M.)
 Doctor of Social Science (D.S.Sc.)
 Doctor of Social Welfare (D.S.W.)
 Doctor of the Science of Law (J.S.D.)
 Doctor of Theology (Th.D.)
 Doctor of Veterinary Medicine (D.V.M.)

2. Paragraph (36) of subdivision (b) of section 3.50 of the Rules of the Board of Regents is added, effective June 5, 2013, to read as follows:

(36) *Acupuncture:*

Doctor of Acupuncture and Oriental Medicine (D.A.O.M.)

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

Data, views or arguments may be submitted to: Office of the Professions, Office of the Deputy Commissioner, State Education Department, State Education Building 2M, 89 Washington Ave., Albany, NY 12234, (518) 474-1941, email: opdepcom@mail.nysed.gov

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

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

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

Subdivision (1) of section 218 of the Education Law prohibits an institution from conferring any degree not specifically authorized by its charter.

Subdivision (4) of section 224 of the Education Law provides that no diploma or degree shall be conferred in this State except by a regularly organized institution of learning meeting all requirements of the law and of The University of the State of New York, and prohibits an individual from appending to his or her name any letters in the same form registered by the Regents as signifying a degree unless that person has received such degree.

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

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

2. LEGISLATIVE OBJECTIVES:

The proposed amendment carries out the legislative intent of the aforementioned statutes that the Regents establish rules for carrying into effect the educational policies of the State by establishing a new degree title that may be conferred by authorized colleges and universities in New York State.

3. NEEDS AND BENEFITS:

The purpose of the proposed amendment is to authorize the conferral in New York State of the degree, Doctor of Acupuncture and Oriental Medicine (D.A.O.M.). The proposed amendment arose from a request to confer this degree by one of the institutions of higher education in New York.

The D.A.O.M. degree is recognized by the Accreditation Commission for Acupuncture and Oriental Medicine (ACAOM) and is an authorized degree in California, Washington, and Oregon. Adding this degree will benefit Acupuncture students and practitioners in New York by affording them the opportunity to earn a post professional doctoral level degree. The D.A.O.M. degree in New York will expand practitioners' access to higher level research and lifelong learning, which ultimately translates to better client care in the profession. Because the D.A.O.M. degree is a new degree in New York, it is necessary to amend sections 3.47 and 3.50 of the Rules of the Board of Regents related to requirements for earned degrees and registered degrees. The State Board for Acupuncture supports the authorization of this new degree title.

4. COSTS: The amendment simply adds a new degree option and imposes no costs on any parties.

(a) Costs to State government. These amendments will not impose any additional costs on State government.

(b) Costs to local government. None.

(c) Costs to private regulated parties. The proposed amendments will not impose any additional costs on private regulated parties.

(d) Costs to the regulatory agency. The proposed amendments will not impose additional costs on the State Education Department.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any program, service, duty, or responsibility on local governments.

6. PAPERWORK:

There are no new forms, reporting requirements, or additional record-keeping associated with the proposed amendment.

7. DUPLICATION:

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

8. ALTERNATIVES:

The amendment arose from the request of a New York college to confer the D.A.O.M. degree. The proposed amendments are permissive in nature and only apply to colleges and universities that want to confer D.A.O.M. degree. Because of the permissive nature of the proposed amendments, no alternatives were considered.

9. FEDERAL STANDARDS:

No Federal standards apply to the subject matter of this rule making. The Federal government does not regulate the titles of degrees which may be conferred by postsecondary institutions in New York State.

10. COMPLIANCE SCHEDULE:

If adopted at the May 2013 Regents meeting, the proposed amendment will be effective on June 5, 2013.

Regulatory Flexibility Analysis

The proposed amendment authorizes the conferral of a new degree, Doctor of Acupuncture and Oriental Medicine (D.A.O.M.). None of the institutions in New York State that may seek to confer this degree are small businesses.

The amendment will not affect small businesses or local governments in New York State. The measure will not impose any adverse economic impact, reporting, recordkeeping, or any other compliance requirements on small businesses or local governments. Because it is evident from the nature of the proposed amendment that it does not affect small businesses or local governments, no further steps were needed to ascertain that fact

and none were taken. Accordingly, a regulatory flexibility analysis is not required, and one was not prepared.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment will apply to colleges and universities authorized to award degrees in New York State, including such institutions located in the state's 44 rural counties with fewer than 200,000 inhabitants and 71 towns in urban counties with a population density of 150 per square mile or less. There are 271 degree-granting institutions in the State, including 64 campuses and community colleges in the State University of New York, 19 senior and community colleges of The City University of New York (CUNY), 148 independent colleges and universities, and 39 proprietary colleges. Excluding CUNY's 19 campuses leaves 252 degree-granting institutions, of which 62 (24.6 percent) are located in rural areas.

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

The proposed amendment authorizes the conferral in New York State of the degree, Doctor of Acupuncture and Oriental Medicine (D.A.O.M.). These amendments will not impose any reporting, recordkeeping, or other compliance requirements on degree-granting institutions. No professional services will be needed to comply with the proposed amendments.

3. COSTS:

The proposed amendment will not impose any costs on degree-granting institutions, including those located in rural areas.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment offers authorized New York colleges and universities the opportunity to confer a new degree title. The proposed amendment relates solely to degree titles and abbreviations. Because of the permissive nature of the proposed amendment, different standards or an exemption for rural areas were not necessary. The proposed amendment will have no adverse impact on public or private parties in rural areas.

5. RURAL AREA PARTICIPATION:

The State Board for Acupuncture, which includes representatives from rural areas of the State, supports the proposed amendment. In addition, all New York colleges and universities that offer registered programs in acupuncture, including those located in rural areas of the State, were asked to comment on the proposed amendment.

Job Impact Statement

The proposed amendment authorizes the conferral of a new degree, Doctor of Acupuncture and Oriental Medicine (D.A.O.M.). Because it is evident from the nature of the proposed amendment that it will have no impact on jobs and employment opportunities, no further steps were needed to ascertain these facts and none were taken. Accordingly, a job impact statement was not required, and one was not prepared.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Interpretation and Translation for Prescription Drugs, Standardized Labeling and Patient-Centered Data Elements for Medications

I.D. No. EDU-12-13-00014-P

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

Proposed Action: Addition of sections 63.11 and 63.12 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 6504 (not subdivided), 6507(2)(a), 6829(1), (6), (7) and 6830(1); and L. 2012, ch. 57, part V

Subject: Interpretation and translation for prescription drugs, standardized labeling and patient-centered data elements for medications.

Purpose: To implement sections 6829 and 6830 of the Education Law, as added by part V of chapter 57 of the Laws of 2012.

Text of proposed rule: Pursuant to sections 207, 6504, 6507, 6829 and 6830 of the Education Law Sections 63.11 and 63.12 of the Regulations of the Commissioner of Education are added, effective July 3, 2013, to read as follows:

§ 63.11 *Interpretation and translation requirements for prescription drugs.*

(a) *Definitions. As used in this section:*

(1) *Covered pharmacy shall mean any pharmacy that is part of a group of eight or more pharmacies, located within New York State and owned by the same corporate entity.*

(2) *Corporate entity shall include related subsidiaries, affiliates, successors, or assignees doing business as or operating under a common name or trading symbol of the covered pharmacy.*

(3) *Limited English proficient individual or LEP individual shall mean an individual who identifies as being, or is evidently, unable to speak, read or write English at a level that permits such individual to understand health-related and pharmaceutical information communicated in English.*

(4) *Translation shall mean the conversion of a written text from one language into an equivalent written text in another language by an individual competent to do so and utilizing all necessary pharmaceutical and health-related terminology. Such translation may occur, where appropriate, in a separate document provided to an LEP individual that accompanies his or her medication.*

(5) *Competent oral interpretation shall mean an oral communication in which a person acting as an interpreter comprehends a message and re-expresses that message accurately in another language, utilizing all necessary pharmaceutical and health-related terminology, so as to enable an LEP individual to receive all necessary information in the LEP individual's preferred pharmacy primary language.*

(6) *Pharmacy primary languages shall mean those languages, up to a maximum of seven languages other than English, spoken by one percent or more of the population of the State, as determined by the U.S. Census. If more than seven languages other than English are spoken by one percent or more of the population, the pharmacy primary languages shall be limited to seven most spoken languages, as determined by the U.S. Census.*

(b) *Provision of competent oral interpretation services and translation services. Except as otherwise provided in subdivision (e) of this section:*

(1) *For purposes of counseling an individual about his or her prescription medications or when soliciting information necessary to maintain a patient medication profile, each covered pharmacy shall provide free, competent oral interpretation services and translation services in such individual's preferred pharmacy primary language to each LEP individual requesting such services or when filling a prescription that indicates that the individual is limited English proficient at such covered pharmacy, unless the LEP individual is offered and refuses such services.*

(2) *With respect to prescription medication labels, warning labels and other written materials, each covered pharmacy shall provide free, competent oral interpretation services and translation services to each LEP individual filling a prescription at such covered pharmacy in such individual's preferred pharmacy language, unless the LEP individual is offered and refuses such services or the medication labels, warning labels and other written materials have already been translated into the language spoken by the LEP individual.*

(3) *Translation and competent oral interpretation shall be provided in the preferred pharmacy primary language of each LEP individual, provided that no covered pharmacy shall be required to provide translation or competent oral interpretation of more than seven languages.*

(4) *The services required by this subdivision may be provided by a staff member of the pharmacy or a third-party contractor. Such services shall be provided on an immediate basis but need not be provided in-person or face-to-face.*

(c) *Notification relating to language assistance services. Except as otherwise provided in subdivision (e) of this section:*

(1) *In accordance with Education Law section 6829(3), each covered pharmacy shall conspicuously post a notice to inform LEP individuals of their rights to free, competent oral interpretation services and translation services. Such notice shall include the following statement in English and in each of the pharmacy primary languages: "Point to your language. Language assistance will be provided at no cost to you."*

(2) *The statement in each of the pharmacy primary languages shall be in 20 point bold face, Arial type in a color that sharply contrasts with the background color of the sign. Each such statement shall be enclosed in a box, and there shall be at least a 1/4 inch clear space between adjacent boxes.*

(3) *The statements in each of the pharmacy primary languages shall be printed on one sign that shall be conspicuously displayed at or adjacent to each counter where prescription drug orders are dropped off and where prescriptions are picked up, and near every cash register at which payment is received for prescription drugs. Such signs shall be positioned so that a consumer can easily point to the statement identifying the language in which such person is requesting assistance.*

(d) *Waivers. An application for a waiver of the provisions of subdivisions (b) and (c) of this section shall be made on a form prescribed by the department. The burden of substantiating the validity of a request for a waiver shall be on the applicant.*

(1) *Each application shall be specific to a registered covered pharmacy, regardless of common ownership.*

(2) *The applicant shall clearly document the financial or physical constraints, threat to other services provided, or other circumstances upon which the request is based.*

(3) *No waiver shall be granted in the absence of a showing that*

implementation of the provisions of subdivisions (b) and (c) of this section would be unnecessarily burdensome when compared to the need for the translation and competent oral interpretation services.

(4) The applicant shall identify alternative sources of competent oral interpretation services or translation services available for LEP individuals within a reasonable distance.

(5) In the event a request for waiver is approved, the pharmacy shall post a notice in the pharmacy primary languages informing LEP individuals of alternative sources.

(6) The duration of a waiver shall be one year and may be renewed upon approval of a new waiver application by the department.

(e) In accordance with Part V of Chapter 57 of the Laws of 2012, the provisions of this section shall preempt any contrary local law or ordinance; provided, however, that cities with a population of 100,000 or more may retain or promulgate such local laws or ordinances imposing additional or stricter requirements relating to interpretation services or translation services in pharmacies. Nothing in this section shall diminish or impair any requirement that any pharmacy or pharmacist provide any language assistance, interpretation, or translation under any applicable federal or state law, local law or ordinance (unless preempted by this section), consent decree, or judicial settlement, judgment or order.

§ 63.12 Standardized patient-centered data elements to be used on all drug labels. In accordance with section 6830 of the Education Law, all prescription medicine dispensed to patients in this State must include standardized patient-centered data elements as prescribed by in this section

(a) Definitions. As used in this section:

(1) Critical elements shall consist of:

(i) patient name;

(ii) directions for use by the patient, which directions shall be structured in full sentences; and

(iii) drug name and strength.

(2) Important elements shall consist of:

(i) name, address and telephone number of the pharmacy;

(ii) patient's address;

(iii) name of prescriber;

(iv) the date of filling or refilling of the prescription; and

(v) the prescription number or other identifying number assigned to the prescription.

(b) All prescription drug labels shall contain all of the critical elements and all of the important elements.

(1) Critical elements of each prescription label shall be:

(i) emphasized by being highlighted in color, in bold type, or both: and

(ii) printed in a minimum of a 12-point font.

(2) Important elements of each prescription label and any other information contained on the label shall not be highlighted in color or in bold type, shall be legible and shall not be presented in a fashion that undermines the emphasis on the critical elements.

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

Data, views or arguments may be submitted to: Office of the Professions, Office of the Deputy Commissioner, State Education Department, State Education Building 2M, 89 Washington Ave., Albany, NY 12234, (518) 474-1941, email: opdepcom@mail.nysed.gov

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

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

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

Subdivisions (1)(e), (6), and (7) of section 6829 of the Education Law, as added by section 3 of Part V of Chapter 57 of the Laws of 2012, requires all covered pharmacies that are part of a group of eight or more pharmacies to provide competent oral interpretation and translation services to persons of Limited English Proficiency (LEP) and requires that pharmacies provide these services in those languages spoken by 1% or more of the population in a given region, as defined by the Commissioner.

Subdivision (1) of section 6830 of the Education Law, as added by section 4 of Part V of Chapter 57 of the Laws of 2012, requires the Commissioner to promulgate regulations requiring standardized patient-centered

data elements to be used on all prescription medicine dispensed in New York State.

2. LEGISLATIVE OBJECTIVES:

The proposed amendments implement Part V of Chapter 57 of the Laws of 2012, which requires all pharmacies that are within a which requires all covered pharmacies that are part of a group of eight or more pharmacies to provide competent oral interpretation and translation services to persons of Limited English Proficiency (LEP). Pharmacies must provide these services in those languages spoken by 1% or more of the population in a given region, as defined by the Education Department. The proposed regulations define the State as one region, thereby requiring LEP services throughout the State in four languages other than English, those being Chinese, Italian, Russian and Spanish. The proposed regulations also establish a process for covered pharmacies to seek a waiver of the interpretation and translation requirements.

The proposed regulations also fulfill the legislative direction to define the elements of patient-centered labels that will be required for all prescriptions filled in New York State.

3. NEEDS AND BENEFITS:

The 2012 New York State budget legislation included amendments to the Education Law, which amendments are commonly referred to as the SafeRx Law (L. 2012, c. 57, Part V). This new law, which becomes effective March 30 2013, includes provisions to assist Limited English Proficient (LEP) individuals who need interpretation and translation services when filling prescriptions at pharmacies. The law also requires the Commissioner of Education to develop rules and regulations to provide more patient-friendly prescription labels for all patients.

Over the course of the months following passage of this legislation the Office of the Professions sought input from interested stakeholders. In addition to receiving written comments, there were three opportunities for oral presentations, one each in Buffalo, Albany and New York City. This input, and advice from the State Board of Pharmacy, assisted in the development of the proposed regulations.

Section 6829 of the Education Law, as added by section 3 of Part V of Chapter 57 of the Laws of 2012, includes the following provisions:

- The legislation applies to covered pharmacies, which the legislation defines as a pharmacy that is part of a group of eight or eight or more pharmacies, located within New York State and owned by the same corporate entity.

- Covered pharmacies are required to provide interpretation and translation services to LEP individuals in their preferred pharmacy primary language, free of charge.

- The legislation defines the preferred pharmacy primary languages as those that are spoken by 1% or more of the population, as determined by the U.S. Census, for each region, as established by the Department, provided that no pharmacy need provide services in more than seven languages.

- Interpretation and translation services may be provided by pharmacy staff or third-party contractors.

- Pharmacies will not be liable for injuries resulting from the actions of a third party as long as the pharmacy entered into the contract reasonably and in good faith.

- Every covered pharmacy must conspicuously display a notice, in the pharmacy primary languages, notifying patients of the available interpretation and translation services.

- The legislation requires the Department to develop a process whereby a covered pharmacy may seek a waiver from these requirements if it can demonstrate that implementation is unnecessarily burdensome when compared to the need for services.

- The legislation also requires the Commissioner, in consultation with the Department of Health, to establish translation and interpretation requirements for mail-order pharmacies; such requirements will be effective March 30, 2014. The Department anticipates that it will come before the Regents with these regulations sometime early next year.

As noted above, the law delegated to the Department the responsibility of establishing the regions to be used in determining the languages in which translation and interpretation services must be provided. The Board of Pharmacy and Department staff considered a number of options, such as dividing the State into 6-8 regions, dividing the State into an upstate and a downstate region only, dividing the State on a county-by-county basis, and considering the State in its entirety as one region. After discussions with stakeholders representing both covered pharmacies and LEP individuals, it was determined that the last option was preferred because it provided services to a large portion of the LEP population in an efficient and cost-effective manner. Establishing the State as a single region will result in four pharmacy primary languages statewide – Chinese, Italian, Russian and Spanish. This approach will expedite the adoption of standardized interpretation and translation services by covered pharmacies and will provide for more languages to be covered in nearly all upstate communities than other options.

It should be noted that New York City has a local law regarding the provision of language assistance, interpretation, and translation services to LEP individuals. Both the enacting statute and the proposed regulations contain provisions that make it clear that neither the new law nor the regulations promulgated to implement it will diminish requirements existing pursuant to this New York City law.

Additionally, in the course of the development of the proposed regulations, the Civil Rights Bureau of the State Attorney General's Office provided information concerning settlement agreements it has with seven large retail pharmacy chains pursuant to which those chains have been providing language assistance, interpretation, and translation services in approximately 10 different languages to LEP individuals throughout the state. While all but one of those agreements will be expiring in 2013, there is nothing in the law or the proposed regulation that would prohibit any pharmacy from providing language assistance, interpretation, and translation services in additional languages.

Education Law § 6830, as added by section 4 of Part V of Chapter 57 of the Laws of 2012, requires the Commissioner to develop regulations requiring the use of standardized patient-centered data elements on all prescription medication labels. It also requires the Commissioner to obtain input from its Boards of Pharmacy and Medicine, consumer groups, advocates for special populations, pharmacists physicians, other health care professionals authorized to prescribe, and other interested parties, in the development of patient-centered prescription labels. Such labeling is intended to increase patient understanding and compliance with medication regimens.

Regarding patient-centered labeling, the Boards of Pharmacy and Medicine relied, in part, on previous studies conducted by the United States Pharmacopeia and by the National Association of Boards of Pharmacy. Based on these studies, the proposed amendment requires that prescription labels must have certain, critical elements, including patient name, the drug name and directions, that must be bolded and/or highlighted and be in at least 12-point font. The proposed regulation also requires that directions for patient use be written in full sentences. Other important information must also be included on the label, including among other things, the patient's address, the pharmacy address and the name of the prescriber, but the manner in which such information is included on the label must not detract from the critical elements.

4. COSTS:

- (a) There are no additional costs to state under the statute.
- (b) There are no additional costs to local government.
- (c) Cost to private regulated parties. The proposed amendments do not impose any additional costs on regulated parties beyond those required under the statute.
- (d) There are no additional costs to the regulating agency.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any programs, service, duty, or responsibility upon local governments.

6. PAPERWORK:

The proposed amendment does not impose any new paperwork or reporting requirements beyond those required by statute.

7. DUPLICATION:

The proposed amendment does not duplicate other existing state or federal requirements.

8. ALTERNATIVES:

See Needs and Benefits section, above.

9. FEDERAL STANDARDS:

Federal standards do not apply, nor does the proposal exceed federal standards.

10. COMPLIANCE SCHEDULE:

The proposed amendment becomes effective on March 30, 2013, which is the effective date of the relevant portions of the new law. Covered pharmacies and registered pharmacists must comply with the proposed amendment on its stated effective date.

Regulatory Flexibility Analysis

(a) Small Businesses:

1. **EFFECT OF THE RULE:** This rule will affect all pharmacies registered by the State Education Department. The State Education Department estimates that of the 5,044 registered pharmacies in New York State, approximately 2,506 are small businesses.

2. **COMPLIANCE REQUIREMENTS:** There are no compliance requirements beyond those imposed by Part V of Chapter 57 of the Laws of 2012.

The 2012 New York State budget legislation included amendments to the Education Law, which amendments are commonly referred to as the SafeRx Law (L. 2012, c. 57, Part V). This new law, which becomes effective March 30 2013, includes provisions to assist Limited English Proficient (LEP) individuals who need interpretation and translation services when filling prescriptions at pharmacies. The law also requires the Commissioner of Education to develop rules and regulations to provide more patient-friendly prescription labels for all patients.

Over the course of the months following passage of this legislation the Office of the Professions sought input from interested stakeholders. In addition to receiving written comments, there were three opportunities for oral presentations, one each in Buffalo, Albany and New York City. This input, and advice from the State Board of Pharmacy, assisted in the development of the proposed regulations.

Section 6829 of the Education Law, as added by section 3 of Part V of Chapter 57 of the Laws of 2012, includes the following provisions:

- The legislation applies to covered pharmacies, which the legislation defines as a pharmacy that is part of a group of eight or more pharmacies, located within New York State and owned by the same corporate entity.
- Covered pharmacies are required to provide interpretation and translation services to LEP individuals in their preferred pharmacy primary language, free of charge.
- The legislation defines the preferred pharmacy primary languages as those that are spoken by 1% or more of the population, as determined by the U.S. Census, for each region, as established by the Department, provided that no pharmacy need provide services in more than seven languages.
- Interpretation and translation services may be provided by pharmacy staff or third-party contractors.
- Pharmacies will not be liable for injuries resulting from the actions of a third party as long as the pharmacy entered into the contract reasonably and in good faith.
- Every covered pharmacy must conspicuously display a notice, in the pharmacy primary languages, notifying patients of the available interpretation and translation services.
- The legislation requires the Department to develop a process whereby a covered pharmacy may seek a waiver from these requirements if it can demonstrate that implementation is unnecessarily burdensome when compared to the need for services.
- The legislation also requires the Commissioner, in consultation with the Department of Health, to establish translation and interpretation requirements for mail-order pharmacies; such requirements will be effective March 30, 2014. The Department anticipates that it will come before the Regents with these regulations sometime early next year.

As noted above, the law delegated to the Department the responsibility of establishing the regions to be used in determining the languages in which translation and interpretation services must be provided. The Board of Pharmacy and Department staff considered a number of options, such as dividing the State into 6-8 regions, dividing the State into an upstate and a downstate region only, dividing the State on a county-by-county basis, and considering the State in its entirety as one region. After discussions with stakeholders representing both covered pharmacies and LEP individuals, it was determined that the last option was preferred because it provided services to a large portion of the LEP population in an efficient and cost-effective manner. Establishing the State as a single region will result in four pharmacy primary languages statewide – Chinese, Italian, Russian and Spanish. This approach will expedite the adoption of standardized interpretation and translation services by covered pharmacies and will provide for more languages to be covered in nearly all upstate communities than other options.

It should be noted that New York City has a local law regarding the provision of language assistance, interpretation, and translation services to LEP individuals. Both the enacting statute and the proposed regulations contain provisions that make it clear that neither the new law nor the regulations promulgated to implement it will diminish requirements existing pursuant to this New York City law.

Additionally, in the course of the development of the proposed regulations, the Civil Rights Bureau of the State Attorney General's Office provided information concerning settlement agreements it has with seven large retail pharmacy chains pursuant to which those chains have been providing language assistance, interpretation, and translation services in approximately 10 different languages to LEP individuals throughout the state. While all but one of those agreements will be expiring in 2013, there is nothing in the law or the proposed regulation that would prohibit any pharmacy from providing language assistance, interpretation, and translation services in additional languages.

Education Law § 6830, as added by section 4 of Part V of Chapter 57 of the Laws of 2012, requires the Commissioner to develop regulations requiring the use of standardized patient-centered data elements on all prescription medication labels. It also requires the Commissioner to obtain input from its Boards of Pharmacy and Medicine, consumer groups, advocates for special populations, pharmacists physicians, other health care professionals authorized to prescribe, and other interested parties, in the development of patient-centered prescription labels. Such labeling is intended to increase patient understanding and compliance with medication regimens.

Regarding patient-centered labeling, the Boards of Pharmacy and

Medicine relied, in part, on previous studies conducted by the United States Pharmacopeia and by the National Association of Boards of Pharmacy. Based on these studies, the proposed amendment requires that prescription labels must have certain, critical elements, including patient name, the drug name and directions, that must be bolded and/or highlighted and be in at least 12-point font. The proposed regulation also requires that directions for patient use be written in full sentences. Other important information must also be included on the label, including among other things, the patient's address, the pharmacy address and the name of the prescriber, but the manner in which such information is included on the label must not detract from the critical elements.

3. **PROFESSIONAL SERVICES:** The proposed amendment will not require pharmacies to obtain professional services in order to comply, beyond those services required by the statute.

4. **COMPLIANCE COSTS:** The proposed amendment will not impose any additional costs on pharmacies beyond those imposed by Part V of Chapter 57 of the Laws of 2012.

5. **ECONOMIC AND TECHNOLOGICAL FEASIBILITY:** The proposed amendment does not impose any additional technological requirements on small businesses.

6. **MINIMIZING ADVERSE IMPACT:** See Compliance section, above. I

7. **SMALL BUSINESS PARTICIPATION:** Comments on the proposed regulations were solicited from the Department of Health, statewide organizations representing parties having an interest in providing services to persons of Limited English Proficiency and stakeholders in providing more clear direction to patients regarding their medication regimens. Included in this group were representatives of the State Boards of Pharmacy, Medicine, Nursing, Dentistry, Podiatry, and Midwifery, and professional associations representing the pharmacy profession, such as the Pharmacists Society of the State of New York and the New York State Council of Health System Pharmacists and the New York Chain Pharmacy Association. These groups have representation from small businesses.

(b) Local Governments:

The proposed amendment implements the provisions of Part V of Chapter 57 of the Laws of 2012, which requires all covered pharmacies that are part of a group of eight or more pharmacies to provide competent oral interpretation and translation services to persons of Limited English Proficiency (LEP). Pharmacies must provide these services in those languages spoken by 1% or more of the population in a given region, as defined by the Education Department. The proposed regulations define the State as one region, thereby requiring LEP services in four languages other than English, those being Chinese, Italian, Russian and Spanish. The proposed regulations also define the elements of patient-centered labels that will be required for all prescriptions filled in New York State. Because it is evident from the nature of the proposed amendment that it does not affect local governments, no regulatory flexibility analysis for local governments has been prepared.

Rural Area Flexibility Analysis

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

The regulations will apply to 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. Of the 24,162 pharmacists registered by the State Education Department, 2,971 pharmacists report their permanent address of record is in a rural county. Likewise, of the 5,044 registered pharmacies in New York State, 782 are located in rural counties.

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

The proposed amendment implements the provisions of Part V of Chapter 57 of the Laws of 2012, which requires all covered pharmacies that are part of a group of eight or more pharmacies to provide competent oral interpretation and translation services to persons of Limited English Proficiency (LEP). Pharmacies must provide these services in those languages spoken by 1% or more of the population in a given region, as defined by the Education Department. The proposed regulations define the State as one region, thereby requiring LEP services in four languages other than English, those being Chinese, Italian, Russian and Spanish. The proposed regulations also define the elements of patient-centered labels that will be required for all prescriptions filled in New York State.

3. **COSTS:**

The proposed amendments do not impose any additional costs on regulated parties beyond those required under the statute.

4. **MINIMIZING ADVERSE IMPACT:**

In developing the proposed amendments, the Department obtained input from representatives of the professions of nursing, medicine, podiatry, midwifery and dentistry. In addition, it held public hearings in Buffalo, Albany, and New York City. More than 20 public advocacy groups and representatives of the retail pharmacy chains have commented on the proposals. Further discussions were then held with representatives of the advocacy groups and of the retail pharmacy chains. The concerns of those

commenting on the proposals were taken into account in modifying the original proposal, and the proposal represented in the proposed regulations was acceptable to both the advocacy groups and the chain retail pharmacies. The proposals make no exception for individuals who live in rural areas, as the legislation did not permit such an exception.

5. **RURAL AREAS PARTICIPATION:**

Comments on the proposed regulations were solicited from the Department of Health, statewide organizations representing parties having an interest in providing services to persons of Limited English Proficiency and stakeholders in providing more clear direction to patients regarding their medication regimens. Included in this group were representatives of the State Boards of Pharmacy, Medicine, Nursing, Dentistry, Podiatry, and Midwifery, and professional associations representing the pharmacy profession, such as the Pharmacists Society of the State of New York and the New York State Council of Health System Pharmacists and the New York Chain Pharmacy Association. These groups have representation from rural areas.

Job Impact Statement

The proposed amendment implements the provisions of Part V of Chapter 57 of the Laws of 2012, which becomes effective March 30 2013 and includes provisions requiring certain large pharmacy chains to provide competent oral interpretation and translation services to persons of Limited English Proficiency when filling prescriptions in such individual's preferred pharmacy language, as defined by the Commissioner in regulations. The law also requires the Commissioner of Education to develop rules and regulations to provide more patient-friendly prescription labels for all patients. The proposed amendment implements these provisions.

Because it is evident from the nature of the proposed amendments that they will not affect job and employment opportunities, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Department of Environmental Conservation

NOTICE OF EXPIRATION

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

High Volume Hydraulic Fracturing

I.D. No.	Proposed	Expiration Date
ENV-39-11-00020-RP	September 28, 2011	February 27, 2013

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

New York State Falconry Regulations

I.D. No. ENV-12-13-00006-P

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

Proposed Action: Amendment of Part 173 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 11-1001, 11-1003, 11-1007 and 11-1009

Subject: New York State Falconry Regulations.

Purpose: To implement changes to New York State's falconry regulations.

Substance of proposed rule (Full text is posted at the following State website: www.dec.ny.gov):

The purpose of this rulemaking is to amend the Department of Environmental Conservation's (department) general regulations governing the sport of falconry (6 NYCRR Part 173). These changes are necessary to bring the New York State regulations in compliance with the changes to the Federal regulations governing the sport of falconry which became effective in 2008. Changes were also made in 2012 to Environmental Conservation Law § 11-1003, Falconry License, changing the fee and term of falconry licenses.

The following is a summary of amendments that the department is proposing:

173.1 Definitions

- The following definitions are to be added to the regulation: Abate-

ment, Conservation Education, Hacking, Hybrid, Imping and Native. The definition of Raptor will be removed and this section will now reference the statutory definition of raptor found in ECL 11-1001.

173.2 Falconry License

- The term for a falconry license is now 5 years and the fee for a license is 40 dollars as changed in ECL 11-1001 in April of 2012.

- Applications for an Apprentice Falconry license will now require a parent or guardian signature for applicants under the age of 18.

- In order for an Apprentice to qualify for the General falconry license they must have been licensed at the Apprentice falconer level for a minimum of 2 years and have possessed, trained, maintained and flown the raptor(s) for at least 4 months in each year.

- General falconers may now possess up to three raptors at any one time (previously limited to 2) and must have at least two years of experience in the practice of falconry as a licensed general falconer before they can sponsor an apprentice.

- Master falconers - may now possess up to 13 raptors (previously could only possess 5). They will be limited to possession of only 5 raptors taken from the wild at any given time and may possess up to three white-tailed eagles or Steller's sea eagles. They must be approved by the department and the Falconry Advisory Board prior to possessing an eagle for falconry.

- As per federal allowance, a license can be re-instated if it has lapsed for less than 5 years. If lapsed more than 5 years then the falconer must go through all the steps of becoming licensed including taking a falconry exam.

173.3 Acquisition of Raptors

- The requirement of submitting a raptor capture authorization form and receiving the department's approval prior to taking a raptor from the wild during the authorized take seasons is removed. The falconry license now provides the authority for take provided the falconer is authorized to take the species of raptor, is within their limit for take of raptors from the wild for that calendar year and reports the bird as required by regulation.

- The federal restriction limiting the number of days to 180 for take of raptors from the wild has been lifted. As a result, we are expanding the seasons for take of raptors from the wild in New York State as follows: Passage capture season in NYS is to be extended through the end of January (previously ended on January 25) and would now go from September 1 through January 31 inclusive. The eyas capture season, which previously was limited to Fridays, Saturdays and Sundays from May 1 to July 15 would now run from May 1 to July 31 inclusive and would also be extended for the capture of nestling great horned owls from February 1 to July 31 inclusive in order to allow falconers the opportunity to trap nestling great horned owls during the time period when they are still in the nest.

- The new regulations clearly define a falconer's responsibility for reporting the take of a wild raptor in various situations. A falconer who will be receiving a wild caught raptor who is present at the capture site where the raptor is taken from the wild is considered the person who removes the bird from the wild even if another individual captures the bird. The falconer receiving the bird from the person who captured the bird is responsible for reporting the take of the bird and the bird will count as one of the raptors the falconer receiving he bird is allowed to capture in that year.

- A falconer who will be receiving a wild caught raptor but is not at the capture site where a raptor is taken from the wild is not considered the person who removes it from the wild. The person who captures the raptor from the wild must be a General or Master falconer and is responsible for reporting the take of the bird. The bird will count as one of the raptors that the person who captured the bird from the wild is allowed to take that year. An exception has been made for a falconer who has a long term or permanent physical impairment that prevents him or her from attending the capture of a raptor from the wild. In this case, the falconer with the impairment may have another licensed General or Master falconer capture the bird for them. The falconer who is unable to attend the capture is responsible for reporting the take of the bird and the bird will count as one of the birds he or she is allowed to take from the wild that year.

173.4 Possession of Raptors

- No changes are proposed for this Section

173.5 Hunting with Raptors

- The only change to this section is that all hybrid raptors must have at least two radio transmitters attached to them when free flown for falconry.

173.6 Care of Raptors

- The only change to this section is to require that a falconer provide pan of clean water for each raptor in their care.

173.7 Disposition of Raptors

- Falconers are now required to report the take, acquisition, transfer, re-banding, microchipping, release, death, loss or theft of a raptor through the USFWS website and electronically record these transactions. For falconers who are unable to record these transactions electronically, they must submit a paper copy of the USFWS 3-186A form to the department. The department must then ensure that the data gets entered electronically through the USFWS web page.

- The authority of the falconry license has been expanded to allow for limited propagation and limited public education using falconry birds held under the authority of a falconry license and assisting wildlife rehabilitators in the care and evaluation of recovering raptors.

- A falconer may use a raptor held under a falconry license for captive propagation without transferring the bird from their falconry license provided the bird is used for fewer than 8 months in captive propagation and the falconer has a federal license authorizing the propagation of the raptor.

- A General or Master falconer may use raptors held under their falconry license for conservation education programs provided that the raptors are used primarily for falconry and the programs address falconry and conservation education. The programs cannot be conducted for profit, however, a falconer may charge a fee for the presentation provided the fee does not exceed the cost required to recoup the cost of presenting the program.

- A General or master falconer may assist a licensed wildlife rehabilitator to condition and/or evaluate raptors in preparation for release to the wild. The falconer may keep the bird they are helping to rehabilitate at the falconer's facilities provided: the rehabilitator provides the falconer with a written letter that identifies the bird and explains that the falconer is assisting the rehabilitator; the falconer returns any such bird that cannot be permanently released to the rehabilitator; the falconer, upon coordination with the rehabilitator, releases the bird to the wild or returns it to the rehabilitator. The falconer who is assisting a rehabilitator to condition raptors does not have to add the bird to their falconry license.

- A General or Master falconer may obtain a first year raptor of a species that he or she is authorized to possess directly from a licensed wildlife rehabilitator. A raptor acquired from a rehabilitator will count as one of the birds the falconer is allowed to take from the wild that year.

173.8 Marking of Raptors

- Captive bred raptors may now have an International Organization for Standardization (ISO) compliant (134.2 kHz) microchip implanted within them or seamless metal band.

- Wild caught Northern goshawks are now required to be banded with either a permanent, non-reusable USFWS leg band or have an implanted (ISO) compliant (134.2 kHz) microchip. The previous requirements for banding of all wild caught peregrine falcons, gyrfalcons and Harris's hawks is still required except the species may now have an implanted ISO compliant (134.2 kHz) microchip.

- If a band must be removed from a captive bred raptor or if the band is lost, the falconer must, within ten days from the day he or she removes the seamless band or note the loss of the band, report it and either request a replacement USFWS non-reusable leg band from the department to replace the lost or removed band or, implant an ISO compliant (134.2kHz) microchip in the bird.

- If a band must be removed from a wild raptor, the falconer must, within five days from the day the band is removed or loss is noted, report it and either request a replacement USFWS non-reusable leg band from the department to replace the lost or removed band or, implant an ISO compliant (134.2kHz) microchip in the bird.

- Upon re-banding or microchipping a raptor, the falconer must immediately enter the required information in the USFWS electronic database at <http://permits.fws.gov/186A> or submit a paper Federal form 3-186A to the department.

173.9 Abatement

- A new section outlining the requirements for abatement is proposed to be added to the regulation.

- Master falconers would be authorized to use raptors held under the authority of their falconry license for abatement purposes.

- The Master falconer would be required to have a Federal Abatement permit prior to conducting these activities.

- Only captive bred raptors could be used for abatement activities.
- Migratory birds shall not be killed, captured or injured during the course of abatement activities unless such take is authorized by a Federal Depredation permit in which the falconer is identified as a subpermittee or under a Federal Depredation Order.

- The falconer is required to submit a copy of their Federal Abatement permit to the department and to maintain accurate records of abatement activities on a calendar-year basis.

173.10 Exception

- No changes are proposed for this Section

Text of proposed rule and any required statements and analyses may be obtained from: Joseph Therrien, New York State Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-4752, (518) 402-8985, email: jetherri@gw.dec.state.ny.us

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

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

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

Regulatory Impact Statement

1. Statutory authority:

Section 11-1007 of the Environmental Conservation Law (ECL) directs the Department of Environmental Conservation (department) to promulgate rules and regulations pertaining to the issuance and use of falconry licenses giving due consideration to the recommendations of the Falconry Advisory Board, established by section 11-1005. Concurrently, Sections 11-1001, 11-1003, 11-1007 and 11-1009 provide additional definitions, license terms and prohibitions governing the sport of falconry.

2. Legislative objectives:

The legislative objective of the statutory provisions listed above is to establish, or authorize the department to establish by regulation, a license program authorizing the possession, training and use of raptors for falconry including setting seasons for the take of raptors from the wild, setting possession limits on the number of raptors authorized to be held, and establish the methods, requirements and prohibitions for flying raptors in New York State.

3. Needs and benefits:

The purpose of this rule making is to repeal the existing 6 NYCRR Part 173 in its entirety and a new Part 173 is proposed. This extensive revision is necessary because numerous changes were made to the federal regulations which govern the sport of falconry, specifically, 50 CFR 21.29, 21.31 and 22.2 by the U.S. Fish and Wildlife Service (USFWS) which is the lead agency for migratory birds. These federal changes require that all states conform with the new federal falconry regulations by January 2014. If a state does not comply by that time then falconry will not be allowed in that state.

Changes were also made to ECL Section 11-1003 in April of 2012 which affect falconry licenses in New York State. These changes made portions of the existing regulations obsolete or in direct conflict with the new regulations and statutes. Briefly, these changes provide regulatory relief for people who engage in falconry while at the same time ensuring the welfare of wild and captive-bred raptors.

The proposed rule would extend the license term from two years to five years and reduce the fees associated with obtaining a falconry license. The rule would also substantially reduce the paperwork and form submissions currently required of falconers

The proposed rule would increase the number of raptors that general and master falconers are authorized to possess and authorize master falconers to possess Steller's sea eagles and white-tailed eagles for falconry and establish the requirements for obtaining and flying these species.

The proposed rule would increase the number of days for take of raptors from the wild for falconry, allow licensed falconers to use birds held under their falconry licenses for education, propagation, abatement activities and to assist wildlife rehabilitators in the care and conditioning of raptors prior to release.

The proposed rule clarifies the authorized activities using raptors and provides further clarity and distinction between wild caught and captive bred raptors including hybrids as to possession, transfer, sale, release and banding and telemetry requirements.

The proposed rule removes the requirement for submission and pre-approval of raptor capture authorization forms, and eliminates or reduces the previously required paper submission for all activities involving a raptor, i.e., capture, release, escape and death, and replaces the forms with electronic submission of this information.

4. Costs:

There are no costs to the department or local governments. Licensees will realize a cost savings from the decrease in license fees as well as time and costs savings associated with the decrease in paperwork requirements.

5. Local government mandates:

These amendments will not impose any programs, services, duties or responsibilities upon any county, city, town, village, school district or fire district.

6. Paperwork:

The proposed rule does not require any additional paperwork by any regulated entity. The rule will reduce the amount of paperwork and frequency of paperwork submission.

7. Duplication:

Federal regulations in 50 CFR 21.29, 21.31 and 22.24 govern the sport of falconry in the United States. The federal regulations require that states promulgate their own regulations authorizing the sport of falconry in their jurisdictions. All aspects of the falconry program including testing, licensing and inspection are the responsibilities of the individual states. Currently, falconers are required to possess both a state and federal falconry license. Once the proposed rule is adopted and subsequently accepted by the USFWS, falconers will no longer need to obtain a federal falconry license and instead will need only obtain a state license.

8. Alternatives:

The New York State Legislature has amended the falconry statutes changing the terms and fees for a falconry license and the USFWS had amended the federal falconry standards. The department met with the falconry advisory board several times to go over the proposed changes and have incorporated their input into the proposed rule. In order to maintain falconry in NYS we have to amend our current regulations to bring them into compliance with both our state statutes and federal regulations.

9. Federal standards:

The federal falconry standards appear in Title 50 of the Code of Federal Regulations Sections 21.29 and 22.24. The proposed rule does not exceed any minimum standards of the federal government.

10. Compliance schedule:

These regulations, if adopted, will become effective immediately. Once adopted, the federal falconry license will no longer be required as of the following January 2014. Compliance with the regulations will be in the form of an amended state license which will be an agency action. No additional steps will be required of the regulated community in order to come into compliance with the proposed regulations.

Regulatory Flexibility Analysis

The purpose of this rule making is to amend the New York State falconry regulations in order to implement the provisions of the new Federal falconry regulations (Code of Federal Regulations Parts 21.29 and 22.24) and to incorporate recent changes in New York State's falconry statutes (Environmental Conservation Law section 11-1003). Regulations pertaining to falconry must be updated to remain in compliance with the Federal falconry regulations. The proposed rule making will provide regulatory relief by decreasing license fees, increasing the license term and reducing the amount of paperwork currently required of licensees.

The department has determined that the proposed rule will not impose an adverse impact as far as additional reporting, recordkeeping, or other compliance requirements on small business or local governments. There will be no impacts to local governments. The regulation sets out procedures by which a license for falconry may be obtained, the manner of acquisition of raptors, hunting methods, and requirements for the care of raptors. Because raptors cannot be bought and sold, no small businesses can be involved. None therefore would be affected in any way by this new regulation.

Since the department's proposed rule making will not impose an adverse impact on businesses or local governments, including little effect on current reporting, recordkeeping or compliance requirements, the department has concluded that this proposed regulation does not require a Regulatory Flexibility Analysis.

Rural Area Flexibility Analysis

The purpose of this rule making is to amend the New York State falconry regulations in order to implement the provisions of the new Federal falconry regulations (Code of Federal Regulations Parts 21.29 and 22.24) and to incorporate recent changes in New York State's falconry statutes (Environmental Conservation Law section 11-1003). Regulations pertaining to falconry must be updated to remain in compliance with the Federal falconry regulations. The proposed rule making will provide regulatory relief by decreasing license fees, increasing the license term and reducing the amount of paperwork currently required of licensees.

The department has determined that the proposed rule will not impose an adverse impact as far as additional reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas. The regulation sets out procedures by which a license for falconry may be obtained, the manner of acquisition of raptors, hunting methods, and requirements for the care of raptors. The proposed regulation reduces the reporting requirements and increases the license term from 2 years to 5 years thereby reducing the frequency of license renewal and subsequent paperwork requirements.

Since the department's proposed rule making will not impose an adverse impact on public or private entities in rural areas, including little effect on current reporting, recordkeeping or compliance requirements, the department has concluded that this proposed regulation does not require a Rural Area Flexibility Analysis.

Job Impact Statement

The purpose of this rule making is to amend the New York State falconry regulations in order to implement the provisions of the new Federal falconry regulations (Code of Federal Regulations Parts 21.29 and 22.24) and to incorporate recent changes in the state's falconry statutes (Environmental Conservation Law section 11-1003). Regulations pertaining to falconry must be updated to remain in compliance with the Federal falconry regulations. The proposed rule making will provide regulatory relief by decreasing license fees, increasing the license term and reducing the amount of paperwork currently required of licensees.

Falconers purchase equipment and supplies for the raptors in their possession and maintain facilities for housing the birds. Although the

proposed rule making authorizes an increase in the number of raptors a falconer may hold at one time, any increased expenditures for equipment and supplies will have a negligible, though positive, effect on local business sales. The proposed rule making will not have a substantial adverse impact on jobs or employment opportunities. Moreover, this rule making is not expected to adversely affect the number of participants or frequency of participation in the regulated activities.

For these reasons, the department anticipates that the proposed regulatory changes will not have an adverse impact on jobs or employment opportunities in New York, and that a Job Impact Statement is not required.

Department of Financial Services

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Suitability in Annuity Transactions

I.D. No. DFS-12-13-00003-EP

Filing No. 239

Filing Date: 2013-03-04

Effective Date: 2013-03-04

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

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

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

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

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

As a result of a low interest rate environment, unsuitable annuities have been aggressively marketed to this state’s most vulnerable residents, particularly senior citizens. In New York alone, life insurance companies wrote \$17 billion in annuity premiums in 2009. The increased complexity of annuities, including the significant investment risk assumed by purchasers of some annuity products, requires the immediate adoption of this Part, which provides critical consumer protections in all annuity sales transactions.

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

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

Subject: Suitability in Annuity Transactions.

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

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

Section 224.0 Purpose.

The purpose of this Part is to require insurers to set forth standards and procedures for recommendations to consumers with respect to annuity contracts so that the insurance needs and financial objectives of consumers at the time of the transaction are appropriately addressed. These standards and procedures are substantially similar to the National Association of Insurance Commissioners’ Suitability in Annuity Transactions

Model Regulation (“NAIC Model”) for annuities, and the Financial Industry Regulatory Authority’s current National Association of Securities Dealers (“NASD”) Rule 2310 for securities. To date, more than 30 states have implemented the NAIC Model, while NASD Rule 2310 has applied nationwide for nearly 20 years. Accordingly, this Part intends to bring these national standards for annuity contract sales to New York.

Section 224.1 Applicability.

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

Section 224.2 Exemptions.

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

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

(b) a contract used to fund:

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

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

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

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

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

Section 224.3 Definitions.

For the purposes of this Part:

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

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

(c) Recommendation means advice provided by an insurance producer, or an insurer where no insurance producer is involved, to a consumer that results in a purchase or replacement of an annuity contract in accordance with that advice.

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

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

(1) age;

(2) annual income;

(3) financial situation and needs, including the financial resources used for the funding of the annuity;

(4) financial experience;

(5) financial objectives;

(6) intended use of the annuity;

(7) financial time horizon;

(8) existing assets, including investment and life insurance holdings;

(9) liquidity needs;

(10) liquid net worth;

(11) risk tolerance; and

(12) tax status.

Section 224.4 Duties of Insurers and Insurance Producers.

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

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

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

(3) the particular annuity contract as a whole, the underlying subaccounts to which funds are allocated at the time of purchase or replacement of the annuity contract, and riders and similar product enhance-

ments, if any, are suitable (and in the case of a replacement, the transaction as a whole is suitable) for the particular consumer based on the consumer's suitability information; and

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

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

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

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

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

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

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

(i) no recommendation is made;

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) filing a complaint with the superintendent; or

(3) cooperating with the investigation of a complaint.

Section 224.5 Insurer Responsibility.

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

Section 224.6 Recordkeeping.

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

Section 224.7 Violations.

A contravention of this Part shall be deemed to be an unfair method of

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

This notice is intended: to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire June 1, 2013.

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

Data, views or arguments may be submitted to: Michael Maffei, NYS Department of Financial Services, 25 Beaver Street, New York, NY 10004, (212) 480-5027, email: michael.maffei@dfs.ny.gov

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

Regulatory Impact Statement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

As a result of a low interest rate environment, unsuitable annuities have been aggressively marketed to this state's most vulnerable residents, particularly senior citizens. In New York alone, life insurance companies wrote \$17 billion in annuity premiums in 2009. The increased complexity of annuities, including the significant investment risk assumed by purchasers of some annuity products, requires the immediate adoption of this Part, which provides critical consumer protections in all annuity sales transactions. In fact, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Act") places such a high level of importance on state regulation of the suitability of annuities that, in an effort to provide incentives to states to adopt suitability requirements, the Act offers state agencies that promulgate suitability regulations federal grants of between \$100,000 to \$600,000 towards enhanced protection of seniors in connection with the sale and marketing of financial products.

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

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

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

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

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

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

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

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

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

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

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

10. Compliance schedule: The standards included in this rule were previously adopted on an emergency basis and have applied to any recommendation to purchase or replace an annuity contract made to a consumer on or after June 30, 2011 by an insurance producer or an insurer and therefore, insurance producers and insurers have been required to comply with the requirements of the rule since such time. Therefore, this rule will be implemented upon its permanent adoption.

Regulatory Flexibility Analysis

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

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

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

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

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

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

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

6. Minimizing adverse impact: There is little if no adverse economic impact on small businesses. The compliance, documentation and record-keeping requirements of this rule should have little impact on small

businesses. Differing compliance or reporting requirements or timetables for small businesses were not necessary.

7. Small business and local government participation: Affected small businesses had the opportunity to comment at suitability public hearings held by the Department in 2009 and on the outreach draft of the rule, which was posted on the Department website for a two-week comment period.

Rural Area Flexibility Analysis

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

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

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

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

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

5. Rural area participation: Affected parties doing business in rural areas of the State had the opportunity to comment at suitability public hearings held by the Department in 2009 and on the outreach draft of the rule, which was posted on the Department website for a two-week comment period.

Job Impact Statement

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

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

NOTICE OF ADOPTION

Credit for Reinsurance

I.D. No. DFS-48-12-00004-A

Filing No. 235

Filing Date: 2013-03-01

Effective Date: 2013-03-20

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

Action taken: Amendment of Part 125 (Regulations 17, 20, and 20-A) of Title 11 NYCRR.

Statutory authority: Financial Services Law, sections 202 and 302; and Insurance Law, sections 301, 307(a), 308, 1301(a)(9), 1301(c) and 1308

Subject: Credit for Reinsurance.

Purpose: Establish rules governing when an authorized ceding insurer may take credit on its balance sheet for a reinsurance recoverable.

Text of final rule: Subdivision (h) of section 125.4 is hereby repealed. A new subdivision (h) of section 125.4 is added to read as follows:

(h) *Alternative credit for cessions to certified assuming insurers (1)*

With respect to reinsurance contracts entered into or renewed on or after January 1, 2011, an insurer may reduce the amount withheld as required under section 125.6(b) of this Part for full credit, as an asset or deduction from reserves, for reinsurance recoverable, including incurred-but-not-reported loss reserves and unearned premium, from any unauthorized assuming insurer or any alien group of insurers, provided that the insurer satisfies the requirements set forth in paragraph (7) of this subdivision and is certified by the superintendent. The reduced amount withheld will be determined in accordance with paragraphs (2) through (8) of this subdivision. Any reinsurer qualifying for reduced collateral under the provisions of this subdivision as in effect on July 1, 2012 will be deemed to continue to remain in full compliance with this subdivision, provided that it satisfies the certification procedures of paragraph (7) of this subdivision by July 1, 2013.

(2) If the superintendent assigns a rating to an assuming insurer, the minimum reduced amounts that may be withheld for full credit are as follows:

<i>Rating by Superintendent</i>	<i>Minimum Amount Withheld for Full Credit</i>
<i>Secure-1</i>	<i>0 percent</i>
<i>Secure-2</i>	<i>10 percent</i>
<i>Secure-3</i>	<i>20 percent</i>
<i>Secure-4</i>	<i>50 percent</i>
<i>Secure-5</i>	<i>75 percent</i>
<i>Vulnerable-6</i>	<i>100 percent</i>

(3) Affiliated reinsurance transactions shall be eligible for reduced security requirements in the same manner as non-affiliated reinsurance transactions.

(4) A certified reinsurer may defer posting security for catastrophe recoverables for a period of up to one year from the date of the first instance of a liability reserve entry by the ceding company as a result of a catastrophic occurrence that is likely to result in significant insured losses as recognized by the superintendent, provided that the certified reinsurer continues to pay claims in a timely manner. Deferral of reinsurance recoverables related specifically to a catastrophic occurrence are permitted only for the following lines of business, as reported on the NAIC annual financial statement:

- (i) Line 1: Fire*
- (ii) Line 2: Allied Lines*
- (iii) Line 3: Farmowners Multiple Peril*
- (iv) Line 4: Homeowners Multiple Peril*
- (v) Line 5: Commercial Multiple Peril*
- (vi) Line 9: Inland Marine*
- (vii) Line 12: Earthquake*
- (viii) Line 21: Auto physical damage*

(5) A ceding insurer may take credit for reinsurance under this subdivision only with respect to a reinsurance contract entered into or renewed on or after the effective date that the assuming insurer is certified pursuant to this subdivision. Any reinsurance contract entered into before the effective date of such certification that is subsequently amended after the effective date of the certification, or a new reinsurance contract, covering any risk for which collateral was provided previously, will only be subject to this subdivision with respect to losses incurred and reserves reported from and after the effective date of the amendment or new contract.

(6) Nothing in this subdivision shall prohibit the parties to a reinsurance agreement from agreeing to provisions establishing security requirements that exceed the minimum security requirements established for certified reinsurers under this subdivision.

(7) Certification Procedure.

(i) Upon receipt of an application for certification, the superintendent will post notice on the Department of Financial Services website that will include instructions on how members of the public may respond to or comment upon the application. The notice will remain posted for at least 30 days before the superintendent will take action upon the application.

(ii) The superintendent will notify the assuming insurer whether the assuming insurer's application to be a certified reinsurer has been approved. If the superintendent certifies the assuming insurer, the superintendent will include in the notification the rating assigned to the certified reinsurer in accordance with paragraph (2) of this subdivision. The superintendent will publish and make available to the public a list of all certified reinsurers and their ratings.

(iii) To be eligible for certification, an assuming insurer must:

(a) be domiciled and licensed to transact insurance or reinsurance in a qualified jurisdiction, as determined by the superintendent pursuant to paragraph (9) of this subdivision;

(b) maintain capital and surplus, or its equivalent, of no less than \$250,000,000 calculated in accordance with subparagraph (iv)(h) of this paragraph. In the case of an association including incorporated and individual unincorporated underwriters, the association shall have minimum capital and surplus equivalents (net of liabilities) of at least \$250,000,000 and a central fund containing a balance of at least \$250,000,000;

(c) maintain financial strength ratings from two or more acceptable rating agencies. These ratings shall be based on interactive communication between the rating agency and the assuming insurer and shall not be based solely on publicly available information. These financial strength ratings will be one factor used by the superintendent in determining the rating assigned to the assuming insurer. An acceptable rating agency is:

- (1) Standard & Poor's;
- (2) Moody's Investors Service;
- (3) Fitch Ratings;
- (4) A.M. Best Company; or
- (5) any other nationally recognized statistical rating organization acceptable to the superintendent;

(d) An assuming insurer applying to be a certified reinsurer shall agree to post 100 percent security upon the entry of an order of rehabilitation, liquidation or conservation against the ceding insurer for the benefit of the ceding insurer or its estate; and

(e) comply with any other conditions that the superintendent requires to ensure creditworthiness of the reinsurer.

(iv) The superintendent will rate each certified reinsurer on a legal entity basis with due consideration for the group rating, except that an association including incorporated and individual unincorporated underwriters that has been approved to do business as a single certified reinsurer may be evaluated on the basis of its group rating. In determining the rating, the superintendent will take into account relevant factors and review appropriate materials, including:

(a) The certified reinsurer's financial strength rating from an acceptable rating agency. The maximum rating that a certified reinsurer may be assigned will correspond to its financial strength rating as outlined in the table in this clause. The lowest financial strength rating received from an approved rating agency will be used in establishing the maximum rating of a certified reinsurer. An insurer that has failed to obtain or maintain at least two financial strength ratings from acceptable rating agencies will lose its eligibility for certification;

Ratings	A.M. Best	S&P	Moody's	Fitch
Secure-1	A++	AAA	Aaa	AAA
Secure-2	A+	AA+, AA, AA-	Aa1, Aa2, Aa3	AA+, AA, AA-
Secure-3	A	A+, A	A1, A2	A+, A
Secure-4	A-	A-	A3	A-
Secure-5	B++, B+	BBB+, BBB, BBB-	Baa1, Baa2, Baa3	BBB+, BBB, BBB-
Vulnerable-6	B, B-, C+, C, C-, D, E, F	BB+, BB, BB-, B+, B, B-, CCC, CC, C, D, R, NR	Ba1, Ba2, Ba3, B1, B2, B3, Caa, Ca, C	BB+, BB, BB-, B+, B, B-, CCC+, CCC, CCC-, DD

(b) The business practices of the certified reinsurer in dealing with its ceding insurers, including its record of compliance with reinsurance contractual terms and obligations;

(c) For a certified reinsurer domiciled in the United States, the most recent applicable NAIC Annual Statement Blank, either Schedule F (for a property/casualty reinsurer) or Schedule S (for a life or health reinsurer);

(d) For a certified reinsurer not domiciled in the United States, of the most recent Form CR-F (for a property/casualty reinsurer) or Form CR-S (for a life or health reinsurer), as such forms shall be prescribed by the superintendent;

(e) The reputation of the certified reinsurer for prompt payment of claims under reinsurance agreements, based on an analysis of ceding insurers' Schedule F reporting of overdue reinsurance recoverables, including the proportion of obligations that are more than 90 days past due or are in dispute, with specific attention given to obligations payable to companies that are in administrative supervision or receivership;

(f) Regulatory actions against the certified reinsurer;

(g) The report of the independent auditor on the financial statements of the certified reinsurer;

(h) For a certified reinsurer not domiciled in the United States, audited financial statements, (i.e., audited United States GAAP basis if available; audited IFRS basis statements including an audited footnote reconciling equity and net income to a United States GAAP basis; or with the permission of the superintendent, audited IFRS statements with reconciliation to United States GAAP certified by an officer of the company), regulatory financial statement filings, and actuarial opinion as filed with the non-United States jurisdiction supervisor. Upon the initial application for certification, the insurer shall provide the superintendent with audited financial statements filed with its non-United States jurisdiction supervisor for at least the previous three years;

(i) The liquidation priority of obligations to a ceding insurer in the certified reinsurer's domiciliary jurisdiction in the context of an insolvency proceeding;

(j) A certified reinsurer's participation in any solvent scheme of arrangement, or similar procedure, that involves United States ceding insurers. A certified reinsurer that proposes participation by the certified reinsurer in a solvent scheme of arrangement shall provide the superintendent with prior notice of such scheme as early as practicable; and

(k) Any other information the superintendent deems relevant.

(v) Upon direction by the superintendent, a certified reinsurer shall adjust, as the superintendent deems appropriate, the security that it is required to post based on the superintendent's analysis, pursuant to subparagraph (iv)(e) of this paragraph, of the reinsurer's reputation for prompt payment of claims. Subject to such additional adjustments as the superintendent may deem necessary in accordance with this subparagraph, a certified reinsurer shall, at a minimum, increase the security that it is required to post by one rating level under subparagraph (iv)(a) of this subdivision if:

(a) more than 15% of the certified reinsurer's ceding insurance clients have overdue reinsurance recoverables on paid losses of 90 days or more that are not in dispute and exceed \$100,000 for each cedent; or

(b) the aggregate amount of reinsurance recoverables on paid losses, which are not in dispute and are overdue by 90 days or more, exceeds \$50,000,000.

(vi)(a) The assuming insurer shall submit to the superintendent:

(i) a properly executed Form CR-1 on a form prescribed by the superintendent as evidence of its submission to the jurisdiction of this State;

(ii) an appointment of the superintendent as an agent for service of process in this State in accordance with Insurance Law section 1213; and

(iii) an agreement to provide security for 100% of the assuming insurer's liabilities attributable to reinsurance ceded by United States ceding insurers if it resists enforcement of a final U.S. judgment.

(b) The superintendent will not certify any assuming insurer that is domiciled in a jurisdiction that the superintendent has determined does not adequately and promptly enforce final U.S. judgments or arbitration awards.

(vii) The certified reinsurer shall agree to meet applicable information filing requirements both with respect to an initial application for certification and on an ongoing basis, and indicate in writing those portions of its filings that it believes are exempt from disclosure pursuant to Public Officers Law section 87(2)(d). The certified reinsurer shall agree to:

(a) Notify the superintendent within ten days of any regulatory actions taken against it, any change in the provisions of its domiciliary license or any change in rating by an approved rating agency, including a statement describing the changes and the reasons therefore;

(b) Submit annually on July 1, Form CR-F or CR-S, as applicable;

(c) Submit annually on July 1, the report of the independent auditor on the financial statements of the certified reinsurer, on the basis described in clause (d) of this subparagraph;

(d) Submit annually on July 1, audited financial statements (i.e., audited United States GAAP basis statements if available and audited International Financial Reporting Standards basis statements, including an audited footnote reconciling equity and net income to a United States GAAP basis, except that the superintendent may in his or her discretion accept audited International Financial Reporting Standards statements with reconciliation to United States GAAP certified by an officer of the insurer, provided that the capital and surplus of the insurer exceeds \$275,000,000); regulatory financial statement filings; an actuarial opinion as filed with the certified reinsurer's domestic regulator; and, upon the initial certification, audited financial statements for the prior three years filed with the certified reinsurer's domestic regulator;

(e) Submit at least annually by July 1, an updated list of all disputed and overdue reinsurance claims regarding reinsurance assumed from United States domestic ceding insurers;

(f) Submit a certification from its domestic regulator that the

certified reinsurer is in good standing and maintains capital in excess of the jurisdiction's highest regulatory action level; and

(g) Submit such other information that the superintendent may reasonably require.

(viii) Change in Rating or Revocation of Certification.

(a) In the case of a downgrade by a rating agency or other disqualifying circumstance, the superintendent will upon written notice assign a new rating to the certified reinsurer in accordance with the requirements of subparagraph (iv)(a) of this paragraph.

(b) If the superintendent upgrades the rating of a certified reinsurer, the certified reinsurer may meet the security requirements applicable to its new rating on a prospective basis, provided that the certified reinsurer posts security under the previously applicable security requirements as to all contracts in force on or before the effective date of the upgraded rating. If the superintendent downgrades the rating of a certified reinsurer, the certified reinsurer shall be subject to the security requirements applicable to its new rating for all business that it has assumed as a certified reinsurer.

(c) The superintendent may suspend, revoke, or otherwise modify a certified reinsurer's certification at any time if the certified reinsurer fails to meet its obligations or security requirements under this section, or if other financial or operating results of the certified reinsurer, or documented significant delays in payment by the certified reinsurer, lead the superintendent to reconsider the certified reinsurer's ability or willingness to meet its contractual obligations.

(d) Upon the superintendent's suspension, revocation or other termination of the certification of a certified reinsurer, unless the assuming insurer posts security in accordance with section 125.6(b) of this Part, the ceding insurer may not continue to take credit for reinsurance ceded to the assuming insurer. If funds continue to be held in trust in accordance with Part 126 of this Title (Insurance Regulation 114), the superintendent may allow additional credit equal to the ceding insurer's pro rata share of such funds, discounted to reflect the risk of uncollectibility and anticipated expenses of trust administration. Notwithstanding the change of a certified reinsurer's rating or suspension, revocation or other termination of its certification, a domestic insurer that has ceded reinsurance to that certified reinsurer may take credit for reinsurance for a period of three months for all reinsurance ceded to that certified reinsurer, unless the superintendent finds the reinsurance to be at high risk of uncollectibility.

(8) Qualified Jurisdictions.

(i) If, upon conducting an evaluation under this paragraph with respect to the reinsurance supervisory system of any alien assuming insurer, the superintendent determines that the jurisdiction qualifies to be recognized as a qualified jurisdiction, the superintendent will publish notice and evidence of such recognition in an appropriate manner. The superintendent may withdraw recognition of a jurisdiction that is no longer qualified and will provide notice by publication or otherwise.

(ii) In order to determine whether the domiciliary jurisdiction of an alien assuming insurer is eligible to be recognized as a qualified jurisdiction, the superintendent will evaluate the reinsurance supervisory system of the non-U.S. jurisdiction, both initially and on an ongoing basis, and consider the rights, benefits and the extent of reciprocal recognition afforded by the non-U.S. jurisdiction to reinsurers licensed and domiciled in the U.S. The superintendent will create and publish a list of jurisdictions whose domiciliary reinsurers may be approved by the superintendent as eligible for certification. No jurisdiction will be deemed to be qualified unless it agrees to share information in accordance with Insurance Law § 110 and cooperate with the superintendent with respect to all certified reinsurers domiciled within that jurisdiction. Additional factors to be considered in determining whether to recognize a qualified jurisdiction, in the discretion of the superintendent, include the following:

(a) The framework under which the assuming insurer is regulated;

(b) The structure and authority of the domiciliary regulator with regard to solvency regulation requirements and financial surveillance;

(c) The substance of financial and operating standards for assuming insurers in the domiciliary jurisdiction;

(d) The form and substance of financial reports required to be filed or made publicly available by reinsurers in the domiciliary jurisdiction and the accounting principles used;

(e) The domiciliary regulator's willingness to cooperate with U.S. regulators in general and the superintendent in particular;

(f) The history of performance by assuming insurers in the domiciliary jurisdiction;

(g) Any documented evidence of substantial problems with the enforcement of final U.S. judgments in the domiciliary jurisdiction. A jurisdiction will not be considered to be a qualified jurisdiction if the superintendent has determined that it does not adequately and promptly enforce final U.S. judgments or arbitration awards;

(h) Any relevant international standards or guidance with re-

spect to mutual recognition of reinsurance supervision adopted by the International Association of Insurance Supervisors or successor organization; and

(i) Any other matters deemed relevant by the superintendent.

(iii) The superintendent will consider the list published through the relevant NAIC committee in determining qualified jurisdictions. However, the superintendent may approve a jurisdiction as qualified that does not appear on the list of qualified jurisdictions. In such a case, the superintendent will provide notice to the relevant NAIC committee.

(iv) A U.S. jurisdiction that is NAIC-accredited will be deemed a qualified jurisdiction.

(9) Recognition of Certification Issued by an NAIC-Accredited Jurisdiction.

(i) If an applicant for certification has been certified as a reinsurer in an NAIC-accredited jurisdiction, the superintendent may accept that jurisdiction's certification and rating, if the assuming insurer submits a properly executed Form CR-1 and any other additional information the superintendent requires. In such a case, the assuming insurer will be considered a certified reinsurer in this State.

(ii) Any change in the certified reinsurer's status or rating in the other jurisdiction shall apply automatically in this State as of the date it takes effect in the other jurisdiction. The certified reinsurer shall notify the superintendent of any change in its status or rating within 10 days after receiving notice of the change.

(iii) The superintendent may withdraw recognition of the other jurisdiction's rating at any time and assign a new rating in accordance with paragraph (8)(vii)(a) of this subdivision.

(iv) The superintendent may withdraw recognition of the other jurisdiction's certification at any time upon written notice to the certified reinsurer. Unless the superintendent suspends, revokes or otherwise terminates the certified reinsurer's certification, the certified reinsurer's certification shall remain in good standing in this State for a period of three months, which shall be extended if additional time is necessary to consider the assuming insurer's application for certification in this State.

(10) Reinsurance Contract Terms. A ceding insurer may not enter into a reinsurance contract with a certified assuming insurer unless the reinsurance contract shall include:

(i) an insolvency clause as provided in Insurance Law § 1308(a)(2)(A);

(ii) a funding clause requiring the certified reinsurer to provide and maintain security in an amount sufficient to avoid the imposition of any financial statement penalty on the ceding insurer under this section for reinsurance ceded to the certified reinsurer;

(iii) a provision stating that any dispute, suit, action or proceeding under the contract, or any dispute, suit, action or proceeding related to or arising out of, directly, indirectly, or incidentally, the contract, or out of the transactions and actions arising from performance of the contract, will be subject to the jurisdiction, and resolved in the courts, of the United States or any state thereof, and that the assuming insurer submits to the personal jurisdiction of such court, will comply with the requirements necessary to give that court jurisdiction, will abide by the final decision of that court or of an appellate court in the event of an appeal, and will consent to any effort to enforce the final decision of the court in the home jurisdiction of the alien assuming insurer, including the granting of full faith and credit or comity in the home jurisdiction of the assuming insurer or any other jurisdiction where the assuming insurer is subject to jurisdiction. Such provision shall not override an agreement between the ceding insurer and the unauthorized alien assuming insurer to submit any and all disputes to arbitration, in accordance with the laws of the U.S. or any state thereof; and

(iv) a provision stating that any dispute, suit, action or proceeding under the contract, or any dispute, suit, action or proceeding related to or arising out of, directly, indirectly, or incidentally, the contract, or out of the transactions and actions arising from performance of the contract, will be governed by and construed in accordance with either the laws of the State of New York or the laws of the state in which the ceding insurer is domiciled or the laws of any state chosen by the ceding insurer. Such provision shall not override an agreement between the ceding insurer and the unauthorized alien assuming insurer to submit any and all disputes to arbitration, in accordance with the laws of the U.S. or any state thereof.

Section 125.5(b)(4)(i) is amended as follows:

(4) The report referred to in paragraph (1) of this subdivision shall be obtained by the ceding insurer from:

(i) the assuming insurer, if accredited in this State, or if [qualified] certified under the provisions of section 125.4(h) of this Part, as to the total net reserves held by it and by all retrocessionaires, or

Section 125.6(b) is amended as follows:

(b) Other than as permitted pursuant to sections 125.4(e), (f) and (g) for risks other than life, annuity and accident and health, or section 125.4(h) of this Part, credit taken by a ceding insurer for reinsurance ceded to an

unauthorized assuming insurer, which is not an accredited or certified assuming insurer, shall not exceed the amounts withheld under a reinsurance treaty with such unauthorized insurer as security for the payment of obligations thereunder, provided such funds are held subject to withdrawal by, and under the control of, the ceding insurer. Amounts withheld include:

(1) funds withheld for which the ceding insurer has set up a liability;

(2) letters of credit complying with Part 79 of this Title (*Insurance Regulation 133*); and

(3) funds deposited in trust agreements complying with Part 126 of this Title (*Insurance Regulation 114*).

Section 125.7 is amended to read as follows:

Section 125.7 Certificate of recognition.

[Each] *The superintendent may issue a certificate of recognition as an accredited reinsurer to each assuming insurer [which] that is complying with the provisions of subdivision (a), (b), (c), or (d), [or (h)] of section 125.4 of this Part [shall be issued a certificate of recognition as an accredited reinsurer.] The superintendent may issue a certificate of recognition as a certified insurer to each assuming insurer that is complying with the provisions of subdivision (h) of Section 125.4 of this Part. [and no] No ceding insurer shall take credit for reinsurance recoverables from such an assuming insurer unless such assuming insurer has a valid certificate of recognition in force. Such certificate shall have a continuous term until revoked, suspended or otherwise terminated by the superintendent.*

Section 125.8 is amended to read as follows:

Section 125.8 Annual filing and processing charge.

Each assuming insurer issued a certificate of recognition as either an accredited reinsurer or certified reinsurer shall pay to the Superintendent of [Insurance] *Financial Services* an annual filing and processing charge of \$1,000, to be paid on or before the first day of July.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 125.4(h)(4), (7), (10) and 125.7.

Text of rule and any required statements and analyses may be obtained from: Michael Campanelli, NYS Department of Financial Services, 25 Beaver Street, New York, NY 10004, (212) 480-5290, email: michael.campanelli@dfs.ny.gov

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

The non-substantive revisions to the proposed rule merely clarify the text, which effectuates no change to the Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement.

Initial Review of Rule

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

Assessment of Public Comment

Prior to the promulgation of the Tenth Amendment (the "Tenth Amendment") to 11 NYCRR 125 (*Insurance Regulations 17, 20, and 20-A*), credit for ceded claims was allowed in limited circumstances when the assuming insurer was not authorized to do business in New York, irrespective of its financial strength. Generally, an authorized ceding insurer was not allowed credit for reinsurance from an unauthorized insurer unless the unauthorized insurer posted collateral equal to 100% of the reserves ceded. Promulgation of the Tenth Amendment provided an alternative regime that allowed a highly-capitalized unauthorized assuming insurer to dispense with all or part of the collateral posting requirement, depending upon the strength of its credit rating. The purpose of the present amendment is to align Part 125 more closely with the Credit for Reinsurance Model Regulation (the "NAIC Model") recently adopted by the National Association of Insurance Commissioners ("NAIC").

The Department received comments on the proposed rule from three large insurers ("Insurer I", "Insurer II", and "Insurer III"). Another insurer sent a letter stating its unqualified support for the proposed amendment. A life insurer association informed the Department that it did not have any comments or recommended changes.

Comments from Insurer I

Insurer I is a global insurance and reinsurance company that, through its subsidiaries, provides property, casualty and specialty products to industrial, commercial and professional firms, insurance companies and other enterprises worldwide. Insurer I commented that while the proposed amendment provides for the downgrade of a certified reinsurer's rating by the Department upon the occurrence of certain events, the amendment does not expressly indicate when the downgrade would be effective or the time by which a certified reinsurer would have to provide its ceding insurers with the increased collateral. Insurer I posited that any downgrade would be effective immediately upon issuance of the notice of downgrade to the certified reinsurer and would be applicable to all losses incurred and reserves reported (including IBNR) as of that date. Insurer I further posited

that the ceding insurer could immediately pursue the downgraded certified reinsurer for the corresponding increase in collateral, pursuant to the terms of their reinsurance agreements. This comment accurately interprets the proposed provision. Insurer I did not suggest revised language in connection with this comment.

Insurer I also asked whether the Department would publicize in advance any intended reduction of a certified insurer's rating, stating that "[i]t would be advantageous to have some knowledge of an impending downgrade, as a collective rush by the various ceding insurers for increased collateral from the reinsurer may make obtaining such collateral difficult." The impetus for the proposed amendment was to conform the rule to the NAIC Model as closely as permissible under New York law. Because the NAIC Model does not require public notice of a contemplated downgrade, the proposed amendment also does not require it. In addition, the Department considers a public notice requirement to be unnecessary, because § 125.4(h)(7)(viii)(c) affords domestic cedents a three-month period during which credit for reinsurance may continue to be taken in the event of a rating downgrade or a suspension, revocation, or termination of the reinsurer's certification.

Finally, Insurer I commented that the term "ceding reinsurer," as used in § 125.4(h)(10) of the proposed amendment, should be changed to "ceding insurer." By not accepting this change, the provision would be limited in its application: it would apply to retrocession contracts but not to reinsurance contracts. The Department agrees with this comment and has clarified the amendment accordingly.

Comments from Insurer II

Insurer II is a leading international insurance organization with operations worldwide. Insurer II commented that the proposed amendment does not require the Superintendent to provide a "thoroughly documented justification with respect to the criteria" relied upon to approve a jurisdiction that is not included in the list of qualified jurisdictions published by the NAIC. As the insurer acknowledged in its comment, the regulatory authority to recognize a qualified jurisdiction resides solely within the purview of the Superintendent, and as such, the Department does not believe the suggested change to be necessary.

Insurer II also commented that the proposed amendment should require the Superintendent to "comply with all reporting and notification requirements that may be established by the NAIC with respect to certified reinsurers and qualified jurisdictions." The Department considers such a provision to constitute an impermissible abdication of the Superintendent's regulatory authority, as well as an improper incorporation by reference, contrary to state law.

Insurer II further commented that the proposed amendment does not expressly grant the Superintendent the authority to revoke a certified reinsurer's certification. While the Department believes that such authority is inherent in the proposed amendment, it nevertheless concurs that inclusion of a more explicit expression of this authority would be helpful and consistent with the NAIC Model. A non-substantive change is made to the amendment in accordance with this comment.

Insurer II's final comment relates to the proposed rule's requirement that a reinsurance contract include language that compels a certified reinsurer to consent to any effort by the ceding insurer to enforce a U.S. court judgment in the certified reinsurer's home jurisdiction. Insurer II contends that the required term is not needed in a reinsurance agreement with a certified reinsurer due to other protections afforded under the certification procedures and elsewhere in the regulation. The Department disagrees with this comment. In drafting the proposed amendment, the Department specifically retained this protection for New York's ceding insurers. Moreover, the proposed amendment already liberalizes the current regulatory regime by no longer mandating the inclusion of specifically-worded contract terms.

Comments from Insurer III

Insurer III is among the largest personal lines property/casualty insurers in the United States, and is a major ceding insurer and purchaser of catastrophic reinsurance coverage. Insurer III suggested three editorial changes to § 125.4(h)(4). Its first suggested revision would expressly limit the deferral period for posting security for catastrophe recoverables ("deferral") to a maximum of one year. Insurer III's second revision is meant to clarify the meaning of "catastrophe" as used in § 125.4(h)(4), by allowing the deferral to be triggered only if there is significant insured loss stemming from the catastrophe. Its third suggested revision would describe the term "timely manner" as the payment of reinsured claims "in compliance with its contractual obligations as set forth in the reinsurance agreement under which the claims are ceded."

The Department believes that the first two suggested changes are non-substantive in nature and serve to provide greater clarity, consistent with the NAIC Model (i.e., (1) that the deferral period is not a fixed one-year period but is instead a period not to exceed one year in duration, and (2) that the deferral may be allowed only with respect to catastrophic events that result in significant insured property losses). The proposed amend-

ment has thus been revised to include the suggested changes. However, the Department finds Insurer III's third suggested change to be superfluous: it is axiomatic that conformance with a contract of insurance (or reinsurance) necessitates timely payment of claims.

Insurer III also seeks to amend § 125.4(h)(5), ostensibly to prevent the retroactive impact of the proposed amendment, and suggested two alternative changes to that subdivision. Each of the alternatives represents a departure from the language of the NAIC Model, and appears to extend by an additional six months the length of time before the proposed amendment, once promulgated, would become effective. The Department will not adopt those changes because they are inconsistent with the NAIC Model.

This amendment is based on the NAIC Model, which has effected a significant modernization in the area of reinsurance collateral requirements. It is being adopted virtually as proposed, with the inclusion of a few clarifying and non-substantive changes, as indicated above.

AMENDED NOTICE OF ADOPTION

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

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

Filing No. 233

Filing Date: 2013-02-27

Effective Date: 2013-04-01

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

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

Amended action: This action amends the rule that was filed with the Secretary of State on February 6, 2013, to be effective March 1, 2013, File No. 00173. The notice of adoption, I.D. No. DFS-29-12-00004-A, was published in the February 27, 2013 issue of the *State Register*.

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

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

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

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

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

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

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

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

Section 65-3 is amended as follows:

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

Section 216.6(h) is amended as follows:

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

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

163B Mineola Boulevard, Mineola, NY 11501; or Walter J. Mahoney Office Building, 65 Court Street, Buffalo, NY 14202."

Section 216.7(d) is amended as follows:

(d) Unreasonable delay.

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

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

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

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

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

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

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

Section 218.5(a) is amended as follows:

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

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

Section 241.2(a) is amended as follows:

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

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

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

The amendment to the adopted rule merely changes the effective date of the rule from March 1, 2013 to April 1, 2013, which effectuates no change to the text of the rule or the Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement.

Assessment of Public Comment

After providing notice of adoption of amendments to multiple Parts of 11 NYCRR by publication in the New York State Register, but prior to the rule's effective date, the Department received a comment from a trade association for insurers ("Association") stating that "until regulations are officially promulgated, companies do not initiate system/IT orders in case there are revisions or amendments to the regulation. The regulations take effect March 1 (two weeks) and companies just received notice today. Companies have expressed concern regarding the changes to the NF-10 form. Specifically if the newly adopted form is not utilized by March 1, these no-fault denial of claim forms may be challenged or considered invalid." The Association asked the Department to change the effective date of the regulation from March 1, 2013 to April 1, 2013.

To ensure that insurers have sufficient time to update their systems and make use of the revised NF-10 form, the Department is extending the date of the rule to April 1, 2013.

Department of Health

EMERGENCY RULE MAKING

NYS Medical Indemnity Fund**I.D. No.** HLT-12-13-00016-E**Filing No.** 245**Filing Date:** 2013-03-05**Effective Date:** 2013-03-05

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

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

Statutory authority: Public Health Law, section 2999-j

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

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

Subject: NYS Medical Indemnity Fund.

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

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

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

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

Those expenses that will or can be covered as qualifying health care

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

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire June 2, 2013.

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

Regulatory Impact Statement**Statutory Authority:**

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

Legislative Objectives:

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

Needs and Benefits:

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

Costs:**Regulated Parties:**

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

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

Costs associated with the Fund will be covered by applicable appropriations. The Department of Health will also seek Federal Financial Participation for the health care costs of qualified plaintiffs that otherwise would be covered by Medicaid. No costs are expected to local governments.

Local Government Mandates:**None.****Paperwork:**

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

Duplication:

There are no other State or Federal requirements that duplicate, overlap, or conflict with the statute and the proposed regulations. Although some of the services to be provided by the Fund are the same as those available under certain Medicaid waivers, the waivers have limited slots. Coordination of benefits will be one of the responsibilities of the Fund Administrator. Health care services, equipment, medications or other items that any commercial insurer providing coverage to a qualified plaintiff is legally obligated to provide will not be covered by the Fund (except for copayments and/or deductibles) nor will the Fund cover any health care service, equipment, or other item that either (1) is already being provided through another State or Federal program or similar program in another country, if applicable, such as the Early Intervention Program or as part of an Individualized Education Plan or (2) is not being provided to a qualified plaintiff through another State or Federal program or similar program in another country, if applicable, for which the qualified plaintiff is eligible

but for which the parent or guardian cannot demonstrate that he or she has made a reasonable effort to obtain such service, equipment or item for the qualified plaintiff through the applicable program.

Alternatives:

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

Federal Standards:

There are no minimum Federal standards regarding this subject.

Compliance Schedule:

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

Regulatory Flexibility Analysis

Effect of Rule:

For 2009, of the 135 general hospitals in New York State that provided maternity services, only ten had less than two hundred deliveries that year.

Compliance Requirements:

The regulations impose no new reporting or recordkeeping obligations.

Professional Services:

None.

Compliance Costs:

There are no costs imposed by these regulations on regulated businesses or local governments.

Economic and Technological Feasibility:

The proposed regulations should not create any economic or technological issues for any hospitals or other health care providers. Manual billing will be permitted for those providers that do not have electronic billing capacity.

Minimizing Adverse Impact:

There will be no adverse impact on small businesses and local governments.

Small Business and Local Government Participation:

For purposes of the regulation drafting process, input was sought from hospital associations, provider associations and advocacy organizations throughout the State as well as the Consumer Advisory Committee required by the statute.

Rural Area Flexibility Analysis

Types and Estimated Number of Rural Areas:

The New York State Medical Indemnity Fund being implemented by these regulations will cover future medical expenses for all qualified plaintiffs throughout New York State who have obtained a judgment or a settlement based on a birth-related neurological impairment on or after April 1, 2011.

Reporting, Recordkeeping and Other Compliance Requirements; and Professional Services:

No reporting, recordkeeping, other compliance requirement or professional services other than the submission of claims are required by the regulations.

Costs:

There are no costs to rural areas associated with these regulations.

Minimizing Adverse Impact:

There will be no adverse impact on rural areas as a result of the proposed regulations.

Rural Area Participations:

For purposes of the regulation drafting process, input was sought from hospital associations, provider associations and advocacy organizations throughout the State as well as the Consumer Advisory Committee required by the statute.

Job Impact Statement

Nature of Impact:

The regulations should have no substantial impact on jobs and employment opportunities.

Categories and Numbers Affected:

None.

Regions of Adverse Impact:

None.

Minimizing Adverse Impact:

None.

Self-Employment Opportunities:

None.

REVISED RULE MAKING NO HEARING(S) SCHEDULED

Adverse Event Reporting Via NYPORTS System

I.D. No. HLT-09-12-00001-RP

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

Proposed Action: Amendment of sections 405.8 and 751.10 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 2805-1

Subject: Adverse Event Reporting Via NYPORTS System.

Purpose: To update current provisions to conform with current practice.

Text of revised rule: Section 405.8 is repealed.

A new section 405.8 is added to read as follows:

405.8 Adverse Event Reporting

(a) Any adverse event required to be reported pursuant to subdivision (b) of this section shall be reported to the department. Hospitals shall report such adverse events, as defined in subdivision (b) of this section, within 24 hours or one business day of when the adverse event occurred or when the hospital has reasonable cause to believe that such an adverse event has occurred. This report to the department shall be submitted in a format specified by the department and shall at a minimum include: the date, the nature, classification and location of the adverse event; and medical record numbers of all patients directly affected by the adverse event.

(b) Adverse events to be reported are:

(1) patients' deaths in circumstances other than those related to the natural course of illness, disease or proper treatment in accordance with generally accepted medical standards;

(2) injuries and impairments of bodily functions, in circumstances other than those related to the natural course of illness, disease or proper treatment in accordance with generally accepted medical standards that necessitate additional or more complicated treatment regimens or that result in a significant change in patient status;

(3) equipment malfunction or equipment user error during treatment or diagnosis of a patient which results in death or serious injury of a patient;

(4) patient elopements resulting in death or serious injury;

(5) abduction of a patient of any age;

(6) sexual abuse/sexual assault on a patient or staff member within or on the grounds of a general hospital;

(7) physical assault of a patient or staff member within or on the grounds of a general hospital;

(8) discharge or release of a patient of any age, who is unable to make decisions, to other than an authorized person;

(9) patient or staff death or serious injury associated with a burn incurred from any source in the course of a patient care process;

(10) patient suicide, attempted suicide or self harm resulting in serious injury;

(11) poisoning occurring within the hospital;

(12) fires or other internal disasters in the hospital which disrupt the provision of patient care services or cause harm to patients or staff members;

(13) disasters or other emergency situations external to the hospital environment which affect hospital operations;

(14) termination of any services vital to the continued safe operation of the hospital or to the health and safety of its patients and staff members, including but not limited to the termination of telephone, electric, gas, fuel, water, heat, air conditioning, rodent or pest control, laundry services, food, or contract services; and

(15) strikes by staff members.

(c) The hospital shall conduct an investigation of adverse events described in paragraphs (1-10) of subdivision (b) of this section. Such investigations shall be thorough and credible and occur within thirty days of when the adverse event occurred or when the hospital has reasonable cause to believe that such an adverse event occurred or upon determination by the department that an investigation is warranted in order to protect patient health and safety. If the hospital reasonably expects such investigation to extend beyond the thirty day period, the hospital shall notify the department electronically of such expectation and the reason(s) and shall inform the department of the expected date of completion, not to exceed sixty days. For adverse events described in paragraphs (1-10) of subdivision (b) of this section, the hospital shall submit its investigative report electronically, in a format prescribed by the department. The investigative report shall document all hospital efforts to identify and analyze the circumstances surrounding the adverse event and to develop and implement appropriate measures to prevent recurrence and improve the overall quality of patient care. This report shall be credible and thorough and contain all information in a format specified by the department.

(d) The requirements of this section shall be in addition to and shall not replace other reporting required by this Part.

(e) Nothing in this section shall prohibit the department from investigating any adverse event occurring in general hospitals.

Section 751.10 is repealed.

A new section 751.10 is added to read as follows:

751.10 Adverse Event Reporting

(a) Any adverse event required to be reported pursuant to subdivision (b) of this section shall be reported to the department within 24 hours or

one business day of when the adverse event occurred or when the center has reasonable cause to believe that such an adverse event has occurred. This notification shall be submitted in a format specified by the department and shall at least include: the date, the nature, classification, and location of the adverse event and medical record numbers of all patients directly affected by the adverse event.

(b) Adverse events to be reported are:

(1) patients' deaths in circumstances other than those related to the natural course of illness, disease or proper treatment in accordance with generally accepted medical standards;

(2) injuries and impairments of bodily functions, in circumstances other than those related to the natural course of illness, disease or proper treatment in accordance with generally accepted medical standards that necessitate additional or more complicated treatment regimens or that result in a significant change in patient status;

(3) equipment malfunction or equipment user error during treatment or diagnosis of a patient which results in death or serious injury of a patient;

(4) patient elopements resulting in death or serious injury;

(5) abduction of a patient of any age;

(6) sexual abuse/sexual assault on a patient or staff member within or on the grounds of a center;

(7) physical assault of a patient or staff member within or on the grounds of a center;

(8) discharge or release of a patient of any age, who is unable to make decisions, to other than an authorized person;

(9) patient or staff death or serious injury associated with a burn incurred from any source in the course of a patient care process;

(10) patient suicide, attempted suicide or self harm resulting in serious injury;

(11) poisoning occurring within the center;

(12) fires or other internal disasters in the center which disrupt the provision of patient care services or cause harm to patients or staff members;

(13) disasters or other emergency situations external to the center environment which affect center operations;

(14) termination of any services vital to the continued safe operation of the center or to the health and safety of its patients and staff members, including but not limited to the termination of telephone, electric, gas, fuel, water, heat, air conditioning, rodent or pest control, laundry services, food, or contract services; and

(15) strikes by staff members.

(c) The center shall conduct an investigation of any adverse events described in paragraphs (1-10) of subdivision (b) of this section. Such investigation shall be thorough and credible and occur within thirty days of when the adverse event occurred or when the center has reasonable cause to believe that such an adverse event occurred or upon determination by the department that an investigation is warranted in order to protect patient health and safety. If the center reasonably expects such investigation to extend beyond the thirty day period, the center shall notify the department electronically of such expectation and the reason(s) and shall inform the department of the expected date of completion, not to exceed sixty days. This investigative report shall be thorough and credible and the center shall submit its report electronically, in a format prescribed by the department.

(d) Nothing in this section shall prohibit the department from investigating any adverse event included in subdivision (b) of this section occurring in such centers.

(e) The requirements of this section shall be in addition to and shall not replace other reporting required by this Chapter.

Revised rule compared with proposed rule: Substantive revisions were made in sections 405.8(b)(3) and 751.10(b)(3).

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: regsqna@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 this regulation is contained in Section 2805-I of the Public Health Law (PHL). PHL Section 2805-I outlines the adverse event reporting requirements for hospitals and diagnostic and treatment centers and directs the Commissioner to make, adopt, promulgate and enforce such rules and regulations as he deems appropriate to effectuate the purposes of PHL Section 2805-I. PHL Section 2805-I also authorizes the Commissioner, after consultation with experts, to add, modify or eliminate by regulation one or more of the adverse events

at PHL Section 2805-I consistent with the standards of a consensus based entity selected by the U.S. Department of Health and Human Services pursuant to the Medicare Improvement for Patients and Providers Act. That entity is currently the National Quality Forum (NQF).

Legislative Objectives:

The legislative intent of PHL Article 28 is to provide for the protection and promotion of the health of the inhabitants of the State of New York by delivering high quality hospital and related services in a safe and efficient manner at a reasonable cost. PHL Section 2805-I is intended to strengthen New York State's hospital and diagnostic and treatment center system by enhancing safeguards and protocols to ensure patient safety with its adverse event reporting requirements. Its aim is to ensure that facility staff become promptly aware of problems, take necessary corrective action and minimize the potential for recurrence. The Department has over time developed and implemented a state of the art and nationally recognized adverse event reporting system, the New York Patient Reporting System (NYPORTS), with a strong reliance on each facility's statutory reporting obligation.

Needs and Benefits:

Current adverse event reporting practice includes the reporting of defined occurrences, adverse events and unexpected deaths to the Department's Office of Health Systems Management's New York Patient Reporting System (NYPORTS). NYPORTS has been in place since 1998 and serves as a nationally recognized adverse event reporting system. NYPORTS is an internet-based system with all required security measures in place. Facilities can query the database to compare their experience with reported events statewide, regionally or within their peer group. While the identity of individual facilities in the comparative groups is not disclosed, the comparative database is a useful tool in support of facility quality improvement activities.

Chapter 542 of the Laws of 2000 created Article 29-D of the Public Health Law, known as the Patient Health Information and Quality Improvement Act of 2000. This law included provisions that established a patient safety center to maximize patient safety, reduce medical errors, and improve the quality of health care. This was to be accomplished by improving systems of data reporting, collection, analysis and dissemination, and to improve public access to health care information not otherwise restricted. The Department's NYPORTS activities support the mission of the patient safety center through its efforts to collect adverse event report data, analyses of the data and dissemination of such analyses to the hospital community.

A collaborative effort between the Department and stakeholders to align the NYPORTS system with national reporting trends resulted in statutory changes made by the Legislature in 2011. PHL Section 2805-I was revised to allow the Department to modify the reporting requirements so they align with the standards of a consensus based entity selected by the U.S. Department of Health and Human Services pursuant to the Medicare Improvement for Patients and Providers Act. That entity is currently the National Quality Forum (NQF). The amendments to PHL 2805-I also allow the Department to release, in a format that does not identify patients, analyses and findings derived from adverse event data to hospitals or the public and adverse event data to researchers for patient safety research projects approved by the Commissioner. These regulatory amendments: update the adverse reporting requirements to more closely align with NQF standards; update the process for reporting; and change the term "incident reporting" to conform with the terminology now used in PHL 2805-I which is "adverse event reporting".

Costs:

This proposal will not increase costs to the Department or to the facilities required to report adverse events to the Department via the NYPORTS system. These amendments update the regulations to: more closely align with NQF standards for reporting; update the process for reporting to reflect current practice; and conform terminology to statutory changes.

Local Government Mandates:

This regulation does not impose any new programs, services, duties, or responsibilities upon any county, city, town, village, school district, fire district or other special district including local government run general hospitals and diagnostic and treatment centers.

Paperwork:

There will be no additional paperwork as these amendments merely update the regulation to more closely align with NQF standards for reporting; update the process for reporting to reflect current practice; and conform terminology to statutory changes.

Duplication:

This regulation does not duplicate any other state or federal law or regulation.

Alternatives:

There are no other alternatives. The current regulation is out of date. This proposal updates the regulation to reflect current practice and to implement and conform with statutory changes.

Federal Standards:

This regulatory amendment does not exceed any minimum standards of the federal government.

Compliance Schedule:

The proposed rule will become effective upon publication of a Notice of Adoption in the State Register for Section 405.8 and 150 days after publication of a Notice of Adoption in the State Register for section 751.10.

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.

Assessment of Public Comment

The Department received comments from 4 associations during the public comment period. They came from the following: Institute for Policy Integrity (Policy Integrity), New York State Trial Lawyers Association (NYSTLA), New York Public Interest Research Group (NYPIRG), and Healthcare Association of New York State (HANYS).

1) COMMENT: The Regulatory Impact Statement (RIS) failed to weigh the costs and benefits of this proposal and examine alternative approaches by conducting to the best of its ability, an empirically grounded analysis of the economic impacts of its proposed rule, and compare those impacts across all reasonable regulatory alternatives. The Department's explanation of the economic costs of its proposed rulemaking is insufficient for similar reasons. (Policy Integrity) The Regulatory Impact Statement should explain the reasoning and likely impact of the changes that would eliminate existing duties or otherwise make the rule-making less strict. (NYPIRG)

1) RESPONSE: This proposal updates the regulation to reflect current practice and to implement and conform to the 2011 changes in Public Health Law (PHL) Section 2805-l. It will not increase costs to the Department or the affected parties. It does not impose any new programs, services, duties or responsibilities upon any county, city, town, village school district, fire district or other special district including local government run general hospitals and diagnostic and treatment centers. There will be no additional paperwork as these amendments merely update the regulation to more closely align with National Quality Forum (NQF) standards for reporting, update the process for reporting to reflect current practice; and conform terminology to statutory changes. In conformance with the changes in PHL Section 2805-l the regulation allows the Department to release, in a format that does not identify patients, analyses and findings derived from adverse event data to hospitals or the public and adverse event data to researchers for patient safety research projects approved by the Commissioner.

2) COMMENT: The absence of original text in the Notice of Proposed Rulemaking makes it difficult for readers to identify all of the proposed regulatory changes and to assess their substantive impacts, if any. A mark-up or redline version would demonstrate more clearly how the existing language compares with that being prepared. This would improve transparency and enable stakeholders to provide better feedback through the notice and comment process. (Policy Integrity) (NYPIRG)

2) RESPONSE: Please see attached Appendix A which sets forth two tables summarizing existing and proposed language as well as Department rationale.

3) COMMENT: The proposed amendment deletes the seven day deadline for notifying the Department of many adverse events. (NYSTLA) A major loophole is created for timeliness of filing of preliminary notice of adverse event occurrence. The proposed amendment eliminates the preliminary written notification of adverse event and essential information. We are mystified over how the purported alignment of New York with recent changes to the NQF updated serious reportable events listing necessitates proposed changes with respect to the timeliness, reporting detail, and investigation methodology. (NYPIRG) Some of the revisions to the proposal would alter the timelines by which hospitals must report the occurrence of a "possibly adverse event"; others would modify the methodology hospitals must use when conducting investigations of adverse events. (Policy Integrity)

3) RESPONSE: The seven day deadline for notifying the Department of many adverse events is a remnant of the paper process and pre-dates the electronic process currently in place. Hospitals and diagnostic and treatment centers must report adverse events within 24 hours or one business day of when the adverse event occurred or when the hospital has reasonable cause to believe that such an adverse event occurred. This report must be submitted in a format specified by the Department and must at a minimum include: the date, the nature, classification and location of the adverse event; and medical record numbers of all patients directly affected by the adverse event. Justification must be included in the description of the event for delays between the date of occurrence and the date of awareness.

4) COMMENT: While the Department claims that this proposal will

more closely align with standards promulgated by the NQF, it does not clarify which of its proposed changes will do so. The Department also does not explain why such alignment is necessary or beneficial to public health. (Policy Integrity)

4) RESPONSE: Please see attached Appendix A which sets forth two tables summarizing existing and proposed language as well as Department rationale. The statutory authority for this proposal is Public Health Law (PHL) Section 2805-l. It was revised in 2011 to allow the Department to be consistent with other states and provide uniformity with the standards of a consensus based entity selected by the U.S. Department of Health and Human Services pursuant to the Medicare Improvement for Patients and Providers Act. That entity is currently the NQF. It benefits the public by clarifying the definitions of reportable events, permitting comparisons of the rates of reporting of adverse events among hospitals and diagnostic and treatment centers and among states. In conformance with the changes in PHL Section 2805-l the regulation allows the Department to release, in a format that does not identify patients, analyses and findings derived from adverse event data to hospitals and diagnostic and treatment centers or the public and adverse event data to researchers for patient safety research projects approved by the Commissioner.

5) COMMENT: The proposed amendment deletes the current requirement for an adverse event report to contain the "full name and title of physicians and hospital staff involved in the incident as well as their license, permit, certification or registration numbers." (NYSTLA)

5) RESPONSE: The need to include information identifying professionals is believed to deter facility staff from filing adverse event reports. The Department does not need such information in order to analyze adverse events. If there is reason to believe, based on an adverse event report, that a professional or other licensed staff engaged in misconduct, the Department may report the event to the applicable professional conduct or licensing entity. In addition it is the responsibility of the facility to maintain compliance with the reporting requirements as set forth in Section 405.3 (Administration), Subdivision (e) (Other Reporting Requirements), Paragraphs (1) (OPMC) and (2) (SED) of Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York (10 NYCRR). The professional conduct or licensing entities can obtain the identities of the professionals and staff from the facilities.

6) COMMENT: The proposed amendment deletes the entire list of specific requirements for the information hospitals must include in their adverse event investigations as currently enumerated in Section 405.8(d)(1) to (7). (NYSTLA) The proposal would weaken investigation methodology. The proposed regulatory changes would eliminate the entire list of specific requirements that hospitals must include in their adverse event investigations. (NYPIRG)

6) RESPONSE: These elements are still captured in an electronic format as prescribed by the Department. Facilities are directed in 405.8(c) and 751.10(c) to conduct an investigation that shall be thorough and credible and contain all information in a format specified by the Department.

7) COMMENT: The current regulation requires submission of a report and investigation when there is "equipment malfunction or equipment user error during treatment or diagnosis of a patient which did or could have adversely affected a patient or personnel." The proposed amendment requires a report/investigation only for "equipment malfunction during treatment or diagnosis of a patient which results in death or serious injury." The proposed amendment omits the words "could have" and "user error". It is important for the Department to be told about all near misses and instances of patient harm in order to prevent more serious incidents. (NYSTLA) The proposed regulation requires a report/investigation only for "equipment malfunction during treatment or diagnosis of a patient which results in death or serious injury." Deleting reporting in cases that "could have resulted in death or serious injury or that were the result of "user error" undermines the potential to identify potentially deadly circumstances before serious harm results. It is important to know about all of the near misses and about user error which could indicate lack of supervision or training. The proposal would also weaken the scope of reportable "elopements" – circumstances when patients leave a hospital or facility without discharge or other appropriate reason – to those incidents that result in death or serious injury (NYPIRG)

7) RESPONSE: The Department clarified that the proposed regulation, consistent with NQF standards, is intended to include equipment user error by now stating that language in both Sections 405.8(b)(3) and 751.10(b)(3). The Department cannot possibly track all "near misses," nor can it track and enforce compliance with reporting "near misses." Attempting to do so would divert Department resources from focusing on the events that actually cause harm. The NQF has appropriately concluded that tracking and analyzing events that cause serious harm provides the most effective means of identifying the causes of adverse incidents and disseminating information to prevent them in the future.

8) COMMENT: There is a gap in information on who will investigate adverse events. The proposal eliminates poisoning from the list of adverse

events that the hospital must investigate, and also deletes the provision authorizing the Department to determine in some instances that the hospital should investigate incidents related to disasters, emergency situations or termination of vital services. (NYPIRG)

8) RESPONSE: Both the hospitals and the centers must investigate certain adverse events. Poisonings must be reported to the Department by general hospitals and treatment and diagnostic centers. Upon review of the facility's report by the Department, it will be determined if the poisoning jeopardized patient safety, and/or actually caused harm to patients or staff. If the poisoning jeopardized patient safety by actually causing harm to patients or staff, the Department will direct the facility to conduct an investigation of the event. Nothing in this regulation will prohibit the Department from investigating any adverse event in these provisions.

9) COMMENT: HANYS is supportive of the changes to the New York Patient Occurrence Reporting and Tracking System (NYPORTS) program and regulatory efforts to align the measure with the NQF's serious reportable events. Standardizing the definitions and reporting methodologies of the NYPORTS measures with NQF provisions will reduce duplicative misaligned reporting obligations. HANYS also recommends that the Department continue to work with the NYPORTS Council to develop further specificity in the definitions and guidelines for these events. It encourages the Department to provide additional resources to the NYPORTS program to enable it to make the necessary changes to conduct comprehensive analyses of the data and share lessons learned with the hospital community. (HANYS)

9) RESPONSE: The Department agrees that it should continue to work with the NYPORTS Council to further develop specificity of the definitions and guidelines for these events.

Justice Center for the Protection of People with Special Needs

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Use of Social Security Numbers

I.D. No. JCP-12-13-00011-P

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

Proposed Action: Addition of Part 702 to Title 14 NYCRR.

Statutory authority: Protection of Special Needs Act, L. 2012, ch. 501

Subject: Use of Social Security Numbers.

Purpose: To assist in verifying the identity of persons vis a vis their presence on the Staff Exclusion List.

Text of proposed rule: A new Part 702 is added to Title 14, NYCRR, to read as follows:

§ 702.1 Background and Intent

(a) *The Protection of People with Special Needs Act (the "Act"), enacted as Chapter 501 of the Laws of 2012, seeks to prevent persons responsible for egregious or repeated acts of abuse or neglect of a vulnerable person from being engaged as employees, administrators, consultants, interns, volunteers or contractors, and from obtaining licenses, certificates or other approvals, for positions where they have the potential for regular and substantial contact with vulnerable persons or other individuals whom the Act seeks to protect.*

(b) *To accomplish this goal, the Act provides that all custodians who have been found by a preponderance of the evidence, after an opportunity for a fair hearing, to have engaged in an act of abuse or neglect of sufficient severity or with sufficient frequency, shall be placed on the register of substantiated category one cases of abuse or neglect, also known as the "staff exclusion list."*

(c) *This regulation outlines the procedures for obtaining and using social security numbers to assist in verifying the identity of subjects of reports in the vulnerable persons central register ("VPCR"); individuals placed on the staff exclusion list and those individuals who must be screened against the staff exclusion list.*

§ 702.2 Applicability

This regulation applies to all facilities and provider agencies as defined in subdivision (4) of section 488 of the Social Services Law and to all other entities that must screen individuals against the staff exclusion list pursuant to subdivision (2) of section 495 of the Social Services Law.

§ 702.3 Legal authority

(a) *The Act provides for the creation of a Justice Center for the Protection of Persons with Special Needs ("Justice Center").*

(b) *Section 492 of the Social Services Law mandates that the Justice Center establish a VPCR in which findings of whether alleged acts of abuse or neglect are substantiated or unsubstantiated shall be entered.*

(c) *Section 492 of the Social Services Law mandates that upon accepting a report of a reportable incident, an investigation must be initiated that includes the determination of whether the subject of the report is currently the subject of an open or substantiated report in the VPCR.*

(d) *Sections 493, 494 and 495 of the Social Services Law provide for the creation of a register of substantiated category one cases of abuse or neglect ("the staff exclusion list"), and describe the circumstances and due process requirements for placing a custodian on that register.*

(e) *Section 495 of the Social Services Law provides that a custodian placed on the staff exclusion list is subject to termination of employment from a facility or provider agency, provided that for state entities bound by collective bargaining, action established by collective bargaining shall govern.*

(f) *Subdivision (2) of section 495 of the Social Services Law requires a screening agency, as defined in this Part, to check the staff exclusion list before determining whether to hire or otherwise allow any person as an employee, administrator, consultant, intern, volunteer or contractor who will have the potential for regular and substantial contact with a service recipient or other applicable individual and before approving an applicant for a license, certificate, permit or other approval to provide care to a service recipient or other applicable individual.*

(g) *Paragraph (e) of subdivision (1) of section 96 of the Public Officers Law permits a state agency to disclose personal information incident to a "routine use," which means any use of such record or personal information relevant to the purpose for which it was collected, and which use is necessary to the statutory duties of the agency that collected or obtained the record or personal information, or necessary for that agency to operate a program specifically authorized by law.*

(h) *Paragraph (c) of subdivision (1) one of section 94 of the Public Officers Law permits a state agency to obtain the social security number of an individual for purposes of a quasi-judicial determination.*

(i) *Paragraph (b) of subdivision (3) of section 399ddd of the General Business Law permits firms, partnerships, associations or corporations to require an individual to disclose or furnish his or her social security account number, when required by state or local law or regulation.*

§ 702.4 Definition

Whenever used in this Part:

(a) *"Custodian" shall mean a director, operator, employee or volunteer of a facility or provider agency as defined in subdivision (4) of section 488 of the Social Services Law; or a consultant or an employee or volunteer of a corporation, partnership, organization or governmental entity which provides goods or services to a facility or provider agency pursuant to contract or other arrangement that permits such person to have regular and substantial contact with individuals who are cared for by such a facility or provider agency.*

(b) *"Delegate investigatory entity" shall have the same meaning as expressed in subdivision (7) of section 488 of the Social Services Law.*

(c) *"Facility" or "provider agency" shall have the same meaning as expressed in subdivision (4) of section 488 of the Social Services Law.*

(d) *"Screening agency" shall mean a facility or provider agency as defined in subdivision (4) of section 488 of the Social Services Law; any other provider of services to vulnerable persons in programs licensed, certified or funded by any state oversight agency; and any other provider agency or licensing agency as defined in subdivision (3) or (4) of section 424-a of the Social Services Law.*

(e) *"Service recipient" shall mean an individual who resides or is an inpatient in a residential facility or who receives services from a facility or provider agency as defined in subdivision (4) of section 488 of the Social Services Law.*

(f) *"Staff exclusion list" shall mean the register of substantiated category one cases of abuse or neglect, pursuant to sections 493 and 495 of the Social Services Law.*

(g) *"State oversight agency" shall mean the state agency that operates, licenses or certifies an applicable facility or provider agency; provided however that such term shall only include the following entities: the office of mental health, the office for people with developmental disabilities, the office of alcoholism and substance abuse services, the office of children and family services, the department of health and the state education department.*

(h) *"Vulnerable person" shall have the same meaning as expressed in subdivision 15 of section 488 of the social services law.*

§ 702.5 Verification of Identity

(a) *The Justice Center or a delegate investigatory entity responsible for investigating a reportable incident pursuant to paragraph (c) of subdivi-*

sion (3) of section 492 of the Social Services Law shall be authorized to obtain the social security number of any custodian who is being investigated as a subject of a reportable incident, by consent from the custodian under investigation or from the applicable facility or provider agency, for purposes of verifying the custodian's identity as the subject of any open or substantiated report in the VPCR and, where applicable, as an individual included on the staff exclusion list.

(b) Any person applying for a position for which such person must be screened against the staff exclusion list pursuant to subdivision (2) of section 495 of the Social Services Law shall provide the applicable screening agency with his or her social security number for submission to the Justice Center for the purpose of verifying the person's identity to determine whether the individual is included on the staff exclusion list.

(c) An individual's failure to provide his or her social security number when requested pursuant to this section, after receiving notice of the reason for such request, may preclude the individual from being considered or approved for, or retained in, any such position.

§ 702.6 Confidentiality

The Justice Center shall promulgate policies and procedures regarding corrective actions or penalties for failure to comply with the use, confidentiality and non-disclosure requirements of Sections 89, 94, 95, 96 and 96-a of the Public Officer's Law.

§ 702.7 Severability

If any provision of this Part or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this Part that can be given effect without the invalid provision or applications, and to this end the provisions of this Part are declared to be severable.

Text of proposed rule and any required statements and analyses may be obtained from: Stephan Haimowitz, Justice Center for the Protection of People with Special Needs, Empire State Plaza, Concourse Level, Room 116, Albany, NY 12242, (518) 486-5698, email: stephan.haimowitz@cqc.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:

The Protection of People with Special Needs Act (Chapt. 501, Laws of 2012, hereafter the "Act"), provides for the creation of a Vulnerable Persons Central Register comprised of accepted reports alleging abuse or neglect in facilities or provider agencies under the oversight of the newly-created Justice Center for the Protection of People with Special Needs. Abuse or neglect is defined in subdivision one of section 488 of the Social Services Law. Investigations of all accepted cases are required, and part of that investigation is verifying whether the custodian under investigation is currently the subject of an open or substantiated report in the Vulnerable Persons Central Register. Sections 492 and 493 of the Social Services Law further establish that the investigation must result in a finding of either substantiated by the preponderance of evidence or unsubstantiated, where an individual responsible custodian is identified.

Subdivision five of section 493 of the Social Services Law together with sections 494 and 495 of the Social Services Law, authorize the creation of a Register of Substantiated Category One Cases of Abuse or Neglect, also known as the Staff Exclusion List. They describe the process by which a custodian may be placed on that list and the consequences of such an outcome. Where a case of abuse or neglect against a custodian is found to be of a certain level of seriousness, it will be classified as a category one, requiring the placement of the responsible custodian on the Staff Exclusion List. As indicated by the enabling legislation, category one cases of abuse or neglect represent the most egregious or repeated acts of abuse or neglect.

Placement on the Staff Exclusion List is permanent and generates certain consequences, including a bar to that person assuming an employment, volunteer or consultant role that would permit regular and substantial contact with a vulnerable person in settings under Justice Center oversight. It also may bar approval of applicants for a license, certificate, permit or other approval to provide care to a service recipient. Placement on the Staff Exclusion List also subjects a custodian already providing services to vulnerable persons to termination from employment, subject to applicable collective bargaining agreements. Cognizant of the considerable consequences of being placed on the Staff Exclusion List, this rule proposes to ensure the prompt and accurate identification of persons who have been placed on that list, as well as those prospective applicants for employment, volunteer or consultant opportunities, or licenses, certificates, permits or other approvals who must be screened for presence on that list pursuant to subdivision two of section 495 of the Social Services Law.

In conjunction with the legislative mandate of the Act, section 94(1)(c)

of the Public Officers Law authorizes a state agency to obtain the social security number of an individual for purposes of a quasi-judicial determination, such as the adjudicatory process required to substantiate category one cases of abuse or neglect against a custodian. Section 399ddd-3(b) of the General Business Law permits firms, partnerships, associations or corporations to require an individual to disclose or furnish his or her social security account number, when required by state or local law or regulation.

The Public Officers Law authorizes an agency "to disclose personal information to those officers and employees of, and to those who contract with, the agency that maintains the record where such disclosure is necessary to the performance of official duties required to be accomplished by statute or necessary to operate a program specifically authorized by law." Section 96(1)(e) of the Public Officers Law also authorizes disclosure of such information by a state agency for a routine agency use as defined in section 92.10 of the Public Officers Law. These statutory authorizations will permit the Justice Center to use social security numbers to help accurately identify those persons placed on the Staff Exclusion List, or screened for presence on that list, as required by the Act.

2. Legislative objectives:

The public policy objective of the Act is to implement preventive strategies to reduce the instances of abuse and neglect of certain vulnerable persons, by ensuring that facilities or provider agencies under the Act make informed decisions when placing employees, volunteers, interns or contractors in a position to have regular and substantial contact with vulnerable persons receiving services, or when state oversight agencies issue licenses, certificates, permits or other approval to provide care to service recipients. Those responsible for processing such applications will now be required to check whether a potential applicant has a history of egregious or repeated instances of abuse or neglect against vulnerable persons before making decisions about hiring or taking on contractors or volunteers, or issuing permissions.

This proposed rule also includes the requisite protections for the personal information of applicants and custodians placed on the Staff Exclusion List by limiting its use to the purposes for which it is collected and ensuring confidentiality of the information as required by law.

3. Needs and benefits:

This proposed rule is necessary to ensure the accurate and prompt identification of individuals that are either placed on the Staff Exclusion List or screened as to their presence on that list, as authorized by section 495 of the Social Services Law. This rule will help avoid misidentification and permit the prompt screening of applicants for positions, licenses or approvals, thus allowing providers to promptly address staffing and service needs.

4. Costs:

a. Costs to regulated parties for the implementation of and continuing compliance with the rule:

The regulated parties include facilities and provider agencies under the Act, all those applying for employee, volunteer or consultant positions, for licenses, certificates, permits or other approvals who will have the potential for regular and substantial contact with vulnerable people under Justice Center jurisdiction. They are mandated, by subdivision two of section 495 of the social services law, to submit to a screening to verify whether or not they are on the Staff Exclusion List. This rule merely implements that statutory requirement by providing that the screening be carried out using the applicant's social security number as one of the personal identifiers. The check will be carried out by an immediate search of the Staff Exclusion List electronically. The use of the social security number will make that process immediate, and limit unnecessary delays. Under these circumstances, the request for a screening and the receipt of the response presents no discernible additional cost to the regulated parties.

All of the respective facilities and providers have statutorily created screening processes for their employees that will have regular and substantial unrestricted and unsupervised contact with service recipients. The addition of the Staff Exclusion List screening will reduce the number of more costly criminal history information records checks, where the prerequisite of a Staff Exclusion List screening can establish, of itself, unsuitability for the position or permitting application.

b. Costs to the agency:

The cost to state agencies is negligible given that they will be able to carry out the Staff Exclusion List screening by electronic means, and receive an almost immediate response by the same means. There is no charge for this screening, and it represents an aspect of the overall operational implementation of the Vulnerable Persons Central Register, provided for by sections 491, 492, 493, 494 and 495 of the Social Services Law, pursuant to which this rule is being promulgated.

5. Local government mandates:

Any facility or provider under the jurisdiction of the Justice Center that is operated by a county, city, town, village, school district or other special district is subject to the terms of the Act, and will therefore be required by this rule to carry out the mandated Staff Exclusion List screening by

submitting a request containing the social security number of the applicant. This may be accomplished in electronic form so long as confidentiality is ensured.

6. Paperwork:

The request would be submitted to the Justice Center by facsimile or secure electronic form. The provider or facility would merely be required to transmit the request to the Justice Center. The recordkeeping requirements are limited to the facility or provider agency's preservation of the notice with regard to presence or absence on the Staff Exclusion List, the respective date of the notice and a record of the hiring decision for purposes of state oversight agency audits. The Justice Center would maintain a record of the requests and responses for screenings in electronic form.

7. Duplication:

There is no known duplication, overlap or conflict with any other state or federal government requirements.

8. Alternatives:

The alternative for accomplishing the Staff Exclusion List screening was to use name, address and date of birth only. However, based on the experience of other agencies, it was determined that the introduction of the social security number would significantly streamline the identity verification process, and provide greater certainty as to the outcome, thus benefitting both the applicants, and the facilities or provider agencies.

9. Federal standards:

This rule meets, but does not exceed federal standards. Not applicable.

10. Compliance schedule:

The provisions of this regulation will take effect on June 30, 2013. Regulated parties will be able to comply with this rule immediately upon its adoption.

Regulatory Flexibility Analysis

1. Effect of rule:

Small businesses include not for profit, volunteer or other types of non-state agencies and providers of services to vulnerable persons under Justice Center jurisdiction. Local governments that operate detention centers for juveniles will be affected.

2. Compliance requirements:

The proposed Rule has been reviewed in consideration of its impact on small business and local government service providers. Because existing small business providers are presently engaged in fielding employment, volunteer and consultant applications, and applicants for licenses, certificates permits or approvals are handled by the state agencies, there is no anticipated additional burden on small businesses or local government. The activity required by this rule is limited, in any event, to the transmission of information that can be provided electronically in a secure fashion, and based on forms provided by the Justice Center.

3. Professional services:

It is not anticipated that any new professional services will be needed as a result of the proposed rule-making.

4. Compliance costs:

Any recurring costs are subsumed in regular operating costs of all entities affected, and are represented in the cost of telephone, fax and electronic communications. As a consequence, no additional cost for compliance is anticipated.

5. Economic and technological feasibility:

Electronic mail and facsimile transmissions are general available technologies that can be used to transmit the information required under this rule.

6. Minimizing adverse impact:

The rule is designed to promote efficiency, promptness and accuracy, thus avoiding any potential adverse impacts from fulfilling the statutory requirement expressed through this rule.

7. Small business and local government participation:

We are seeking comments during the public comment period on rural area participation. However rural areas participated in formulating the legislation under which this rule is being promulgated by virtue of their input into the "The Measure of a Society: Protection of Vulnerable Persons in Residential Facilities against Abuse and Neglect" report prepared by Clarence J. Sundram, the Governor's Special Advisor on Vulnerable Persons. See, <http://www.governor.ny.gov/assets/documents/justice4specialneeds.pdf>.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

The rule will apply to every county in New York State that has facilities or providers under the Justice Center's jurisdiction.

2. Reporting, recordkeeping and other compliance requirements; and professional services:

There are no professional services required for compliance with this rule. The compliance requirements are no different than those of a type already being carried out by the facilities or providers in each of New York's

counties, as comprehended under the human resources, staffing and licensing, certification or approval activities of each of these entities.

3. Costs:

No capital costs are required. The annual costs are included in the existing human resources, staffing, licensing, and certification or approval activities of those affected.

4. Minimizing adverse impact:

There are no adverse impacts on rural areas.

5. Rural area participation:

We are seeking comments during the public comment period on rural area participation. However rural areas participated in formulating the legislation under which this rule is being promulgated by virtue of their input into the "The Measure of a Society: Protection of Vulnerable Persons in Residential Facilities against Abuse and Neglect" report prepared by Clarence J. Sundram, the Governor's Special Advisor on Vulnerable Persons. See, <http://www.governor.ny.gov/assets/documents/justice4specialneeds.pdf>.

Job Impact Statement

The proposed regulations are not expected to have a negative impact on jobs or employment opportunities in either public or private sector. A full job impact statement has not been prepared for the proposed regulations as it is not anticipated that the proposed regulations will have any adverse impact on jobs or employment opportunities.

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

**Procedure for Disclosure of Facility or Provider Records
Relating to Abuse or Neglect**

I.D. No. JCP-12-13-00012-P

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

Proposed Action: Addition of Part 703 to Title 14 NYCRR.

Statutory authority: Protection of Special Needs Act, L. 2012 ch. 501

Subject: Procedure for disclosure of facility or provider records relating to abuse or neglect.

Purpose: To permit public access to records relating to abuse or neglect from facilities or providers licensed or certified by the State.

Text of proposed rule: A new Part 703 is added to Title 14, NYCRR, to read as follows:

Part 703 JUSTICE CENTER FACILITY AND PROVIDER DISCLOSURE

§ 703.1 Background

The Protection of People with Special Needs Act (Chapter 501 of the Laws of 2012) provides that access to records relating to the abuse or neglect of vulnerable persons may be obtained from facilities or provider agencies as defined in subdivision (4) of section 488 of the Social Services Law that are not agencies of state government. Subdivision (6) of section 490 of the Social Services Law provides that records in those providers' possession that relate to abuse or neglect shall be made available to the same extent that they would be available under Article Six of the Public Officers Law from a state agency.

§ 703.2 Applicability

(a) *This Part governs the process for obtaining the disclosure of records of state certified or licensed facilities or provider agencies, as defined in subdivision (4) of section 488 of the Social Services Law, relating to the abuse or neglect of vulnerable persons, as mandated by subdivision 6 of section 490 of the Social Services Law.*

(b) *Individual requests for records under other statutory authority, including section 33.25 of the Mental Hygiene Law, section 422-A of the Social Services Law and Article Six of the Public Officers Law as applied to the records of the Justice Center for the Protection of People with Special Needs as a state agency, are not covered by this Part.*

§ 703.3 Legal Authority

(a) *The Protection of People with Special Needs Act creates the Justice Center for the Protection of People with Special Needs and authorizes the Justice Center to promulgate regulations to implement its mandate.*

(b) *Subdivision (6) of section 490 of the Social Services Law requires the Justice Center to respond to requests for disclosure of records of state certified or licensed facilities or provider agencies, as defined in subdivision (4) of section 488 of the Social Services Law, relating to the abuse or neglect of vulnerable persons.*

§ 703.4 Definitions

Whenever used in this Part:

(a) *"Justice Center" means the New York State Justice Center for the Protection of People with Special Needs.*

(b) "Requester" means the person submitting a request to the Justice Center for disclosure of facility or provider agency records under this Part.

(c) "Record" means any information kept, held, filed, produced or reproduced by, with or for a provider, in any physical form whatsoever, insofar as it is related to abuse and neglect as defined in subdivision (1) of section 488 of the Social Services Law. This definition includes, but is not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes.

§ 703.5 Record Requests

(a) The Justice Center shall receive, process and respond to requests for access to facility or provider agency records in accordance with this Part.

(b) All requests to inspect or copy records shall be made in writing and shall reasonably describe the records to which access is being sought. Such requests shall be directed to the Justice Center records access officer at the address indicated on the Justice Center website.

(c) All requests for facility or provider agency records shall include the following information:

(1) the name, mailing address, phone number and electronic mail address, if any, of the requester;

(2) the name and address or other identifying information of the facility or provider agency from which the records are sought; and

(3) a description of the nature and content of the record sought to be disclosed sufficient to enable the facility or provider agency and the Justice Center to identify responsive records.

§ 703.6 Record Request Processing

(a) As soon as practicable after receipt of a request for facility or provider agency records, the Justice Center shall notify the applicable facility or provider agency of the request and shall request such facility or provider agency to begin a search for any responsive records.

(b) Within 10 days from the first business day following the receipt of the request for facility or provider agency records, the Justice Center shall issue an acknowledgement of the request, which may include an approximate date upon which the request will be granted or denied, and/or a request for clarification or further particularization of the types of records the requestor is seeking.

(c) Within a reasonable time thereafter, as determined by the complexity of the request, the volume of records, the ease or difficulty for the facility or provider agencies to locate or retrieve records, the need to review records to determine the extent to which they must be disclosed or other circumstances, the Justice Center shall make the records available to the person requesting them or deny the request for the records.

§ 703.7 Provider Duties and Responsibilities

(a) Facility and provider agencies shall respond to Justice Center inquiries and requests for records in a timely manner and to the extent disclosure is authorized by federal and state law, and shall keep the Justice Center informed of any difficulties or delays in retrieving potentially responsive records.

(b) In providing records to the Justice Center for purposes of this Part, a facility or provider agency may use any appropriate means of transmittal, including electronic mail and electronic document transfers, taking appropriate measures to ensure confidentiality of communications. However, the Justice Center shall have access to the original records in possession of the facility or provider agency whenever it deems it necessary, taking into account the need for the facility or provider agency to maintain such records for provision of services to individuals in its care.

(c) The facility or provider agency shall produce any potentially responsive records to the records access officer of the Justice Center.

(d) The Justice Center shall advise the applicable state oversight agency when a facility or provider agency does not comply with their duties and responsibilities under this Part.

§ 703.8 Record Review and Exemptions from Disclosure

(a) As soon as practicable after receipt of potentially responsive records, the Justice Center shall review the records provided to it and make its determination regarding redactions of information contained in such records and exemptions from disclosure of those records consistent with the exemptions to disclosure contained in Article 6 of the Public Officers Law.

§ 703.9 Decisions

(a) Grants of requests for disclosure of records shall be in writing and shall indicate the manner of production.

(b) Denials of requests for records shall be in writing and shall state the basis of the decision. The denial shall also inform the requester of the opportunity to appeal the decision to the Executive Director of the Justice Center.

(c) Where no responsive records exist, or the facility or provider agency has been unable to locate responsive records, the decision shall so state.

§ 703.10 Fees

(a) Fees for the production of records pursuant to this Part shall be charged as follows:

(1) The requester shall be charged no more than 0.25 cents per page per photocopy. At the Justice Center's discretion, photocopying fees may be waived in any case.

(2) Photocopying costs incurred by the facility or provider agency in making records available to the Justice Center for review shall be factored into the calculation of the cost of producing the record.

(3) There shall be a one-time charge for processing responses provided in electronic form in accordance with paragraph (c) of subdivision (1) of section 87 of the Public Officers Law.

(4) If the records copying process exceeds two hours of employee time, additional charges may be levied in accordance with paragraph (c) of subdivision (1) or section 87 of the Public Officers Law. Included in this calculation will be the time and cost to the facility or provider agency to reproduce records for Justice Center review.

(5) In any event the requester will be advised of the total amount of the fees due, prior to the provision of the records.

§ 703.11 Records Access

(a) Records that the Justice Center determines are subject to disclosure shall be made available in the following manner:

(1) To the extent practicable, records requested by electronic means shall be provided in like form to the requester upon payment of any fees for production, as required under this Part.

(2) Photocopied records shall be provided to the requester by mail at the physical or electronic address provided upon payment of the fees for production, as required under this Part.

(3) Records determined to be subject to disclosure by the Justice Center, may be inspected at the Justice Center's main offices by the requester, as indicated on the Justice Center website and during weekday business hours when the records access officer is present.

§ 703.12 Appeal

(a) Any person denied access to a record under this Part may, within 30 days of such denial, appeal to the Executive Director of the Justice Center.

(b) The time for deciding an appeal shall commence upon receipt of a written request for appeal that identifies the record that is the subject of the appeal, the reasons why such record should be disclosed and the name and return address of the appellant.

(c) Within a reasonable time after receipt of the written request for appeal, the Executive Director shall:

(1) provide access to the record; or

(2) explain in writing the factual and statutory reasons for denial of access to the record; and

(3) inform the individual of the right to seek judicial review of such determination pursuant to Article 78 of the Civil Practice Law and Rules.

Text of proposed rule and any required statements and analyses may be obtained from: Stephan Haimowitz, Justice Center for the Protection of People with Special Needs, Empire State Plaza, Concourse Level, Room 116, Albany, NY 12242, (518) 486-5698, email: stephan.haimowitz@cqc.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:

The authority for the proposed regulations is Chapter 501 of the Laws of 2012 which added Article 20 to the Executive Law and Article 11 to the Social Services Law as well as amended other laws.

In December 2012 Governor Cuomo signed the Protection of People with Special Needs Act which created a Justice Center with specified responsibilities designed to enhance protection for vulnerable persons against abuse, neglect and other harmful conduct through effective incident reporting and investigation systems, fair disciplinary processes, informed and appropriate staff hiring procedures and strengthened monitoring and oversight systems.

This legislation created the Justice Center for the Protection of People with Special Needs. It provides for the Justice Center to field records requests from the public for documents relating to abuse and neglect from facilities and providers of services who are licensed or certified by state agencies, making them available to the same extent that they would be from a state agency under New York State's Freedom of Information Law.

This rule implements the statutory authorization that gives the Justice Center the task of receiving, processing and reviewing records requests from the public for records relating to abuse and neglect.

2. Legislative objectives:

The public policy objectives of the Act are centered on preventing the abuse and neglect of vulnerable persons through a variety of mechanisms. One of those mechanisms is harmonizing practices with respect to respon-

ses to incidents of abuse and neglect that occur in facilities or provider agencies providing services to vulnerable people, and that are licensed or certified by New York State.

3. Needs and benefits:

The purpose of this rule is to ensure consistency in transparency with regard to instances of abuse and neglect of vulnerable persons occurring in institutional settings that are subject to state oversight, while at the same time protecting individual rights to privacy and ensuring compliance with confidentiality laws.

This rule crafts the process whereby these policy objectives can be achieved in a practical and efficient manner, consistent with the provisions of the Freedom of Information Law.

4. Costs:

a. Costs to regulated parties for the implementation of and continuing compliance with the rule.

Prior to the enactment of the Protection of People with Special Needs Act, the regulated parties were required to identify and reproduce records pursuant to requests from qualified persons under sections 33.25 and 31.16 of the Mental Hygiene Law, and under section 422-a of the Social Services Law. In addition, the regulated parties also have existing obligations to open their records for outside review and audit for licensing or certification purposes. Consequently, it is anticipated that personnel already exist within the provider agencies or facilities that are responsible for records management and access.

With the implementation of this rule pursuant to statutory mandate, the activities that the regulated parties will have to undertake are substantially similar to activities in which they already engage, especially given that under this rule the Justice Center will be responsible for the more labor intensive task of record review and redaction, thus limiting the burden on the regulated parties.

In addition, the transfers of information under this rule may be achieved through electronic means, including scanning and electronic mail so long as it ensures confidentiality. This alternative will obviate the need for expenditures on postage, printing or paper for the reproduction and transfer of documents. Under this model, document reproduction and transfer can be carried out using mechanisms that constitute part of regular operating costs. Where the facility or provider must make photocopies to reproduce the record or enlist personnel time to make the copies, the cost will be passed onto the requester of the records, as provided for in the rule and in existing New York State Freedom of Information Law.

b. Costs to the agency, the state and local governments for the implementation and continuation of the rule.

The cost to the state to implement this rule is represented in the budgeting of the Justice Center for a records access officer, who will, in addition to the activities contemplated under this rule, respond to requests for Justice Center records as required of any state agency. Moreover, the rule provides for recovering the cost of reproduction of the records from the requester.

This rule is not applicable to state agencies or local governments, except to the extent that state agencies incorporate into their auditing systems compliance with the Justice Center regulations as a condition of licensing, certification or other approval.

5. Local government mandates:

This rule covers only non-state or private entities, and as a consequence will not affect a county, city, town, village, school district, fire district or other special district, which are already subject to the Freedom of Information Law.

6. Paperwork:

The reporting is inherent in the communications between the Justice Center and the respective non-state provider for purposes of processing the records requests as indicated in the rule.

7. Duplication:

There is no duplication or overlap with other rules or legal requirements of the state and federal government.

8. Alternatives:

Not applicable.

9. Federal standards:

This rule meets, but does not exceed federal standards. Not applicable.

10. Compliance schedule:

The provisions of this regulation will take effect June 30, 2013. Regulated parties will be able to comply with this rule immediately upon its adoption.

Regulatory Flexibility Analysis

1. Effect of rule:

Small businesses affected will include not for profit, volunteer or other types of non-state agencies and providers of services to vulnerable persons under Justice Center jurisdiction. Local government is not affected by the promulgation of this rule.

2. Compliance requirements:

The proposed Rule has been reviewed by the Justice Center with regard

to potential impacts on small business or local governments. No additional professional services will be required of as a result of this rule, as tasks of the same type, i.e., identifying and locating records responsive to requests for records, are currently being performed by the affected facilities or provider agencies. In addition, because of the electronic nature of the transactions, minimal paperwork will be involved on the part of business.

3. Compliance costs:

No initial capital costs are associated with the implementation of this rule. The cost of compliance is for small business only, as local government is not affected by this rule. Compliance can be achieved by the use of existing resources and through mechanisms that are part of general operating costs, such as facsimile, phone and electronic mail communications.

4. Economic and technological feasibility:

The technology used for secure communications is now commonplace, and already utilized by the providers or facilities as they typically manage confidential records such as clinical and medical or educational records and personal information.

6. Minimizing adverse impact:

The rule was designed to allow for variable time frames in compliance, in consideration of the practical aspects of identifying and producing records, depending on the system of records management and the accessibility of the records. The rule also allows for collecting fees for the time expended in reproducing large numbers of records, which takes into account personnel time expended although these funds although, by operation of law, these funds are remitted to the state's general fund. The rule also provides for expediting processing through the use of electronic secure communications.

7. Small business and local government participation:

We are seeking comments during the public comment period on rural area participation. However rural areas participated in formulating the legislation under which this rule is being promulgated by virtue of their input into the "The Measure of a Society: Protection of Vulnerable Persons in Residential Facilities against Abuse and Neglect" report prepared by Clarence J. Sundram, the Governor's Special Advisor on Vulnerable Persons. See, <http://www.governor.ny.gov/assets/documents/justice4specialneeds.pdf>.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

The rule will apply to every county in New York State that has facilities or providers under the Justice Center's jurisdiction.

2. Reporting, recordkeeping and other compliance requirements; and professional services:

The proposed Rule has been reviewed by the Justice Center with regard to potential impacts for compliance. The compliance requirements are no different than those of a type already being carried out by records management personnel in each of the respective facilities or providers in New York's counties.

3. Costs:

There are no capital costs associated with this rule, or any difference in the requirements as to rural or urban areas. It is expected that compliance with this rule can be achieved with existing resources.

4. Minimizing adverse impact:

The rule provides for the secure electronic transfer of information, thus minimizing any adverse impact that might be generated by distance from the Justice Center central offices.

5. Rural area participation:

We are seeking comments during the public comment period on rural area participation. However rural areas participated in formulating the legislation under which this rule is being promulgated by virtue of their input into the "The Measure of a Society: Protection of Vulnerable Persons in Residential Facilities against Abuse and Neglect" report prepared by Clarence J. Sundram, the Governor's Special Advisor on Vulnerable Persons. See, <http://www.governor.ny.gov/assets/documents/justice4specialneeds.pdf>.

Job Impact Statement

A job impact statement is not submitted because this proposed rule with have no adverse impact on jobs or employment opportunities. This proposal regulates access to existing records which are already the subject of records management and reproduction which can be managed by existing personnel and technology.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Procedures for Criminal History Information Checks

I.D. No. JCP-12-13-00015-P

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

Proposed Action: Addition of Part 701 to Title 14 NYCRR.

Statutory authority: Protection of People with Special Needs Act (L. 2012, ch. 501)

Subject: Procedures for Criminal History Information Checks.

Purpose: To establish consistent rules for conducting Criminal History Information Checks.

Substance of proposed rule (Full text is posted at the following State website: www.JusticeCenter.ny.gov): § 701.1 contains the Background and Intent. This section sets forth the statutory authorization regarding criminal history information checks to be conducted by the Justice Center.

§ 701.2 contains the Applicability of this Part. This section lists the entities subject to the provisions of this Part.

§ 701.3 contains the Legal Base which is the statutory authority under which the criminal history information checks are to be conducted.

§ 701.4 contains the Definitions for the purposes of this Part, including the terms “Authorized person”, “Executive Director,” “Justice Center”, “Criminal history information”, “Prospective employee”, “Provider of services”, “Register of substantiated category one cases of abuse and neglect” and “Subject individual”.

§ 701.5 contains Requests for criminal history information checks. It sets forth the procedures to be followed to ensure that the appropriate entities request fingerprint-based criminal history checks for subject individuals who will be working with vulnerable populations in programs operated or supported by New York State human services agencies.

§ 701.6 contains Criminal history review and evaluation. This section lists the procedures to be followed by the Justice Center and providers of services when conducting the review of the criminal history information and evaluating the results of criminal history information checks.

§ 701.7 contains Notification of subsequent criminal charges which sets forth the procedure to be followed when the Justice Center receives notice of a subsequent arrest of a subject individual who has undergone a criminal history information check pursuant to the provisions of this Part.

§ 701.8 contains the Responsibilities of providers of services concerning recordkeeping, notifications and retention and disposal of information.

Text of proposed rule and any required statements and analyses may be obtained from: Stephan Haimowitz, Justice Center for the Protection of People with Special Needs, Empire State Plaza, Concourse Level, Room 116, Albany, NY 12242, (518) 486-5698, email: stephan.haimowitz@cqc.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 553 of the Executive Law grants the Justice Center for Protection of People with Special Needs (“Justice Center”) the power and responsibility to review and evaluate the criminal history information for any person for whom a criminal history check is required by law because they are applying to be employed or utilized at facilities or provider agencies defined in subdivision 4 of section 488 of the Social Services Law that are operated, licensed, certified or otherwise authorized by the Office of Mental Health (“OMH”), the Office for People With Developmental Disabilities (“OPWDD”), and the Office of Children and Family Services (“OCFS”).

Section 16.33 of the Mental Hygiene Law provides that certain providers of services for persons with developmental disabilities must request a criminal history information check for specified individuals.

Section 31.35 of the Mental Hygiene Law provides that certain providers of services for persons with mental illness must request a criminal history background check for each prospective operator, employee, or volunteer of such provider of services. In accordance with 14 NYCRR Section 550.5, such Office has delegated responsibility to the Justice Center for review and evaluation of background checks for providers for whom the Justice Center has authority to perform such review and evaluation pursuant to subdivision (5) of section 553 of the Executive Law.

Section 378-a of the Social Service Law provides that authorized agencies which operate a residential program for children and OCFS must request a criminal history information check for each prospective operator, employee, or volunteer of certain residential facility for children who will have regular and substantial unsupervised or unrestricted physical contact with children in such program.

2. Legislative objectives: To implement statutory requirements enacted in the Protection of People with Special Needs Act (the “Act”)(Chapter 501 of the Laws of 2012).

3. Needs and benefits: The Justice Center is proposing to adopt the following regulation because the Act requires that criminal history information checks be conducted on each prospective operator, employee, or volunteer who will have the potential for regular and substantial unsupervised or unrestricted physical contact with individuals receiving services from

such provider of services which are operated, licensed, certified, or otherwise authorized by OMH (except for secure treatment units operated pursuant to Article 10 of the Mental Hygiene Law or programs operated in facilities of the Department of Corrections and Community Supervision), OPWDD, and certain residential programs operated by authorized agencies and the OCFS pursuant to subdivision (1) of section 378-a of the Social Services Law, excluding foster family homes and residential programs for victims of domestic violence. The Justice Center was established in response to the recognized need to strengthen and standardize the safety net for vulnerable persons who receive care from New York State’s human services agencies. Prior to the passage of the Act, New York State’s human services agencies were required to conduct criminal history information checks on certain subject individuals pursuant to different laws, but using similar standards. The Act centralizes the criminal history information check requirements for the OMH, OPWDD and OCFS in the Justice Center. The purpose of this Part is to establish standards and procedures for such criminal history information checks.

4. Costs: The cost for a New York State criminal history information check through the Division of Criminal Justices Services is \$75.00, the cost for a national criminal history information check through the Federal Bureau of Investigation is \$16.50, and if fingerprints are submitted through MorphoTrust, the State-approved vendor, the current fee is set at \$10.75. OMH and OPWDD currently own and utilize Live Scan equipment to submit prints, thereby avoiding the use of the State-approved vendor. Accordingly, the direct cost for a New York State and national criminal history information check request by either OMH or OPWDD currently is \$91.50. The direct cost for a New York State and national criminal history record check as authorized by subdivision (1) of section 378-a of the Social Services Law of \$102.25, which includes the State-approved vendor fee, will be absorbed either by the authorized agency which operates a residential program for children or the individual seeking employment.

5. Local government mandates: The required criminal history information check is a statutory requirement that will not result in any additional imposition of duties or responsibilities upon county, city, town, village, school or fire districts.

6. Paperwork: In order to assist providers in fulfilling their responsibilities in implementing statutory requirements enacted in the Act, the Justice Center has developed the Justice Center Criminal History Information Tracking System (Justice Center CHITS), which is a web-based system designed to enter applicant information and track the status of the fingerprinting process. Because only a minimum amount of data must be input into the system, and the system is designed to generate all of the required forms mandated in the statute, it is intended to reduce any administrative burden related to the implementation of the Act. Aside from record retention requirements necessary for monitoring compliance, the regulation will not require providers of service to furnish additional information, reports, records or data.

7. Duplication: This proposed rule does not duplicate, overlap, or conflict with any State or federal statute or rule. It should be noted that the Office of Alcoholism and Substance Abuse Services has a similar statutory requirement and is promulgating its own regulations on the subject.

8. Alternatives: The Act requires the adoption of this proposed regulation. There were no significant alternatives to be considered.

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

10. Compliance schedule: These regulations will become effective on June 30, 2013.

Regulatory Flexibility Analysis

1. Effect of Rule: Agencies that operate mental health programs that contract with, or are approved or otherwise authorized by, the New York State Office of Mental Health (“OMH”) and the Office for People With Developmental Disabilities (“OPWDD”) are subject to this regulation. The regulation shall also apply to authorized agencies which operate certain residential programs for children and the Office of Children and Family Services (“OCFS”), excluding foster family homes and residential programs for victims of domestic violence. Some of the aforementioned programs would be considered “small businesses.” The cost for criminal history checks for the mental health programs currently required to request such checks, is borne by OMH and OPWDD and will continue to be under the Protection of People with Special Needs Act (the “Act”) (Chapter 501 of the Laws of 2012). Prior to the enactment of the Act, criminal history information checks, by authorized agencies operating residential programs for children, for staff engaged directly in the care and supervision of children, were voluntary. These criminal history information checks required under the Act are now required, so this may impose an economic impact on these authorized agencies. 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.

2. **Compliance Requirements:** Providers of services that are subject to these requirements must, by statute, request criminal history information concerning certain subject individuals employed or utilized by the provider of service who will have the potential for regular and substantial unsupervised or unrestricted contact with individuals who receive services. One or more persons in their employ must be designated to request a criminal history information check through the Justice Center for the Protection of People with Special Needs ("Justice Center"). Payment for the fingerprinting fee, which is paid to the Division of Criminal Justice, is currently the responsibility of OMH and the OPWDD. In the case of an authorized agency which operates a residential program for children and OCFS, either the provider or the applicant for employment of volunteer service is required to pay the fingerprinting fee. Providers of service must inform the subject individuals of their right to request information and of the procedures available to them to review and correct criminal history information maintained by the State and by the Federal Bureau of Investigation. Although subject individuals cannot be hired before a determination is received from the Justice Center about whether or not the application must be denied, providers can give temporary approval to prospective employees and permit them to work so long as they do not have unsupervised contact with individuals receiving services.

3. **Professional Services:** No additional professional services will be required by small businesses or local governments to comply with this rule.

4. **Compliance Costs:** The cost for a New York State criminal history information check through the Division of Criminal Justice Services is \$75.00, the cost for a national criminal history information check through the Federal Bureau of Investigation is \$16.50, and if fingerprints are submitted through MorphoTrust, the State-approved vendor, the current fee is set at \$10.75. OMH and OPWDD currently own and utilize Live Scan equipment to submit prints, thereby avoiding the use of the State-approved vendor. Accordingly, the direct cost for a New York State and national criminal history information check request by either OMH or OPWDD currently is \$91.50. The direct cost for a New York State and national criminal history record check as authorized by subdivision (1) of section 378-a of the Social Services Law of \$102.25, which includes the State-approved vendor fee, will be absorbed either by the authorized agency which operates a residential program for children or the individual seeking employment.

5. **Economic and Technological Feasibility:** In order to assist providers in fulfilling their responsibilities in implementing statutory requirements enacted in the Act, the Justice Center has developed the Justice Center Criminal History Information Tracking System (Justice Center CHITS), which is a web-based system designed to enter applicant information and track the status of the fingerprinting process. Because only a minimum amount of data must be input into the system, and the system is designed to generate all of the required forms mandated in the statute, it is intended to reduce any administrative burden related to the implementation of the Act. Aside from record retention requirements necessary for monitoring compliance, the regulation will not require providers of service to furnish additional information, reports, records or data. This technology will be accessible through existing computer networks. There may be a very small number of providers that do not have any computer from which they can access this technology. The Justice Center will work with those providers either to identify a way to obtain such access or identify another alternative.

6. **Minimizing Adverse Impact:** Because most of the requirements in this proposal are statutorily required, compliance with them is mandatory. However, the Justice Center has developed its compliance plan with the goal of minimizing adverse impact to the greatest extent possible. The Justice Center CHITS is one example of a strategy intended to reduce the administrative burden related to implementation of the Act. Furthermore, the Justice Center has endeavored to maximize its capability to have fingerprints taken electronically, through systems using technologies that capture fingerprints electronically and would transmit the fingerprints directly to the Division of Criminal Justice Services to obtain criminal history information. It has many advantages to the traditional "ink and roll" process for obtaining fingerprints.

While the Justice Center's implementation plans will accommodate the ability to accept some fingerprints through the "ink and roll" method, our strategy is designed to utilize the Live Scan and MorphoTrust technology to the greatest extent possible as of June 30, 2013.

7. **Small Business and Local Government Participation:** We are seeking comments during the public comment period on rural area participation. However, small businesses and local governments participated in formulating the legislation under which this rule is being promulgated by virtue of their input into the "The Measure of a Society: Protection of Vulnerable Persons in Residential Facilities against Abuse and Neglect" report prepared by Clarence J. Sundram, the Governor's Special Advisor on Vulnerable Persons, which addressed the problem of abuse and neglect of vulnerable people in programs operated or supported by agencies of the state of

New York and resulted in the enactment of the Act. See <http://www.governor.ny.gov/assets/documents/justice4specialneeds.pdf>

Rural Area Flexibility Analysis

1. **Effect of Rule:** Agencies that operate mental health programs that contract with, or are approved or otherwise authorized by, the New York State Office of Mental Health ("OMH") and the Office for People With Developmental Disabilities ("OPWDD") are subject to this regulation. The regulation shall also apply to authorized agencies that operate residential programs for children and the Office of Children and Family Services ("OCFS"), excluding foster family homes and residential programs for victims of domestic violence. However, since these state agencies and agencies authorized pursuant to subdivision (1) of section 378-a of the Social Services Law were already authorized to conduct such checks, the proposed rule will not impose any adverse economic impact on rural areas, nor will it impose new reporting, record keeping or other compliance requirements on local governments.

2. **Compliance Requirements:** Providers of service that are subject to these requirements, including those in rural areas, must, by statute, request criminal history information concerning prospective subject individuals who will have the potential for regular and substantial unsupervised or unrestricted contact with individuals receiving services. One or more persons in their employ must be designated to request a criminal history information check. The criminal history record information must be obtained through the Justice Center for the Protection of People with Special Needs ("Justice Center"). Payment for the fingerprinting fee, which is paid to the Division of Criminal Justice Services ("DCJS"), is the responsibility of the applicable state oversight agency that licenses, certifies or otherwise approves the provider of service. In the case of a program or facility licensed or certified by the OCFS, either the provider or the applicant for employment of volunteer service is required to pay the fingerprinting fee. Providers of service must inform their prospective subject individuals of their right to request information and of the procedures available to them to review and correct criminal history information maintained by the State and the Federal Bureau of Investigation ("FBI"). Although prospective subject individuals cannot be hired before a determination is received from the Justice Center about whether or not the application must be denied, providers can give temporary approval to prospective subject individuals and permit them to work so long as they do not have unsupervised contact with clients.

3. **Professional Services:** No additional professional services will be required by small businesses or local governments to comply with this rule.

4. **Compliance Costs:** The cost for a New York State criminal history information check through the Division of Criminal Justice Services is \$75.00, the cost for a national criminal history information check through the Federal Bureau of Investigation is \$16.50, and if fingerprints are submitted through MorphoTrust, the State-approved vendor, the current fee is set at \$10.75. OMH and OPWDD currently own and utilize Live Scan equipment to submit prints, thereby avoiding the use of the State-approved vendor. Accordingly, the direct cost for a New York State and national criminal history information check request by either OMH or OPWDD currently is \$91.50. The direct cost for a New York State and national criminal history record check as authorized by subdivision (1) of section 378-a of the Social Services Law of \$102.25, which includes the State-approved vendor fee, will be absorbed either by the authorized agency which operates a residential program for children or the individual seeking employment.

5. **Economic and Technological Feasibility:** In order to assist providers in fulfilling their responsibilities in implementing statutory requirements enacted in The Protection of People with Special Needs Act (the "Act")(Chapter 501 of the Laws of 2012), the Justice Center has developed the Justice Center Criminal History Information Tracking System (Justice Center CHITS), which is a web-based system designed to enter applicant information and track the status of the fingerprinting process. Because only a minimum amount of data must be input into the system, and the system is designed to generate all of the required forms mandated in the statute, it is intended to reduce any administrative burden related to the implementation of the Act. Aside from record retention requirements necessary for monitoring compliance, the regulation will not require providers of services to furnish additional information, reports, records, or data. This technology will be accessible through existing computer networks. There may be a very small number of providers that do not have any computer from which they can access this technology. The Justice Center will work with those providers either to identify a way to obtain such access or identify another alternative.

6. **Minimizing Adverse Impact:** Because most of the requirements in this proposal are statutorily required, compliance with them is mandatory. However, the Justice Center has developed its compliance plan with the goal of minimizing adverse impact to the greatest extent possible. The Justice Center CHITS is one example of a strategy intended to reduce the

administrative burden related to implementation of the Act. Furthermore, the Justice Center has endeavored to maximize its capability to have fingerprints taken electronically, through systems called either Live Scan or MorphoTrust. These systems utilize technologies that capture fingerprints electronically and would transmit the fingerprints directly to the Division of Criminal Justice Services to obtain criminal history information. It has many advantages to the traditional "ink and roll" process.

While the Justice Center's implementation plans will accommodate the ability to accept some fingerprints through the "ink and roll" method, particularly in rural areas where access to State-operated Live Scan or MorphoTrust technology may be more difficult, our strategy is designed to utilize the Live Scan and Morpho-Trust technology to the greatest extent possible as of June 30, 2013.

7. Rural Area Participation: We are seeking comments during the public comment period on rural area participation. However, rural areas participated in formulating the legislation under which this rule is being promulgated by virtue of their input into the "The Measure of a Society: Protection of Vulnerable Persons in Residential Facilities against Abuse and Neglect" report prepared by Clarence J. Sundram, the Governor's Special Advisor on Vulnerable Persons, which addressed the problem of abuse and neglect of vulnerable people in programs operated or supported by agencies of the state of New York and resulted in the enactment of the Act. See <http://www.governor.ny.gov/assets/documents/justice4specialneeds.pdf>

Job Impact Statement

A Job Impact Statement is not necessary for this filing. Proposed 14 NYCRR Part 701 should not have any adverse impact on the existing employees and volunteers of providers of services as it applies only to future prospective employees and volunteers. It is anticipated that the number of future prospective employees/volunteers of providers of services who have regular and substantial unsupervised or unrestricted physical contact with individuals receiving services will be reduced to the degree that the criminal history information check reveals criminal history information barring employment.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Administrative Adjudication Process for Substantiated Cases of Abuse and Neglect

I.D. No. JCP-12-13-00017-P

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

Proposed Action: Addition of Part 700 to Title 14 NYCRR.

Statutory authority: Protection of People with Special Needs Act (L. 2012, ch. 501)

Subject: Administrative adjudication process for substantiated cases of abuse and neglect.

Purpose: To establish administrative adjudication procedures for substantiated cases of abuse and neglect.

Substance of proposed rule (Full text is posted at the following State website: www.justicecenter.ny.gov): § 700.3 contains the definitions for the purposes of this Part, including the terms "Executive Director," "Justice Center," "Administrative Law Judge," "Subject," "Hearing," "Substantiated Report," and "Abuse or neglect."

§ 700.4 contains the Initiation of Request for Amendment. This section sets forth the process by which the subject of a substantiated report of abuse or neglect has the right to request an amendment of the report, which includes submission by the subject of a signed written statement during a specified time period.

§ 700.5 contains the Review Based Upon Request for Amendment. This section sets forth the process by which the Justice Center administrative appeals unit conducts reviews of substantiated reports that may be requested by subjects under Social Services Law section 494(1)(a).

§ 700.6 contains the Right to a Hearing/Hearing Issues. This section sets forth the subject's right to a hearing before an administrative law judge after review by the administrative appeals unit and a substantiated finding, as well as the subject's right to retain counsel at his or her own expense and the hearing issues.

§ 700.7 contains the Notice of the Pre-Hearing Conference. This section sets forth the procedure for initiating a pre-hearing conference, the requirements for the notice of pre-hearing conference, and the requirement that the notice be mailed at least 20 days before the date of the pre-hearing conference.

§ 700.8 contains the Pre-Hearing Conference. This section sets forth the requirements of the pre-hearing conference and provides for pre-hearing conference by telephone or video conference, and also includes provisions for identification and exchange of witness information and evidence, notification as to request for an interpreter and scheduling a hearing date.

§ 700.9 contains the Responsibilities of the Administrative Law Judge. This section sets forth the powers of the administrative law judge as well as the requirement that the proceedings be conducted in a fair and impartial manner. This section also sets forth the procedure for requesting that an administrative law judge recuse himself or herself, grounds for recusal, requirements for a written decision if the request for recusal is denied, and the procedure for appeal of the denial.

§ 700.10 contains the Conduct of the Hearing. This section sets forth that the administrative law judge presides and makes all procedural rulings, that the hearing may be conducted by video conference, the requirements for appearances, and that the burden of proof is on the Justice Center. This section also includes that the parties may make an opening and closing statement and that at the conclusion of the hearing, the parties will have the opportunity to provide written argument of issues of law.

§ 700.11 contains the Hearing Record. This section sets forth that a verbatim recording will be made of the hearing in a manner that accurately records the hearing and that a transcript of the hearing will be made available to a party upon request and payment of the cost of the transcript. This section also defines the contents of a hearing record.

§ 700.12 contains the Administrative Law Judge's Report and Recommendations. This section sets forth that at the conclusion of the hearing the administrative law judge will issue a report and recommendation, which will include his or her determination of the issues. This section also includes requirements for the report and recommendation such as a description of the issues, recitation of relevant facts, assessment of credibility, applicable statutory and regulatory authority as well as findings of fact and conclusions of law. A copy of the written report and recommendation is provided to the Executive Director.

§ 700.13 contains the Executive Director's Final Determination. This section sets forth that after receipt of the administrative law judge's report and recommendation and the hearing record, the executive director or his or her designee shall make a final determination. The final determination of the executive director or designee shall be in writing and embodied in an order. The order shall be based exclusively upon the record of the hearing and shall contain findings of fact and conclusions of law. The order shall contain notice of the right to seek review of the order pursuant to Article 78 of the Civil Practice Law and Rules.

§ 700.14 contains Finality. This section sets forth that the determination of the executive director or his or her designee shall be final and is not subject to further administrative review.

Text of proposed rule and any required statements and analyses may be obtained from: Stephan Haimowitz, Justice Center for the Protection of People with Special Needs, Empire State Plaza, Concourse Room 116, Albany, NY 12242, (518) 486-5698, email: stephan.haimowitz@cqc.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:

The Protection of People with Special Needs Act (Chapter 501 of the Laws of 2012, which added Article 20 to the Executive Law and Article 11 to the Social Services Law as well as amended other laws) provides authority for the proposed regulations. Section 494 of the Social Services Law specifically requires, in part, that the office shall establish an appeals process by which the subject of a substantiated report of abuse or neglect is notified of the right to appeal and the procedure by which he or she may challenge the determination that a report is substantiated.

2. Legislative Objectives:

In December 2012, Governor Cuomo signed the Protection of People with Special Needs Act. The legislative objective includes creation of uniform safeguards implemented by the Justice Center for the Protection of People with Special Needs to protect vulnerable persons against abuse, neglect and other conduct that may jeopardize their health, safety and welfare and to provide fair treatment to the employees who provide support for vulnerable persons.

3. Current Requirements:

Current regulations do not exist for the adjudication process and section 494 of the Social Services Law requires establishment of an appeals process by which the subject of a substantiated report of abuse or neglect is notified of the right to appeal and the procedure by which he or she may challenge the determination that a report is substantiated.

4. Needs and Benefits:

Among other things, the Justice Center will be responsible for developing the vulnerable persons' central register, which will include the names of individuals found to have committed certain substantiated egregious or repeated acts of abuse or neglect using a preponderance of the evidence standard. Individuals whose names are placed on the register will be prohibited from future employment in the care of vulnerable persons.

All persons found to have committed a substantiated act or acts of abuse or neglect will have access to fair administrative review procedures before their names are included on the vulnerable persons' central register, including the right to an administrative hearing before an administrative law judge to challenge those findings. The Justice Center intends to establish a regulatory framework for creation of an appeals process wherein the subject of a substantiated report of abuse or neglect may initially request an amendment and appeal of a substantiated report by the administrative appeals unit of the Justice Center, and if that unit finds that there is a preponderance of the evidence that a subject committed an act or acts of abuse or neglect giving rise to the substantiated report, the subject of a substantiated report then has a right to a hearing before an administrative law judge. It is important for state regulations governing the adjudication process to be established so that there is a fair procedure in place wherein an individual may challenge the determination that a report of abuse or neglect is substantiated.

These regulations provide a system designed to effect timely and fair disposition of adjudicatory proceedings, a statement of the agency's rules governing procedures for requesting amendment and appeal and administrative hearings, and requirements for clear and detailed notices, including a statement of the rights of the subject.

5. Costs:

Costs to Regulated Parties: The adjudication regulations do not directly impose costs upon private regulated parties or the regulated State oversight agencies defined in the Act. Private regulated parties, which include facilities and providers defined under the Act, and the State oversight agencies, may, however, experience minimal indirect impact by establishment of the appeals process in which the subject of a substantiated report of abuse or neglect may challenge a substantiated finding. In order to conduct the legal review by the administrative appeals attorney, where an investigation has been conducted by one of the regulated parties, the investigating agency will be required to provide a copy of the investigatory file to the Justice Center. Because the investigatory file contains documents generated as a result of other legal requirements and no new documents are required to be prepared as a result of the adjudication regulations, it is believed that the cost of providing a copy of the investigatory file to the Justice Center will be minimal. In addition, when the subject proceeds to a hearing before an administrative law judge, and an investigation has been conducted by one of the regulated parties, appearance at the hearing may be required by an employee of the regulated party as a witness. It is not possible to calculate the cost to the regulated party of having an employee appear at a hearing as a witness, but it is believed that the cost will be minimal. In addition, recordkeeping requirements are not imposed on the regulated parties by the adjudication regulations, but to the extent that additional records will be maintained as an indirect result of the adjudication process (i.e. notifications will be provided to the regulated parties at various points of the adjudication process), current laws and regulations already impose recordkeeping requirements and it is believed that the cost of the additional recordkeeping performed by the regulated parties will be minimal.

6. Local Government Mandates:

The proposed regulations do not directly impose any new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district or other special district. Any facility or provider under the jurisdiction of the Justice Center that is operated by a county, city, town, village, school district or other special district is subject to the terms of the Act, however, and may have to provide investigatory records or have an employee appear as a witness at an administrative hearing. Also, the regulations do not impose recordkeeping requirements, although additional records may be maintained as an indirect result of the adjudication process. It is believed that any additional indirect costs will be minimal.

7. Costs to the Justice Center:

The Protection of People with Special Needs Act requires establishment of an appeal procedure wherein the subject of a substantiated report of abuse or neglect may challenge the substantiated finding. The adjudication regulations implement the requirements of the Act and the cost of the adjudication process is not reliably quantifiable at this time.

8. Paperwork:

The proposed regulations will enable the Justice Center to establish the procedure by which a subject of a substantiated report of abuse or neglect may challenge the determination that a report is substantiated. Although some paperwork associated with an administrative appellate review and administrative hearing will be generated by the Justice Center, including

written notifications to the subject, a written report and recommendation, and a written final order, to the extent feasible, electronic communication, reports and orders will be used to avoid unnecessary paperwork costs. Regarding State Oversight Agencies and private agencies affected by the new law, electronic communication will be the main source of notifications and correspondence and an increase in paperwork should be minimal.

9. Duplication:

There are no known relevant State regulations which duplicate, overlap or conflict with the proposed regulations. The proposed regulations apply only to the adjudication process within the framework of the Justice Center for the Protection of People with Special Needs.

10. Alternatives:

There is no alternative to the statutory requirement that the Department enact regulations establishing an appeals process by which the subject of a substantiated report of abuse or neglect is notified of the right to appeal and the procedure by which he or she may challenge the determination that a report is substantiated. Alternative adjudicatory models used by other State agencies were considered in developing the appeals process governing the subject's request for amendment and appeal, the subject's right to an administrative hearing and the rules governing the administrative hearing.

11. Federal Standards:

The proposed regulations do not conflict with any Federal government standards.

12. Compliance Schedule:

The proposed regulations will be effective upon publication of a Notice of Adoption in the New York State Register. Regulated parties will be able to comply with this rule immediately upon its adoption.

Regulatory Flexibility Analysis

1. Effect on small business and local governments:

The proposed adjudication regulations have been reviewed in consideration of impact on service providers of all sizes and local governments. A determination has been made that some provider agencies which employ fewer than 100 employees overall provide services to "vulnerable persons" under the Act and meet the requirements of small businesses as defined in SAPA § 102(8). The impact of the adjudication regulations upon small businesses as well as local governments is discussed below.

2. Reporting, recordkeeping and compliance requirements and professional services:

The adjudication regulations do not directly impose adverse economic impact or reporting, recordkeeping or other compliance requirements, or professional service requirements on the small businesses described above or on local governments. Indirectly, minimal impact may result by the establishment of an appeals process in which the subject of a substantiated report of abuse or neglect may challenge a substantiated finding.

3. Costs:

In order to conduct the legal review by the administrative appeals attorney, where an investigation has been conducted by one of the small business provider agencies, the investigating agency will be required to provide a copy of the investigatory file to the Justice Center. The investigatory file, however, contains documents generated as a result of other legal requirements and no new documents are required to be prepared as a result of the adjudication regulations and it is believed that the cost of providing a copy of the file will be minimal. In addition, where the subject proceeds to a hearing before an administrative law judge, and an investigation has been conducted by one of the small business provider agencies, appearance at the hearing may be required by an employee of the agency as a witness. It is not possible to calculate the cost to the small businesses of having an employee appear at a hearing as a witness, but it is believed that the cost will be minimal. In addition, recordkeeping requirements are not imposed on the regulated parties by the adjudication regulations, but to the extent that additional records will be maintained as an indirect result of the adjudication process (i.e. notifications will be provided to the regulated parties at various points of the adjudication process), current laws and regulations already impose recordkeeping requirements and it is believed that the cost of the additional recordkeeping performed by the regulated parties will be minimal. Similarly, the proposed regulations do not directly impose any new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district or other special district. Any facility or provider under the jurisdiction of the Justice Center that is operated by a county, city, town, village, school district or other special district is subject to the terms of the Act, however, and may have to provide investigatory records or have an employee appear as a witness at an administrative hearing. Also, the regulations do not impose recordkeeping requirements, although additional records may be maintained as an indirect result of the adjudication process. It is believed that any additional indirect costs will be minimal.

4. Minimizing adverse impact:

A review and consideration of the approaches for minimizing adverse economic impact as suggested in the State Administrative Procedure Act

has been conducted. The Protection of People with Special Needs Act creates uniform standards across systems to be implemented and monitored by the Justice Center. It is believed that implementation of a uniform set of standards will benefit the regulated parties, including small business and local government, and that as a result, any indirect adverse impact will be minimized. In addition, whenever possible, emphasis will be upon the efficient use of resources available, electronic communications and documents will be acceptable, locations of hearings will be conducted with consideration of geographic factors and impact upon witnesses, and the use of video conference technology for hearings may be employed.

5. Participation by small business:

We are seeking comments during the public comment period on small business participation. However, small businesses participated in formulating the legislation under which this rule is being promulgated by virtue of their input into "The Measure of a Society: Protection of Vulnerable Persons in Residential Facilities against Abuse and Neglect" report prepared by Clarence J. Sundram, the Governor's Special Advisor on Vulnerable Persons, which addressed the problem of abuse and neglect of vulnerable people in programs operated or supported by agencies of the state of New York and resulted in the enactment of the Protection of People with Special Needs Act. See <http://www.governor.ny.gov/assets/documents/justice4specialneeds.pdf>.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

Every county in New York has facilities or providers under the jurisdiction of the Justice Center.

2. Reporting, recordkeeping and other compliance requirements and professional services:

Impact on service providers in rural areas has been considered regarding the adjudication regulations and it has been determined that the regulations do not directly impose an adverse economic impact on public or private entities in rural areas, reporting, recordkeeping, other compliance or professional service requirements. Indirectly, minimal impact may result by the establishment of an appeals process in which the subject of a substantiated report of abuse or neglect may challenge a substantiated finding.

3. Costs:

In order to conduct the legal review by the administrative appeals attorney, where an investigation has been conducted by one of the providers in a rural area, the investigating agency will be required to provide a copy of the investigatory file to the Justice Center. The investigatory file, however, contains documents generated as a result of other legal requirements and no new documents are required to be prepared as a result of the adjudication regulations and it is believed that the cost of providing a copy of the file will be minimal. In addition, where the subject proceeds to a hearing before an administrative law judge, and an investigation has been conducted by one of the providers in a rural area, appearance at the hearing may be required by someone at the agency as a witness. It is not possible to calculate the cost of having an employee appear at a hearing as a witness, but it is believed that the cost will be minimal. In addition, recordkeeping requirements are not imposed on the regulated parties by the adjudication regulations, but to the extent that additional records will be maintained as an indirect result of the adjudication process (i.e. notifications will be provided to the regulated parties at various points of the adjudication process), current laws and regulations already impose recordkeeping requirements and it is believed that the cost of the additional recordkeeping performed by the regulated parties will be minimal.

4. Minimizing adverse impact:

A review and consideration of the approaches for minimizing adverse economic impact as suggested in the State Administrative Procedure Act has been conducted. The Protection of People with Special Needs Act creates uniform standards across systems to be implemented and monitored by the Justice Center. It is believed that implementation of a uniform set of standards will benefit the regulated parties, including those in rural areas, and that as a result, any indirect adverse impact will be minimized. In addition, whenever possible, emphasis will be upon the efficient use of resources available, electronic communications and documents will be acceptable, and locations of hearings will be conducted with consideration of geographic factors and impact upon witnesses, and the use of video conference technology for hearings may be employed.

5. Participation by providers in rural areas:

We are seeking comments during the public comment period on rural area participation. However, rural areas participated in formulating the legislation under which this rule is being promulgated by virtue of their input into "The Measure of a Society: Protection of Vulnerable Persons in Residential Facilities against Abuse and Neglect" report prepared by Clarence J. Sundram, the Governor's Special Advisor on Vulnerable Persons, which addressed the problem of abuse and neglect of vulnerable people in programs operated or supported by agencies of the state of New York and resulted in the enactment of the Protection of People with Special Needs

Act. See <http://www.governor.ny.gov/assets/documents/justice4specialneeds.pdf>.

Job Impact Statement

The proposed regulations are not expected to have a negative impact on jobs or employment opportunities in either public or private sector. A full job impact statement has not been prepared for the proposed regulations as it is not anticipated that the proposed regulations will have any adverse impact on jobs or employment opportunities.

This proposal establishes an appeals process by which the subject of a substantiated report of abuse or neglect may challenge the substantiated finding. The creation of the adjudication process which includes the right to review by an administrative appeals attorney and the right to a hearing by an administrative law judge is expected to create additional employment opportunities. Although administrative hearings involving institutional allegations of child abuse and neglect are currently conducted by the Office of Children and Family Services (OCFS) and effective June 30, 2013, the Justice Center will have jurisdiction over the adjudication of those allegations, it is not expected that the creation of the adjudication process herein will have a negative impact on jobs or employment opportunities in either the public or private sector.

Office of Mental Health

EMERGENCY/PROPOSED

RULE MAKING

NO HEARING(S) SCHEDULED

Transfer of Involuntary Patients to Authorized Secure Facilities

I.D. No. OMH-12-13-00018-EP

Filing No. 246

Filing Date: 2013-03-05

Effective Date: 2013-03-05

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

Proposed Action: Amendment of Part 57 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09, 29.01, 29.11 and 31.04

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

Specific reasons underlying the finding of necessity: The rule adds provisions to allow for the transfer of involuntary patients to regional forensic units operated by the Office of Mental Health. Patients whose behavior is such as to raise the likelihood of their causing harm to others cannot be given the care and treatment they require at other hospitals operated by the Office since, for the protection of other patients and staff of such hospitals, they must be kept in closed wards while in a civil facility. Current regulations provide for the transfer of involuntary patients to Mid-Hudson Forensic Psychiatric Center and Kirby Forensic Psychiatric Center. Due to increasing demands on the system, Mid-Hudson and Kirby Forensic Psychiatric Centers have been consistently under pressure to admit patients, placing a strain on their capacity. The emergency rule will enable the transfer of these patients to not only the two Office-operated forensic hospitals, but to the maximum security forensic units located at the Rochester Regional Forensic Unit and Northeast Regional Forensic Unit. These maximum security forensic units have similar security services as found at Mid-Hudson and Kirby; therefore, it is feasible to utilize these forensic units to meet the need for the Part 57 beds. As this is a health and safety issue for patients and staff, the rule is filed appropriately as an Emergency Adoption.

Subject: Transfer of Involuntary Patients to Authorized Secure Facilities.

Purpose: To allow for the transfer of an involuntary patient from an OMH hospital to one of its regional forensic units.

Text of emergency/proposed rule: 1. Section 57.1 of Title 14 NYCRR is amended to read as follows:

(a) *The forensic mental health system offers care to New Yorkers pursuant to Mental Hygiene, Criminal Procedure, and Correction Laws. The Office ensures that mental health services are available to members of this population at multiple geographical points throughout the forensic system. In addition to the Mid-Hudson Forensic Psychiatric Center and Kirby Forensic Psychiatric Center, the Office operates two maximum security*

regional forensic units: the Rochester Regional Forensic Unit, located on the grounds of the Rochester Psychiatric Center, and the Northeast Regional Forensic Unit, located at Central New York Psychiatric Center.

(b) [The Mid-Hudson Psychiatric Center and Kirby Forensic Psychiatric Center are] These forensic facilities [in the Office of Mental Health] and units [which] offer a range and variety of programs and services for the care, treatment, and rehabilitation of [the mentally ill of the] persons age [of] 16 and over with mental illness, comparable with those offered at other hospitals in the Office of Mental Health. In addition, they have the staff and physical surroundings to enable them to offer such programs and services to patients requiring closer supervision than can be given at other hospitals.

(c) Patients whose behavior is such as to raise the likelihood of their causing harm to others cannot be given the care and treatment they require at such other hospitals operated by the Office of Mental Health since, for the protection of other patients and staff of such hospitals, they must be kept in closed wards [and even] while in [seclusion] a civil facility.

(d) The Mid-Hudson Forensic Psychiatric Center, [and] Kirby Forensic Psychiatric Center, Rochester Regional Forensic Unit and Northeast Regional Forensic Unit [with] have specially trained staff and a secure perimeter. As such, these settings [security] permit freer movement, within [institution] facility grounds, of [such] patients who pose a risk of harm to others, as well as offer them an opportunity for [and the possibility of] rehabilitation, recreation, and therapies which, because of their need for close supervision, would not be available for them at the other hospitals.

2. The heading and subdivisions (a) and (b) of Section 57.2 of Title 14 NYCRR are amended to read as follows:

Procedure for transfer to Mid-Hudson Psychiatric Center, [and] Kirby Forensic Psychiatric Center, Rochester Regional Forensic Unit and Northeast Regional Forensic Unit

(a) Application. The director of a hospital [in the department] operated by the Office of Mental Health may make application in writing to the commissioner or his designee for transfer of an involuntary patient at his facility to the Mid-Hudson Forensic Psychiatric Center, [or] Kirby Forensic Psychiatric Center, Rochester Regional Forensic Unit or Northeast Regional Forensic Unit. Such application must be supported by a statement of facts showing that:

(1) there is a substantial risk that such patient may cause physical harm to other persons, as manifested by homicidal or other violent behavior by which others are placed in reasonable fear of serious physical harm.

(2) reasonable efforts at treatment have been made without eliminating such substantial risk of physical harm to others.

(3) the patient needs the close supervision provided at the Mid-Hudson Forensic Psychiatric Center, [or] Kirby Forensic Psychiatric Center, Rochester Regional Forensic Unit or Northeast Regional Forensic Unit. A copy of the application together with a copy of this Part shall be given to the patient, to the nearest relative of the patient, if there be known to the director, and to the Mental Hygiene Legal Service. Proof of service of such copy and proof of service of any paper required by this Part shall be placed in the patient's record.

(b) Notice of commissioner's decision. If the commissioner or his designee finds that the application sets forth facts justifying the transfer of the patient to the Mid-Hudson Forensic Psychiatric Center, [or] Kirby Forensic Psychiatric Center, Rochester Regional Forensic Unit or Northeast Regional Forensic Unit, he shall so notify the director who made the application. Such director shall thereupon give notice of the proposed transfer of such patient to the Mid-Hudson Forensic Psychiatric Center, [or] Kirby Forensic Psychiatric Center, Rochester Regional Forensic Unit or Northeast Regional Forensic Unit, to the persons served with a copy of the application. The notice shall have attached thereto a copy of the determination of the commissioner or his designee and shall state that such transfer will be effected unless, within 48 hours of service of the notices, exclusive of Saturdays, Sundays, and holidays, the patient, or anyone on his behalf, files written objection to the transfer with such director.

3. Section 57.3 of Title 14 NYCRR is amended to read as follows:

[(1)] (a) An application may be made for the immediate transfer of a patient to Mid-Hudson Forensic Psychiatric Center, [or] Kirby Forensic Psychiatric Center, Rochester Regional Forensic Unit or Northeast Regional Forensic Unit [may request immediate transfer thereto]. In such case, the application shall set forth all the facts required by section 57.2 of this Part and, in addition shall set forth facts showing that the hospital where he is being held cannot manage the patient and that a delay in the transfer would seriously jeopardize the safety of the patient, other patients at the facility, or employees thereof. A copy of the application shall be served upon the nearest relative of the patient, if there be any known to the director, and upon the Mental Hygiene Legal Service. If the commissioner or his designee approves the application, he shall order, within 48 hours of receipt of the application the immediate transfer of the patient. The order shall contain a provision that the transfer is conditional upon full review

by the commissioner or his designee. A copy of the order shall be served upon the patient, the Mental Hygiene Legal Service, and any relative served with a copy of the application.

[(2)] (b) Within 24 hours of the patient's arrival at Mid-Hudson Forensic Psychiatric Center, [or] Kirby Forensic Psychiatric Center, Rochester Regional Forensic Unit or Northeast Regional Forensic Unit, the director of the Mid-Hudson Forensic Psychiatric Center, [or] Kirby Forensic Psychiatric Center, Rochester Psychiatric Center or Central New York Psychiatric Center shall serve notice upon the patient, the nearest relative of the patient, if there be any known to him, and upon the Mental Hygiene Legal Service of the patient's rights to object to the transfer. The procedure set forth in section 57.2 of this Part shall apply. If the decision of the commissioner or his designee is to uphold the transfer, he shall issue an order confirming the transfer. If the decision is to the contrary, he shall rescind the transfer.

4. Section 57.4 of Title 14 NYCRR is amended to read as follows:

(a) An involuntary patient transferred to Mid-Hudson Forensic Psychiatric Center, [or] Kirby Forensic Psychiatric Center, Rochester Regional Forensic Unit or Northeast Regional Forensic Unit shall be retained at such hospital only as long as his condition requires retention at such hospital in accordance with the criteria set forth in section 57.2(a) of this Part.

(b) The director of Mid-Hudson Forensic Psychiatric Center, [or] Kirby Forensic Psychiatric Center, Rochester Psychiatric Center or Central New York Psychiatric Center shall comply with the provisions of article 31 of the Mental Hygiene Law and apply, in accordance with such article, for the required periodic orders authorizing retention of involuntary patients. In addition, such director shall periodically review the need for retention in the Mid-Hudson Forensic Psychiatric Center, [or] Kirby Forensic Psychiatric Center, Rochester Regional Forensic Unit or Northeast Regional Forensic Unit of each involuntary patient and shall file a report with the commissioner or his designee for each such patient at intervals of not more than six months setting forth reasons why the patient needs continued retention at such facility. A copy of such report shall be served on the patient and the Mental Hygiene Legal Service.

(c) Involuntary patients who no longer need retention in the Mid-Hudson Forensic Psychiatric Center, [or] Kirby Forensic Psychiatric Center, Rochester Regional Forensic Unit or Northeast Regional Forensic Unit but who still require involuntary care and treatment shall be transferred to another hospital in the Office of Mental Health.

5. Section 57.5 of Title 14 NYCRR is amended to read as follows:

Each involuntary patient previously transferred to the Mid-Hudson Forensic Psychiatric Center, [or] Kirby Forensic Psychiatric Center, Rochester Regional Forensic Unit or Northeast Regional Forensic Unit who is a patient therein on the effective date of this Part, shall be served within one month of such date with a copy of this Part, a statement setting forth reasons why such patient needs continued retention therein, and a notice of the patient's rights to object to further retention at such facility. A copy of such statement and notice shall be served upon the nearest relative of the patient, if there be any known to the director, and upon the Mental Hygiene Legal Service. If there is no written objection made by or on behalf of the patient, the patient may be retained at Mid-Hudson Forensic Psychiatric Center, [or] Kirby Forensic Psychiatric Center, Rochester Regional Forensic Unit or Northeast Regional Forensic Unit subject to the provisions of section 57.4 of this Part. If there is an objection, the procedure set forth in sections 57.2 and 57.3 of this Part shall apply.

6. Section 57.6 of Title 14 NYCRR is amended to read as follows:

Nothing in this Part shall affect any right of the patient or someone acting on his behalf to initiate a proceeding allowed to him by law before a court of competent jurisdiction to challenge his transfer to or retention at Mid-Hudson Forensic Psychiatric Center, [or] Kirby Forensic Psychiatric Center, Rochester Regional Forensic Unit or Northeast Regional Forensic Unit.

7. Section 57.7 of Title 14 NYCRR is amended to read as follows:

The commissioner or his designee may, when supported by documentation that retention at Mid-Hudson Forensic Psychiatric Center, [or] Kirby Forensic Psychiatric Center, Rochester Regional Forensic Unit or Northeast Regional Forensic Unit is no longer appropriate, authorize the return of a patient to the sending facility or other appropriate facility.

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 June 2, 2013.

Text of rule and any required statements and analyses may be obtained from: Sue Watson, NYS Office of Mental Health, 44 Holland Avenue, Albany, NY 12229, (518) 474-1331, email: Sue.Watson@omh.ny.gov

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: Sections 7.09 and 31.04 of the Mental Hygiene Law grant the Commissioner of the Office of Mental Health the authority

and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction.

Section 29.11 of the Mental Hygiene Law authorizes the Commissioner to order or approve the transfer of a patient from one facility, as defined in section 1.03 of the Mental Hygiene Law, to another appropriate facility.

Section 29.01 of the Mental Hygiene Law grants the Commissioner the authority to adopt regulations governing admissions to hospitals and to prescribe and furnish forms for use in procedures for admission.

2. **Legislative Objectives:** Articles 7 and 31 of the Mental Hygiene Law reflect the Commissioner's authority to establish regulations regarding mental health programs. The forensic mental health system offers care to New Yorkers pursuant to Mental Hygiene, Criminal Procedure, and Correction Laws. The Office of Mental Health (Office) is charged with the responsibility to ensure that mental health services are available to members of this population at multiple geographical points throughout the forensic system. Section 29.11 of the Mental Hygiene Law authorizes the Commissioner to order or approve the transfer of a patient from one facility, as defined in section 1.03 of the Mental Hygiene Law, to another appropriate facility. Existing regulations found at 14 NYCRR Part 57 provide for the transfer of an involuntary patient from a hospital of the Office to one of the Office's forensic psychiatric centers. The proposed regulation establishes provisions to allow for the transfer of an involuntary patient from a hospital of the Office to one of its regional forensic units.

3. **Needs and Benefits:** The Office operates two forensic psychiatric centers (Mid-Hudson Forensic Psychiatric Center and Kirby Forensic Psychiatric Center) and two maximum security regional forensic units (Rochester Regional Forensic Unit, located on the grounds of Rochester Psychiatric Center and Northeast Regional Forensic Unit, located at Central New York Psychiatric Center). These facilities and forensic units offer a range and variety of programs and services for the care, treatment, and rehabilitation of persons age 16 and over with mental illness, comparable with those offered at other hospitals of the Office, but they have the staff and physical surroundings to enable them to offer such programs and services to patients requiring closer supervision than can be given at other hospitals.

As noted above, the Office is charged with the responsibility of ensuring that mental health services are available to members of this population at multiple geographical points throughout the forensic system. Both Mid-Hudson Forensic Psychiatric Center and Kirby Forensic Psychiatric Center serve a large number of patients and frequently operate at full capacity. The patients at these facilities often exhibit behaviors that raise the likelihood of their causing harm to others. The Rochester Regional Forensic Unit (RRFU) and the Northeast Regional Forensic Unit (NERFU) are maximum security units designed to provide care and treatment to individuals with mental illness in a secure environment. The amendments to 14 NYCRR Part 57 will enable the transfer of individuals needing these services to the RRFU or NERFU.

Due to increasing demands on the system, Kirby and Mid-Hudson Forensic Psychiatric Centers have been consistently under pressure to admit patients, placing a strain on their capacity. This has implications throughout the system, because it reduces the ability of the State to transfer individuals from civil facilities to a secure setting under Part 57. Since Kirby and Mid-Hudson have similar security and services as the Office's other forensic facilities (RRFU and NERFU), it is feasible to utilize these other facilities to meet the need for Part 57 beds.

In addition, expanding utilization of additional forensic facilities such as RRFU and NERFU will increase the probability that upstate involuntary patients who are too violent to remain in a civil hospital could be transferred to a hospital that is closer to their home and/or originating hospital. Geographic proximity, whenever possible, may also help facilitate continuity of care and support from a patient's support network. Furthermore, geographic proximity will also decrease the transportation burden for the patient and the Office.

4. Costs:

(a) **cost to State government:** These regulatory amendments will not result in any additional costs to State government. If patients are able to be transferred to facilities that are closer to their originating hospital, it is expected that there will be a transportation cost savings for the Office.

(b) **cost to local government:** These regulatory amendments will not result in any additional costs to local government.

(c) **cost to regulated parties:** These regulatory amendments will not result in any additional costs to regulated parties.

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:** No increased paperwork is anticipated as a result of this rule making.

7. **Duplication:** These regulatory amendments do not duplicate existing State or federal requirements.

8. **Alternatives:** The only alternative to the regulatory amendment that was considered was inaction. Since the Office's regional forensic units

can appropriately serve involuntary patients in a secure environment, thereby mitigating the potential for Mid-Hudson Forensic Psychiatric Center and Kirby Forensic Psychiatric Center to be over capacity, that alternative was necessarily rejected.

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

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

Regulatory Flexibility Analysis

The amendments to 14 NYCRR Part 57 are needed to allow for the transfer of involuntary patients from a hospital of the Office of Mental Health (Office) to the regional forensic units operated by the Office (Rochester Regional Forensic Unit and Northeast Regional Forensic Unit). As there will be no adverse economic impact on small businesses or local governments as a result of these amendments, a regulatory flexibility analysis is not submitted with this notice.

Rural Area Flexibility Analysis

The amendments to Part 57 of Title 14 NYCRR serve to allow for the transfer of involuntary patients from a hospital of the Office of Mental Health (Office) to the regional forensic units operated by the Office (Rochester Regional Forensic Unit and Northeast Regional Forensic Unit). The proposed rule will not impose any adverse economic impact on rural areas; therefore, a Rural Area Flexibility Analysis is not submitted with this notice.

Job Impact Statement

A Job Impact Statement is not submitted with this notice because it is evident from the subject matter that there will be no adverse impact on jobs and employment opportunities as a result of these amendments. The proposed rule serves to allow for the transfer of involuntary patients from a hospital of the Office of Mental Health (Office) to the regional forensic units operated by the Office (Rochester Regional Forensic Unit and Northeast Regional Forensic Unit).

NOTICE OF ADOPTION

Repeal of Outdated Forms and Conforming Amendments

I.D. No. OMH-01-13-00001-A

Filing No. 240

Filing Date: 2013-03-05

Effective Date: 2013-03-20

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

Action taken: Repeal of Appendix 1; and amendment of section 15.1(c) of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09, 29.01 and 31.04

Subject: Repeal of outdated forms and conforming amendments.

Purpose: To eliminate antiquated forms.

Text or summary published in: the January 2, 2013 issue of the Register, I.D. No. OMH-01-13-00001-P.

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

Text of rule and any required statements and analyses may be obtained from: Sue Watson, NYS Office of Mental Health, 44 Holland Avenue, Albany, NY 12229, (518) 474-1331, email: Sue.Watson@omh.ny.gov

Assessment of Public Comment

The agency received no public comment.

Office for People with Developmental Disabilities

NOTICE OF ADOPTION

Repeal of Outdated Forms and Conforming Amendments

I.D. No. PDD-01-13-00002-A

Filing No. 244

Filing Date: 2013-03-05

Effective Date: 2013-03-20

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

Action taken: Amendment of Parts 15 and 17; and repeal of Appendix 1 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 13.07, 13.09(b) and 16.00

Subject: Repeal of outdated forms and conforming amendments.

Purpose: To eliminate antiquated forms.

Text or summary was published in the January 2, 2013 issue of the Register, I.D. No. PDD-01-13-00002-P.

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

Text of 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., Albany, NY 12229, (518) 474-1830, email: Barbara.Brundage@opwdd.ny.gov

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.

Assessment of Public Comment

The agency received no public comment.

Public Service Commission

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Protecting Company Water Mains

I.D. No. PSC-12-13-00007-P

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

Proposed Action: The Commission is considering a petition filed by Beekman Water Company, Inc. to require certain of its customers to change the electrical grounding system at their homes to prevent corrosion of company water mains caused by improper grounding.

Statutory authority: Public Service Law, sections (4)1, 5(1)(f), 89-c(1) and (10)

Subject: Protecting company water mains.

Purpose: To allow the company to require certain customers to make changes to the electrical grounding system at their homes.

Substance of proposed rule: The Commission is considering whether to approve, modify or reject, in whole or in part, a petition filed by Beekman Water Company, Inc. (Company) to require certain of its customers to change the electrical grounding system at their homes in order to prevent corrosion of Company water mains caused by improper grounding. The purpose of this filing is to allow the Company to charge certain of its customers a set rate for the Company to change the electrical grounding system at customer homes, or to require those same customers to have their own contractor change the electrical grounding system at their homes to the Company's satisfaction. The Commission may resolve related matters and may take this action for 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-W-0075SP1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Petition for the Submetering of Electricity

I.D. No. PSC-12-13-00008-P

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

Proposed Action: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by UDC Gateway, LLC to submeter electricity at 1560 Fulton Street, Brooklyn, New York.

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

Subject: Petition for the submetering of electricity.

Purpose: To consider the request of UDC Gateway, LLC to submeter electricity at 1560 Fulton Street, Brooklyn, New York.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by UDC Gateway, LLC at 1560 Fulton Street, Brooklyn, New York, located in the territory of Consolidated Edison Company of New York, Inc.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact: Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: Deborah.Swatling@dps.ny.gov

Data, views or arguments may be submitted to: Jeffrey C. Cohen, Acting Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 408-1978, email: secretary@dps.ny.gov

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

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

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

(13-E-0066SP1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

The Approval of the Transfer of Ownership of Laser and DMP from Indirect Ownership by Williams to Direct Ownership

I.D. No. PSC-12-13-00009-P

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

Proposed Action: The Commission is considering the approval of transfer of ownership of Laser Northeast Gathering Company LLC (Laser) and DMP New York, Inc. (DMP) from indirect to direct ownership of Williams Field Services Company LLC (Williams).

Statutory authority: Public Service Law, section 70

Subject: The approval of the transfer of ownership of Laser and DMP from indirect ownership by Williams to direct ownership.

Purpose: To consider the approval of the transfer of ownership of Laser and DMP from indirect ownership by Williams to direct ownership.

Substance of proposed rule: The Public Service Commission is consider-

ing a petition filed by Laser Northeast Gathering Company LLC (Laser), DMP New York, Inc. (DMP), LNGC Holdings LLC and Williams Field Services Company, LLC (Williams) on February 7, 2013, requesting approval of the transfer of ownership of DMP from indirect ownership by Williams to direct ownership by Williams. Laser and DMP own and operate a 9.82 mile, sixteen inch, natural gas gathering pipeline in the Town of Windsor that interconnects with the interstate pipeline owned by Millennium Pipeline Company LLC. The Commission may adopt, reject or modify, in whole or in part, the relief proposed and may resolve related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact: Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: deborahswatling@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-G-0050SP1)

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

Main Tier of the RPS Program

I.D. No. PSC-12-13-00010-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 the request of Azure Mountain Power Company to provide financial support for its hydroelectric facility in St. Regis Falls, NY, under the "Maintenance Tier" (Main Tier), in the Renewable Portfolio Standard (RPS) Program.

Statutory authority: Public Service Law, sections 4(1), 5(2) and 66(1)

Subject: Main Tier of the RPS Program.

Purpose: To allocate funding from the Main Tier to an eligible hydroelectric facility.

Substance of proposed rule: The Commission is considering whether to adopt, modify, or reject, in whole or in part, Staff's recommendation to provide financial support, under the Renewable Portfolio Standard (RPS) Maintenance Tier (Main Tier), to Azure Mountain Power Company for its 800 kW hydroelectric facility located in St. Regis Falls, NY.

On February 20, 2012, Azure Mountain Power Company submitted a filing to the Department of Public Service seeking a 10-year Maintenance Tier contract in the amount of \$30/MWh for a total of \$75,000 annually (based on an average annual generation level of 2,500 MWh) for its hydroelectric facility located in St. Regis Falls.

By Order issued September 24, 2004, the Commission established a maintenance resource category eligible for support as a subset of the Main Tier of the RPS program to assist certain existing renewable resource energy facilities to remain financially viable. A later Order, issued April 14, 2005, established a process for a case-by-case review and analysis to determine the level of funding for a maintenance resource. A further Order, issued October 31, 2005, clarified that the level of support offered through the Maintenance Tier would at least be adequate to allow the facility to cover its future operating costs and any necessary future capital costs, but need not cover all sunk costs.

Department of Public Service Staff reviewed the filing of Azure Mountain Power Company and recommended a level of support at \$20/MWh for the first 2,500 MWh of annual generation up to \$50,000 annually. It also recommended the following conditions if the company were to accept the terms of support:

RPS-eligible Attributes:

In order to enter into an RPS Maintenance Tier contract with New York State Energy Research and Development Authority (NYSERDA), Azure Mountain Power Company (Azure) must possess, for the entire contract term, the rights to assign the RPS-eligible attributes to NYSEERDA. The RPS-eligible attributes associated with the energy delivered under a PURPA contract, or purchase power agreement, and claimed by the party

to that contract, are not eligible for RPS support. The definition of an RPS-eligible attributes will be subject to the contract executed with NYSEERDA, but generally refers to any and all credits, benefits, emissions reductions, offsets, and allowances, howsoever entitled, directly attributable to the generation of the facility. One RPS-eligible attribute shall be created upon the generation of one MWh of production. RPS-eligible attributes generally include, but are not limited to any avoided emissions of pollutants to the air, soil or water and any set-aside allowances from emissions trading programs.

Contract Term:

The award will be offered for a term of 10 years. The contract term will become effective January 1, 2013 and expire on December 31, 2023.

Energy Deliverability:

Energy must be deliverable into a market controlled by the New York Independent Systems Operator.

RPS Production Incentive:

Azure will be paid a fixed RPS production incentive of \$20.00/MWh, on up to 2,500 MWh per year, for energy actually delivered to the New York energy market in conformance with RPS Program requirements. Generation, in any year, in excess of 2,500 MWh will not be subject to a production incentive.

Award Revocation:

This award is presented in anticipation of the repair/reconstruction of the existing timber crib dam at the St. Regis Falls facility. If the repair/reconstruction of the dam at this facility is not completed by October 15, 2014, this offer may be rescinded and all funds paid under a Maintenance Tier contract executed as a result of this offer will be subject to refund.

Upon completion of the repair/reconstruction of the dam, the Azure shall provide staff of the Department of Public Service all documentation, including but not limited to, invoices, engineer's reports, dam recertification (from either Federal or state regulatory agency), necessary to support the completion of the dam project.

Suspension of Contract:

Subject to the terms of the contract to be executed with the NYSEERDA, Azure may, at its discretion, and upon sufficient notice to NYSEERDA, suspend its obligation to deliver RPS-eligible attributes to NYSEERDA, if such RPS-eligible attributes are sold into the New York State voluntary market or pursuant to a New York State Executive Order 111 procurement (energy and attributes may not be export outside of New York State).

The New York Public Service Commission reserves the right to revise the term of this award, including the production incentive amount, if a review of the books and records of Azure indicate that the level of support provided here is no longer necessary for the continued operation of the project.

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.

(03-E-0188SP38)

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

Reliability Support Services Agreement for Electric Service Reliability

I.D. No. PSC-12-13-00013-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 an agreement filed by Niagara Mohawk Power Corporation d/b/a National Grid to procure Reliability Support Services from NRG Energy, Inc.'s Dunkirk Power LLC generating facility located in Dunkirk, New York.

Statutory authority: Public Service Law, sections 4(1), 5(1)(b), 5(2), 65

(1), (2) and (3), 66(1), (2), (3), (4), (5), (6), (8), (9), (10), (11), (12), (12-a), (12-b), (16) and (20)

Subject: Reliability Support Services Agreement for electric service reliability.

Purpose: Consideration of a Reliability Support Services Agreement for electric service reliability.

Substance of proposed rule: The Public Service Commission is considering whether to adopt, modify, or reject, in whole or in part, the March 5, 2013 filing made by Niagara Mohawk Power Corporation d/b/a National Grid, seeking approval of an agreement to procure Reliability Support Services (RSS) from NRG Energy, Inc.'s Dunkirk Power LLC generating facility located in Dunkirk, New York, and to recover the costs associated with the RSS agreement. National Grid maintains that the RSS agreement is needed to ensure transmission system reliability in western New York for an interim period.

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.

(12-E-0136SP2)

Office of Temporary and Disability Assistance

NOTICE OF ADOPTION

Fair Hearings Process for the Home Energy Assistance Program

I.D. No. TDA-36-12-00001-A

Filing No. 232

Filing Date: 2013-02-27

Effective Date: 2013-03-20

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

Action taken: Amendment of sections 358-3.5(b)(4) and 393.5(e) of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), 22(8) and 97; 42 USC section 8621, et seq.

Subject: Fair Hearings Process for the Home Energy Assistance Program.

Purpose: Eliminate the requirement that a fair hearing request concerning the Home Energy Assistance Program (HEAP) must be made within 105 days of the social services district's termination of the receipt of HEAP applications for the program year.

Text or summary was published in the September 5, 2012 issue of the Register, I.D. No. TDA-36-12-00001-P.

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

Text of rule and any required statements and analyses may be obtained from: 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

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Child Support

I.D. No. TDA-49-12-00014-A

Filing No. 234

Filing Date: 2013-02-27

Effective Date: 2013-03-20

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

Action taken: Amendment of sections 346.2 and 347.17 of Title 18 NYCRR.

Statutory authority: United States Code, section 654(6)(B)(ii) of Title 42; Code of Federal Regulations, sections 302.33 and 303.2 of Title 45; Social Services Law, sections 20(3)(d), 111-a, 111-c(4)(a), 111-g(3)(a) and (b); and Family Court Act, section 453(a)

Subject: Child Support.

Purpose: To address child support services applications and notification requirements and the imposition of an annual service fee; and set forth requirements concerning the provision of legal services and the recovery of associated costs.

Text or summary was published in the December 5, 2012 issue of the Register, I.D. No. TDA-49-12-00014-P.

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

Text of 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

Initial Review of Rule

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

Assessment of Public Comment

The Office of Temporary and Disability Assistance (OTDA) received one communication in response to the proposed amendments to 18 NYCRR §§ 346.2 and 347.17.

Comment: A State agency requested that OTDA confirm that the regulations are intended to apply to non-public assistance recipients who voluntarily seek child support assistance from social services districts.

Response: Yes, the amendments to 18 NYCRR §§ 346.2 and 347.17 are intended to apply to non-public assistance recipients who voluntarily seek child support assistance.

Urban Development Corporation

EMERGENCY RULE MAKING

Innovate NY Fund

I.D. No. UDC-12-13-00001-E

Filing No. 236

Filing Date: 2013-03-01

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: Addition of Part 4252 to Title 21 NYCRR.

Statutory authority: Urban Development Corporation Act, sections 9-c and 16-u; and L. 1968, ch. 174

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

Specific reasons underlying the finding of necessity: The current economic crisis, including high unemployment and the immediate lack of seed stage capital for job generating small business, are the reasons for the emergency adoption of this Rule which is required for the immediate implementation of the Innovate NY Fund Program in order to promptly

provide assistance to the State's small businesses engaged in one or more emerging technology fields and demonstrating a potential for substantial growth and job development. These businesses shall be in the pre-revenue, recently established revenue stream phase or not yet in receipt of institutional investments. This assistance will sustain and increase employment generated by these businesses.

Subject: Innovate NY Fund.

Purpose: Provide the basis for administration of The Innovate NY Fund.

Text of emergency rule: Part 4252

INNOVATE NY FUND

Section 4252.1 Purpose

The purpose of these regulations is to facilitate administration of the Innovate NY Fund (the "Fund" or the "Program") authorized pursuant to section sixteen-u of the New York State Urban Development Corporation Act (the "Act").

Section 4252.2 Definitions

The following terms shall have the meanings given below:

1. "Beneficiary Company" shall mean a Seed Stage Business that an Investment Entity selects for a Fund investment (also referred to as a "Portfolio Company" after the Fund investment is made).

2. "Carried Interest on Capital Gains" shall mean the share of any profits that the owners, partners or members of an Investment Entity receive as compensation.

3. "Corporation" shall mean the New York State Urban Development Corporation d/b/a Empire State Development, a corporate governmental agency of the State of New York, constituting a political subdivision and public benefit corporation created by chapter one hundred seventy-four of the Laws of nineteen hundred sixty-eight, as amended.

4. "Disbursement Process" means the process for disbursing Program funds to Investment Entities.

5. "Due Diligence" shall mean an in-depth investigative approach to evaluating the Beneficiary Company and verifying an investment opportunity, which may include assessment of the management team, business plan, financial history, financial projections, and the Beneficiary Company's technology and products/services.

6. "Emerging Technology Field" shall mean one or more of the emerging technologies, as defined in section thirty-one hundred two-e of the Public Authorities Law, or any field, area or technology that is achieving or has the potential to achieve contemporary technological advances, innovation, transformation or development.

7. "Equity" shall mean common stock, convertible preferred stock, stock warrants or convertible notes or bonds that can also convert to common stock, and similar types of securities.

8. "Follow-on Investment" shall mean a subsequent investment made by an investor after an initial round of investment in a Portfolio Company.

9. "Hybrid Investment" shall mean an investment that combines Equity and debt features, such as preferred stocks, convertible bonds, and convertible notes.

10. "Investment Entity" shall mean a regional and local economic development organization, technology development organization, research university, or investment fund that provides or is otherwise qualified to make seed-stage investments in companies located in the State of New York.

11. "Leveraging" or "leverage" shall mean utilizing investment assets alongside other sources of capital.

12. "Matching Investment Funds" shall mean monies secured in addition to Program funds.

13. "Portfolio Company" shall mean a Beneficiary Company after the Fund investment is made.

14. "Seed-Stage Business" shall mean a Small Business, located in New York State and working in one or more Emerging Technology Fields, which demonstrates a potential for substantial growth and job development, has the potential to generate additional economic activity in New York State, and that is pre-revenue, has only begun to earn revenue, or has not yet received institutional investments.

15. "Small Business" shall have the meaning as set forth in section 131 of the Economic Development Law.

16. "State" shall mean the State of New York.

Section 4252.3 Investment Objectives

The Fund objective is to invest in Seed Stage Businesses through Investment Entities that are selected by and are under contract to the Corporation. Investment priority shall be given to Seed Stage Businesses involved in commercialization of research and development or high technology manufacturing.

Section 4252.4 Selection of Investment Entities

The Corporation shall identify and select Investment Entities through one or more competitive statewide, regional or local solicitations. Investment Entity applicants shall be evaluated on criteria including, but not limited to, the applicant's: (a) record of success in raising investment

funds and successfully investing them; (b) capacity to perform Due Diligence and to provide management expertise and other value-added services to Beneficiary Companies; (c) financial resources for identifying and investing in seed-stage and early-stage companies; (d) ability to secure non-State Matching Investment Funds at a ratio that is equal to or greater than one-to-one (1:1); (e) ability to evaluate the commercial potential of emerging technologies; (f) ability to secure partnerships with local or regional investors; (g) conflict of interest policy acceptable to the Corporation; (h) investment record and capacity to invest in the State; (i) management fees, promotes, share of return and other fees and charges and; (j) other criteria that the Corporation determines is relevant to making investment decisions consistent with the purposes of the Fund. Applicants must specify particular industry sector, regional or other investment strategies. The Corporation shall determine the amount of the Program funds to commit to an Investment Entity. After an Investment Entity is under contract to the Corporation, the Corporation may award additional Program funds to an Investment Entity without an additional solicitation.

Section 4252.5 General Requirements

1. The Corporation and each Investment Entity receiving Program funds shall enter into one or more written agreements governing the Corporation's investment, which may include a Limited Partnership Agreement, that are consistent and in compliance with the Act, including section 16-u thereof, this rule, and other applicable laws and regulations.

2. The Corporation shall distribute Program funds promptly pursuant to a Disbursement Process agreed to between the Corporation and the Investment Entity in order to enable the Investment Entity to fulfill its commitments to Beneficiary Companies in a timely manner.

3. The commitment period for an Investment Entity to make investments with the Program funds shall typically be three years or less.

4. Returns on investments or interest accrued with respect to Program funds received by an Investment Entity through the Fund shall be returned to the Corporation in accordance with the agreements entered into between the Investment Entity and the Corporation.

Section 4252.6 Eligible Investments in Beneficiary Companies

In order to be eligible for an initial investment, a Beneficiary Company must be a Seed-Stage Business. Prior to the investment of Program funds in a Beneficiary Company, the Beneficiary Company must agree, pursuant to a written agreement satisfactory to the Corporation, that the Beneficiary Company will be located and remain located within the State for a period satisfactory to the Corporation and that in the event that the Beneficiary Company breaches such obligation, the Corporation shall have all remedies at law and such other remedies as the Corporation may set forth in the agreement with the Beneficiary Company, which may include recovery or recapture, in full or in part, of the Program funds investment.

Investment Entities shall not invest Program funds in a Beneficiary Company in an amount greater than five hundred thousand dollars, or seven hundred fifty thousand dollars in the case of a biotechnology-related Beneficiary Company, at any one time, unless the Beneficiary Company and the Investment Entity can demonstrate to the satisfaction of the Corporation that exceeding the applicable investment limit significantly increases the potential of the investment to result in substantially greater growth, job development, and additional economic activity in New York State and the Corporation consents to such greater investment in writing. Investments in Beneficiary Companies may take the form of Equity or Hybrid Investments. Program funds may be used for Follow-on Investments in Portfolio Companies, subject to the investment amount limits and exceptions set forth above. In the case of two or more Innovate NY Investment Entities investing in the same beneficiary company in the same investment round, applicable investment limits may be increased pending review and approval by the Corporation.

Section 4252.7 Fund Accounts

Each participating Investment Entity shall deposit Program funds and program related investment proceeds (including, without limiting the foregoing, returns and interest) into a bank account in a State or Federally chartered banking institution, satisfactory to the Corporation, or as otherwise agreed in writing between the Corporation and the Investment Entity.

Section 4252.8 Matching Investment Funds Requirements

At such time as an Investment Entity has invested fifty percent of the Program funds committed to such Investment Entity and annually thereafter, the aggregate investments of Program funds by the Investment Entity in Beneficiary Companies shall be leveraged with Matching Investment Funds from private sources of capital, excluding investments after the initial funding round, at a ratio equal to or greater than two to one (2:1). Investments made in funding rounds prior to the date of the initial investment of Program Funds shall not be counted toward satisfying this Matching Investment Funds requirement. Funding provided by the State of New York, including, but not limited to, Small Business Technology Investment Fund proceeds, does not satisfy this Matching Investment Funds

requirement. In the case of two or more Innovate NY Investment Entities investing in the same Beneficiary Company in the same investment round, matching funds from all private sources shall be applied as determined by the Investment Entities but no amount shall be applied as matching funds more than once.

Section 4252.9 Fees and Capital Gains

The Investment Entities may charge fees, pursuant to a written schedule of fees, and receive Carried Interest on Capital Gains with the prior written approval of the Corporation. The amount of any fees and the amount of the Carried Interest on Capital Gains will be detailed in the agreements to be entered into between the Investment Entity and the Corporation. Returns to the Corporation, such as capital gains and the return of the investment, will be detailed in the agreements to be entered into between the Investment Entity and the Corporation.

Section 4252.10 Auditing, Compliance and Reporting

The Corporation shall evaluate the investment activities of each participating Investment Entity in conformance with the agreements to be entered into between the Corporation and the Investment Entity, in accordance with the criteria set forth in section 16-u of the Act, and this rule and in accordance with other applicable law and regulations. Each Investment Entity will be required to provide quarterly and annual reports outlining the impact and effectiveness of the investments made, current status, leveraged funds, business revenue, numbers of jobs created, and other items as determined by Corporation. These annual reports and additional reports as requested at the discretion of the Corporation may be required to include:

- a. The number of investments made;
- b. The type of each investment;
- c. The location of each Beneficiary Company;
- d. The amount of Program funds and private funds invested in each Beneficiary Company;
- e. The projected and actual number of jobs created or retained by each Beneficiary Company receiving Program funds;
- f. The type of product or technology being developed or produced by each Beneficiary Company; and
- g. Such other information as the Corporation may require.

The Corporation may conduct or request audits of the Investment Entities in order to ensure compliance with the provisions of section 16-u of the Act, any regulations promulgated with respect thereto and agreements between the Investment Entities and the Corporation of all aspects of the use of Program funds and investment transactions.

In the event that the Corporation finds substantive noncompliance at any time, the Corporation may terminate the Investment Entity's participation in the Program. The agreements between the Corporation and the Investment Entity shall provide that, upon termination of an Investment Entity's participation in the Program, the Investment Entity shall return to the Corporation, promptly after its demand thereof, all Program funds held by the Investment Entity, and provide to the Corporation, promptly after its demand thereof, an accounting of all Program funds, including all currently outstanding investments that were made using Program funds. Notwithstanding such termination, the Investment Entity shall remain liable to the Corporation with respect to any unpaid amounts due from the Investment Entity pursuant to the terms of the agreements between the Corporation and the Investment Entity. In the event that an Investment Entity's participation in the Program is terminated, the Corporation, in its discretion, may transfer to one or more of the other participating Investment Entities without an additional solicitation all or part of the award made to such Investment Entity.

Section 4252.11 Confidentiality and State Employees

To the extent permitted by law, all information regarding the financial condition, marketing plans, customer lists, or other trade secrets and proprietary information of a Beneficiary Company shall be confidential and exempt from public disclosures.

To the extent permitted by law, no full-time employee of the State of New York or any agency, department, authority or public benefit Corporation thereof shall be eligible to receive assistance under this Program.

Section 4252.12 Non-Discrimination and Affirmative Action

The Corporation's affirmative action and non-discrimination policies and programs are grounded in both public policy and applicable law, including but not limited to, Section 2879 of the Public Authorities Law, Article 15-A of the Executive Law and Section 6254 (11) of the Unconsolidated Laws. These laws mandate the Corporation to take affirmative action in implementing programs. The Corporation has charged the affirmative action department with overall responsibility to ensure that the spirit of these mandates is incorporated into the Corporation's policies and projects. Where applicable, the affirmative action department will work with applicants in developing an appropriate Affirmative Action Program for business and employment opportunities generated by the Corporation's participation of the Program.

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires May 29, 2013.

Text of rule and any required statements and analyses may be obtained from: Antovk Pidedjian, Sr. Counsel, New York Urban Development Corporation, 633 Third Avenue, 37th Floor, New York, NY 10017, (212) 803-3792, email: apidedjian@esd.ny.gov

Regulatory Impact Statement

1. Statutory Authority: Section 9-c of the New York State Urban Development Corporation Act Chapter 174 of the Laws of 1968 (Uncon. Laws section 6259-c), as amended (the "Act"), provides, in part, that the Corporation shall, assisted by the Commissioner of Economic Development and in consultation with the Department of Economic Development, promulgate rules and regulations in accordance with the State Administrative Procedure Act.

Section 16-u of the Act provides for the creation of the Innovate NY Fund (the "Program") and authorizes the New York State Urban Development Corporation d/b/a Empire State Development (the "Corporation"), within available appropriations, to fund investments in small businesses engaged in one or more emerging technology fields and demonstrating a potential for substantial growth and job development. These businesses shall be in the pre-revenue, recently established revenue stream phase or not yet in receipt of institutional investments. The investments will be made in these small businesses through investment entities that are selected by and are under contract with the Corporation.

2. Legislative Objectives: Section 16-u of the Act (Uncon. Laws section 6266-u, added by Chapter 103 of the Laws of 2011) sets forth the legislative objective of authorizing the Corporation, within available appropriations, to provide funds to investment entities, including regional and local development organizations, technology development organizations, research universities and investment funds that provide seed-stage investments to support emerging New York state businesses that have demonstrated potential for substantial growth and job development in an emerging technology field and have the potential to generate additional economic activity in New York State. The adoption of 21 NYCRR Part 4252 will further these goals by setting forth the types of available assistance, evaluation criteria, the application process and related matters for the Program.

3. Needs and Benefits: The State has allocated \$25,922,157 of federal funds for this program. Innovate NY will provide investments to investment entities, in order to provide funding for those organizations' equity and quasi equity investments in New York's eligible small businesses. Small businesses have been determined to be a major source of employment throughout New York State. Small businesses have historically had difficulties obtaining capital in order to remain competitive and grow their operations, and the current economic difficulties have exacerbated this problem. Making equity investments in small businesses should sustain and potentially increase the employment provided by such businesses, especially during this period of historically high unemployment and underemployment. The Program allows the Corporation to use investment entities contracted through a competitive process by the Corporation to invest Program funds. The rule further facilitates the administration of the Program by defining eligible and ineligible small businesses, permissible types of investments and other criteria to be applied by the institutions in making equity investments in small businesses.

4. Costs: The Program is funded by a State appropriation of federal funds in the amount of \$25,922,157 dollars. Pursuant to the rule, the amount of Program funds invested will not be greater than \$500,000 (or greater than \$750,000 in the case of any individual biotechnology-related beneficiary) at any one time, unless the beneficiary company can demonstrate to the satisfaction of the Corporation that exceeding the applicable investment limit significantly increases the potential of the investment to result in substantially greater growth, job development, and additional economic activity in New York State and the Corporation consents to such investment in writing. The costs to investment entities that participate in the Program would depend on the size of their existing fund and their particular structure for sourcing, evaluating, and monitoring investments. The investment entities will propose a compensation structure for administering the Innovate NY funds, and that structure is likely to include both a management fee and a component of carried interest on capital gains.

5. Paperwork / Reporting: There are no additional reporting or paperwork requirements as a result of this rule for Program participants except those required by the statute creating the Program such as quarterly and annual reports on the organization's activity and providing information in connection with an audit by the Corporation with respect to the organization's use of Program funds. Standard documents used for most other assistance by the Corporation will be employed in keeping with the Corporation's overall effort to facilitate the application process for all of the Corporation's clients.

6. Local Government Mandates: The Program imposes no mandates – program, service, duty, or responsibility – upon any city, county, town, village, school district or other special district.

7. Duplication: The regulations do not duplicate any existing state or federal rule.

8. Alternatives: While larger financial institutions can potentially provide small business financing and the investment entities already provide small business capital, the access of seed-stage businesses to capital is very limited. The State has established the Program in order to enhance the access of small businesses to such capital, and the proposed rule provides the regulatory basis for providing investment entities for equity investments in small businesses in accordance with the statutory requirements of the Program.

9. Federal Standards: There are no minimum federal standards related to this regulation. The regulation is not inconsistent with any federal standards or requirements. Federal funds through US Treasury's State Small Business Credit Initiative are being used for this program and all regulations associated with SSBCI will be followed.

10. Compliance Schedule: The regulation shall take effect immediately upon adoption.

Regulatory Flexibility Analysis

1. Effects of Rule: In the rule: "Small business" is defined as a business that is resident and authorized to do business in the State, independently owned and operated, not dominant in its field, and employs one hundred or fewer persons on a full time basis; "Investment Entity" is defined as a regional and local economic development organization, technology development organization, research university, or investment fund that provides or is otherwise qualified to make seed-stage investments in companies located in the State of New York and "Seed-Stage Business" is defined as a small business, located in New York State and working in one or more emerging technology fields, which demonstrates a potential for substantial growth and job development, has the potential to generate additional economic activity in New York State, and that is pre-revenue, has only begun to earn revenue, or has not yet received institutional investments. The rule will facilitate the statutory Program's purpose of having New York State Urban Development Corporation d/b/a Empire State Development (the "Corporation") make investments in investment entities in order to provide funding in principal amounts equal to or less than five hundred thousand dollars to small businesses, or seven-hundred fifty thousand to biotechnology-related small businesses, with the possibility of additional funding under prescribed circumstances, located within the State, that are engaged in one or more emerging technology fields and demonstrating a potential for substantial growth and job development. These businesses shall be in the pre-revenue, recently established revenue stream phase or not yet in receipt of institutional investments.

2. Compliance Requirements: There are no compliance requirements for local governments in these regulations. Small businesses and investment entities must comply with the federal compliance and reporting requirements this program requires. Eligible small businesses receiving funds must use the funds for a business purpose and remain in the State for a period acceptable to the Corporation. Penalties will be imposed for any failure to meet requirements. This is a voluntary program.

3. Professional Services: Applicants do not need to obtain professional services to comply with these regulations.

4. Compliance Costs: There are no compliance costs for small businesses and local governments in these regulations.

5. Economic and Technological Feasibility: There are no compliance costs for small businesses and local governments in these regulations so there is no basis for determining the economic and technological feasibility for compliance with the rule by small businesses and local governments.

6. Minimizing Adverse Impact: This rule has no adverse impacts on small businesses or local governments because it is designed to provide funds to investment entities in order to enhance the ability of such organizations to invest in small businesses.

7. Small Business and Local Government Participation: A number of investment entities that provide equity or quasi-equity investing in small businesses were surveyed by the Corporation and were supportive of the Fund and its structure. A number of roundtable discussions were held as part of the 2009 Small Business Task Force as well as Legislature-sponsored sessions, where various stakeholders supported and advocated for such a fund. Creation of such a seed fund was one of the primary recommendations of the 2009 Small Business Task Force.

Rural Area Flexibility Analysis

1. Types and Estimated Numbers of Rural Areas: Investment entities serving all of the 44 counties defined as rural by the Executive Law § 481(7), are eligible to apply for the Innovate NY Fund (the "Program") assistance pursuant to a State-wide request for proposals.

2. Reporting, Recordkeeping and Other Compliance Requirements and Professional Services: The rule will not impose any new or additional reporting or recordkeeping requirements other than those that would be required of any investment entity receiving similar equity investments, on such matters as financial condition, required matching funds, and utilization of Program funds; no additional acts will be needed to comply other

than the said reporting requirements and the making of equity investments in small businesses in the normal course of the business for any investment entity that receives Program assistance; and, it is not anticipated that applicants will have to secure any additional professional services in order to comply with this rule.

3. Costs: The costs to investment entities that participate in the Program would depend on the size of their existing fund and their particular structure for sourcing, evaluating, and monitoring investments. The investment entities will propose a compensation structure for administering the Innovate NY funds, and that structure is likely to include both a management fee and a component of carried interest on capital gains. While industry standard is 20% carried interest in capital gains and a 2.5% yearly management fee that declines over time, we expect that respondents may be more competitive.

4. Minimizing Adverse Impact: The purpose of the Program is to provide funds to investment entities which will invest in seed-stage companies. This rule provides a basis for cooperation between the State and investment entities, including investment entities that serve rural areas of the State, in order to maximize the Program's effectiveness and minimize any negative impacts for such investment entities and the small businesses, including small businesses located in rural areas of the State, that such investment entities serve.

5. Rural Area Participation: This rule maximizes geographic participation by not limiting applicants to those located only in urban areas or only in rural areas.

Job Impact Statement

These regulations will not adversely affect jobs or employment opportunities in New York State. The regulations are intended to improve the economy of New York by providing greater access to capital for small businesses working in one or more emerging technology fields. The Program includes minorities, women and other New Yorkers who have difficulty accessing regular credit markets.

There will be no adverse impact on job opportunities in the state.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Capital Access Program

I.D. No. UDC-12-13-00002-P

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

Proposed Action: Addition of Part 4251 to Title 21 NYCRR.

Statutory authority: Urban Development Corporation Act, section 5(4); L. 1968, ch. 174 and L. 2011, ch. 103, section 16-K

Subject: Capital Access Program.

Purpose: Provide the basis for administration of the Capital Access Program.

Text of proposed rule: Part 4251

CAPITAL ACCESS PROGRAM

Section 4251.1 Purpose.

The purpose of this rule is to facilitate the administration of the Capital Access Program (the "Program") authorized by section sixteen-k of the New York State Urban Development Corporation Act (the "Act"). Pursuant to the Act, the Corporation (hereinafter defined) may, within available appropriations, assist small businesses, that otherwise find it difficult to obtain regular or sufficient bank financing, through the funding of loan loss reserves for loans made to such small businesses by participating financial institutions.

Section 4251.2 Definitions.

a) "Act" shall have the meaning given in Section 4251.1 of this rule.

b) "Capital Access Program", "Program" or "CAP" shall mean the loan portfolio insurance program established pursuant to section sixteen-k of the Act and subject to applicable laws, rules and regulations, and any guidelines that the Corporation may from time to time adopt with respect to the Program.

c) "Community Based Lending Organization" shall include community development financial institutions, small business lending consortia, certified development companies, providers of United States Department of Agriculture business and industrial guaranteed loans, United States Small Business Administration loan providers, community development credit unions, and community banks.

d) "Corporation" shall mean the New York State Urban Development Corporation, d/b/a Empire State Development, a corporate governmental agency of the State of New York, constituting a political subdivision and public benefit corporation created by chapter one hundred seventy-four of the Laws of nineteen hundred sixty-eight, as amended.

e) "Eligible Small Business" shall mean a Small Business that otherwise finds it difficult to obtain regular or sufficient bank financing.

f) "Financial Institution" shall mean any bank, trust company, savings bank, savings and loan association or cooperative bank chartered by the State or any national banking association, federal savings and loan association or federal savings bank or any Community Based Lending Organization, provided, however, that such entity has its principal office located in the State.

g) "Highly Distressed Area" shall mean an area of pervasive poverty, high unemployment and general economic distress, that has (1) a poverty rate of at least twenty percent for the most recent year for which the data is available; or (2) an unemployment rate of at least 1.25 times the statewide unemployment rate for the most recent year for which the data is available; or (3) a median household income that is eighty percent or less of the statewide median household income for the most recent year for which the data is available.

h) "Loan Loss Reserve Fund" shall mean an account subject to the Program maintained as a loan loss reserve for losses incurred by a Participating Financial Institution on its portfolio of Program Loans.

i) "Minority-Owned Business Enterprise" shall mean a business enterprise, including a sole proprietorship, partnership or corporation that is: (1) at least fifty-one percent owned by one or more Minority Group Members; (2) an enterprise in which such minority ownership is real, substantial and continuing; (3) an enterprise in which such minority ownership has and exercises the authority to control independently the day-to-day business decisions of the enterprise; (4) an enterprise authorized to do business in this state and independently owned and operated; (5) an enterprise owned by an individual or individuals, whose ownership, control and operation are relied upon for certification, with a personal net worth that does not exceed three million five hundred thousand dollars, as adjusted annually on the first of January for inflation according to the consumer price index of the previous year; and (6) an enterprise that is a Small Business, unless the term Minority-Owned Business Enterprise is otherwise defined in section 310 of the Executive Law, in which case the definition shall be as set forth for such term in such section.

j) "Minority Group Members" shall mean persons who are:

1) Black;

2) Hispanic persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American descent or either Indian or Hispanic origin, regardless of race;

3) Asian and Pacific Islander persons having origins in the Far East, Southeast Asia, the Indian sub-continent or the Pacific Islands; or

4) American Indian or Alaskan Native persons having origins in any of the original people of North America and maintaining identifiable tribal affiliations through membership and participation or community identification, unless the term Minority Group Member is otherwise defined in section 310 of the Executive Law, in which case the definition shall be as set forth for such term in such section.

k) "Participating Financial Institution" shall mean a Financial Institution approved to participate in the Program by the Corporation.

l) "Program Loan" shall mean a loan that conforms with section sixteen-k of the Act and this rule, which is made to an Eligible Small Business by a Participating Financial Institution and covered by a Loan Loss Reserve Fund under the Program.

m) "Regulated Depository Financial Institution" shall mean a financial institution regulated and chartered by the State or federal government that is legally allowed to accept monetary deposits from consumers, provided that such depository institutions are insured by the Federal Deposit Insurance Corporation (FDIC).

n) "Small Business" shall have the meaning as set forth in section 131 of the Economic Development Law.

o) "State" shall mean the State of New York.

p) "Third Party Agent" or "Agent" shall mean either New York Business Development Corporation or another third party contracted through a competitive process by the Corporation to administer the Capital Access Program.

q) "Women-owned Business Enterprise" shall mean a business enterprise, including a sole proprietorship, partnership or corporation that is: (1) at least fifty-one percent owned by one or more United States citizens or permanent resident aliens who are women; (2) an enterprise in which the ownership interest of such women is real, substantial and continuing; (3) an enterprise in which such women ownership has and exercises the authority to control independently the day-to-day business decisions of the enterprise; (4) an enterprise authorized to do business in State and independently owned and operated; (5) an enterprise owned by an individual or individuals, whose ownership, control and operation are relied upon for certification, with a personal net worth that does not exceed three million five hundred thousand dollars, as adjusted annually on the first of January for inflation according to the consumer price index of the previous year; and (6) an enterprise that is a Small Business, unless

the term Women-Owned Business Enterprise is otherwise defined in section 310 of the Executive Law, in which case the definition shall be as set forth for such term in such section.

Section 4251.3 Participating Financial Institutions.

To the extent feasible, the Corporation shall assure adequate geographic distribution of Participating Financial Institutions throughout the State. A Financial Institution that becomes a Participating Financial Institution shall execute an agreement in such form as the Corporation or the Agent may prescribe, which agreement shall contain, among other things, the terms and provisions set forth in Section 4251.4 of this rule and such other terms and provisions as the Corporation or the Agent may deem necessary or appropriate.

Section 4251.4 Program Operations.

a) A Participating Financial Institution shall:

1) provide to the Corporation or the Agent, as the case may be, a plan for the marketing of the Program to Eligible Small Businesses, including Small Businesses in Highly Distressed Areas and Minority-Owned Business Enterprises and Women-Owned Businesses Enterprises, with appropriate lending objectives identified by the Participating Financial Institution for such areas and businesses;

2) make Program Loans to Eligible Small Businesses only for the purposes of expansion, facility or technology upgrading, start-up or working capital purposes;

3) not make any Program Loan in a principal amount greater than five hundred thousand dollars;

4) with respect to each Program Loan, deliver for deposit in the Loan Loss Reserve Fund an amount, specified or agreed to in writing by the Corporation or its Third Party Agent, from both the Participating Financial Institution and the Eligible Small Business borrower, in aggregate neither less than three percent nor more than seven percent of the principal amount of the Program Loan, whereby the amount contributed by the Eligible Small Business is not greater than fifty percent of such aggregate; and

5) with respect to each Program Loan, certify to the Corporation or the Third Party Agent in such a fashion and with such supporting information as the Corporation or the Third Party Agent shall prescribe, that the Participating Financial Institution has made such loan and delivered the aggregate Loan Loss Reserve Fund contribution with respect to such loan.

b) With respect to each Program Loan, the Corporation or its Third Party Agent, after satisfactory certification pursuant to paragraph (5) of subdivision (a) of section 4251.4, shall transfer to the Loan Loss Reserve Fund account an amount, as determined by the Corporation or the Third Party Agent, that is (1) not less than the aggregate contribution of the Participating Financial Institution and the Small Business with respect to such loan, and (2) not greater than one hundred fifty percent of such aggregate contributions as determined by the Corporation or its Third Party Agent.

c) In the event the Participating Financial Institution suffers a loss on its portfolio of Program Loans, the Participating Financial Institution may in its discretion draw upon the funds in such Loan Loss Reserve Fund to cover such loss in whole or in part.

d) With respect to a Participating Financial Institution, if there are insufficient funds in the Loan Loss Reserve Fund account to cover losses on such institution's Program Loans, the Corporation or its Agent may authorize the Participating Financial Institution to withdraw an amount equal to the current balance in the Loan Loss Reserve Fund account, which payment shall be deemed to satisfy fully the claim(s) on the Loan Loss Reserve Fund with respect to such losses, and the Participating Financial Institution shall have no right to receive any further amount from the Loan Loss Reserve Fund account with respect to such claim(s).

Section 4251.5 Program Administration.

a) The Corporation may administer the Program through the Third Party Agent, which may be the New York Business Development Corporation, established under section 210 of the Banking Law, provided, however, that if the Third Party Agent is to be a Financial Institution other than the New York Business Development Corporation, then such Third Party agent will be selected pursuant to a competitive process.

b) Any contract entered into pursuant to this Section 4251.5, shall have a term of two years and shall be renewed for an additional two year period subject to requirements of subdivision (c) of Section 4251.5 of these rules and regulations and provide for compensation for expenses incurred by the Third Party Agent in connection with its services as Agent and for such other services as the Corporation may deem appropriate including, but not limited to the use of the premises, personnel and personal property of the Third Party Agent.

c) The Corporation shall conduct an annual review and assessment of the performance of the Third Party Agent in its capacity as agent for the Corporation to determine whether the contract with the Third Party Agent should be renewed for an additional two year period. The review shall be based on whether the Third Party Agent has satisfactorily met the terms

and conditions of the contract, and such other factors as the Corporation shall deem appropriate.

d) Where an initial determination finds that the Third Party Agent's performance is unsatisfactory, the Corporation will allow the Third Party Agent a limited opportunity to take corrective action, generally, during a period of not longer than 60 days.

e) Where a final review of the Third Party Agent's performance concludes that the Third Party Agent's performance continues to be unsatisfactory, the Corporation shall submit to the speaker of the Assembly and the temporary President of the Senate the Corporation's recommendation to terminate the contract with the Third Party Agent, and thereafter, may terminate the contract and take over administration of the Program pursuant to section sixteen-k of the Act or procure another Third Party Agent.

Section 4251.6 Loan Loss Reserve Account.

a) All amounts in a Loan Loss Reserve Fund shall be deposited: (1) if the Participating Financial Institution is a Regulated Depository Financial Institution, in a depository account at said Participating Financial Institution; or (2) if the Participating Financial Institution is not a Regulated Depository Financial Institution, in a depository account at a Regulated Depository Financial Institution satisfactory to the Corporation.

b) Earnings of interest from the principal of said Loan Loss Reserve Fund account shall be (1) maintained in the said account and held as additional loan loss reserves for Program Loans and (2) available to the Corporation or the Agent at any time and from time to time, to be used to defray the costs of administering the Program incurred by the Corporation or its Agent or to replenish the loan loss reserve account of the Corporation or its Agent.

Section 4251.7 Application and Approval Process.

The Corporation shall identify, review, and approve eligible Participating Financial Institutions through an open recruitment and enrollment process throughout the life of the Program. Participating Financial Institutions participating in the Program will possess sufficient commercial lending experience, financial and managerial capabilities, and operational skills to meet the Program objectives. The Corporation may require from applicants such information or documentation as it deems necessary and appropriate, including one or more of the following documents.

a) For banks (including CDFI banks):

1) Uniform Banking Performance Report (UBPR) showing that commercial loans and leases comprise a significant part of the institution's assets.

2) A UBPR peer group analysis showing that the institution's percentage of non-current loans and leases does not exceed its peer group average.

b) For community credit unions:

1) Financial Performance Reports (FPRs) from the National Credit Union Administration.

c) For Community Development Financial Institutions (excluding banks and community credit unions):

1) A review of the CDFI's CARS ratings (CDFI Assessment and Ratings System).

Section 4251.8 Claims and Recoveries.

The Corporation or its Agent will process claims made against a Loan Loss Reserve fund by a Participating Financial Institution as set forth in the agreement between the Participating Financial Institution and the Corporation. The process for collections and the process for treating recoveries will be detailed in the agreement between the Participating Financial Institution and the Corporation.

Section 4251.9 Auditing, Compliance and Reporting.

a) The Corporation or its Agent shall require quarterly and annual reporting from Participating Financial Institutions. Each report shall be in such form and provide such information as the Corporation or the Agent may, from time to time, prescribe, and may include, without limiting the foregoing, the following information:

1) use and balance of Loan Loss Reserve Fund;

2) information regarding all Program Loans covered by the Loan Loss Reserve Fund;

3) the outstanding amount of each Program Loan covered by the Loan Loss Reserve Fund;

4) the amount of interest income generated on the Loan Loss Reserve Account Fund;

5) the dollar amount, number of claims and recoveries with respect to the Loan Loss Reserve Fund;

6) types and uses of each credit product enrolled in the Loan Loss Reserve Fund;

7) pricing of each loan enrolled in the Loan Loss Reserve Fund;

8) a unique Program Loan identifier number, the census tract and zip code of each Program Loan borrower's principal location in the state;

9) for each Program Loan, the total amount of principal loaned and

authorized as a line of credit, and of that amount, the portion that is from non-private sources;

10) date of the initial Program Loan disbursement;

11) the insurance premiums paid by each Program Loan borrower and the Participating Lender;

12) each Program Loan borrower's annual revenues in the last fiscal year;

13) each Program Loan borrower's Full Time Equivalent (FTE) employees at the beginning and end of the period covered by the report;

14) the 6-digit North American Industry Classification System (NAICS) code for each Program Loan borrower's industry;

15) the year each Program Loan borrower's business was incorporated;

16) the number of jobs created or retained as a result of each Program Loan;

17) with respect to each Program Loan, the amount of additional private financing occurring after closing of such loan, if applicable; and

18) any other information that the Corporation may require.

b) The Corporation may conduct audits of Participating Financial Institutions in order to ensure compliance with the provisions of applicable laws and regulations, and with respect to agreements between the Participating Financial Institution and the Corporation and the Agent, all aspects of the use of Program funds and Program Loan transactions, and any other area that the Corporation determines to be relevant to the Program. In the event that the Corporation finds substantive noncompliance, the Corporation may terminate the Participating Financial Institution's participation in the Program. Upon termination, no additional funds will be disbursed to the Loan Loss Reserve account for the Participating Financial Institution. Notwithstanding such termination, the Participating Financial Institution shall remain liable to the Corporation for any amount recovered on claims associated with the use of the Loan Loss Reserve account.

Section 4251.10 Confidentiality.

a) To the extent permitted by law, all information regarding the financial condition, marketing plans, manufacturing processes, production costs, customer lists, or other trade secrets and proprietary information of a person or entity requesting assistance from the Program administered through Participating Financial Institutions, shall be confidential and exempt from public disclosures.

b) To the extent permitted by law, no full time employee of the State of New York or any agency, department, authority or public benefit corporation thereof shall be eligible to receive assistance under this Program.

Section 4251.11 Non-Discrimination and Affirmative Action.

The Corporation's affirmative action and non-discrimination policies and programs are grounded in both public policy and applicable law, including but not limited to, Section 2879 of the Public Authorities Law, Article 15-A of the Executive Law and Section 6254(11) of the Unconsolidated Laws. These laws mandate the Corporation to take affirmative action in implementing programs. The Corporation has charged the affirmative action department with overall responsibility to ensure that the spirit of these mandates is incorporated into the Corporation's policies and projects. Where applicable, the affirmative action department will work with applicants in developing an appropriate Affirmative Action Program for business and employment opportunities generated by the Corporation's participation of the Program.

Text of proposed rule and any required statements and analyses may be obtained from: Antovk Pidedjian, Sr. Counsel - Lending, New York Urban Development Corporation, 633 Third Avenue, 37th Floor, New York, NY 10017, (212) 803-3792, email: apidedjian@esd.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 9-c of the New York State Urban Development Corporation Act Chapter 174 of the Laws of 1968 (Uncon. Laws section 6259-c), as amended (the "Act"), provides, in part, that the Corporation shall, assisted by the Commissioner of Economic Development and in consultation with the Department of Economic Development, promulgate rules and regulations in accordance with the State Administrative Procedure Act.

Section 16-k of the Act provides for the creation of the Capital Access Program (the "Program") and authorizes the New York State Urban Development Corporation d/b/a Empire State Development (the "Corporation"), within available appropriations, to provide funding for loan loss reserves to Community Based Lending Organizations and Participating Financial Institutions, in order to provide portfolio insurance for those organizations' loans to New York's small businesses that are unable to obtain adequate credit or adequate terms for such credit.

2. Legislative Objectives: Section 16-k of the Act (Uncon. Laws section

6266-k, added by Chapter 103 of the Laws of 2011) sets forth the Legislative objective of authorizing the Corporation, within available appropriations, to provide funding for loan loss reserves to financial institutions and other community based lending organizations, in order to provide portfolio insurance for those organizations' loans to New York's small businesses that are unable to obtain adequate credit or adequate terms for such credit. The adoption of 21 NYCRR Part 4251 will further these goals by setting forth the types of available assistance, evaluation criteria, the application process and related matters for the Program.

3. Needs and Benefits: The State has allocated \$18,994,204 of federal funds to provide funding for loan loss reserves to financial institutions and other community based lending organizations, in order to provide portfolio insurance for those organizations' loans to New York's small businesses that are unable to obtain adequate credit or adequate terms for such credit. Small businesses have been determined to be a major source of employment throughout the State. Small businesses have historically had difficulties obtaining financing or refinancing in order to remain competitive and grow their operations, and the current economic difficulties have exacerbated this problem. Providing loans to small businesses should sustain and potentially increase the employment provided by such businesses, especially during this period of historically high unemployment and underemployment. The Program allows the Corporation to use either the New York Business Development Corporation or another third party contracted through a competitive process by the Corporation to administer the Capital Access Program if desirable. The rule further facilitates the administration of the Program by defining eligible and ineligible small businesses, eligible uses of the proceeds of loans to small businesses and other criteria to be applied by the institutions in making loans to small businesses.

4. Costs: The Program is funded by a State appropriation of federal funds in the amount of \$18,994,204 dollars. Pursuant to the rule, principal amount of Program Loans will not be greater than \$500,000. The costs to participating financial institutions or community based lending organizations would depend on the extent to which they participate in the Program and their effectiveness and efficiency in making small business loans.

5. Paperwork / Reporting: There are no additional reporting or paperwork requirements as a result of this rule for Program participants except those required by the statute creating the Program such as an annual report on the organization's lending activity and providing information in connection with an audit by the Corporation with respect to the organization's use of Program funds. Standard documents used for most other assistance by the Corporation will be employed in keeping with the Corporation's overall effort to facilitate the application process for all of the Corporation's clients.

6. Local Government Mandates: The Program imposes no mandates – program, service, duty, or responsibility – upon any city, county, town, village, school district or other special district.

7. Duplication: The regulations do not duplicate any existing state or federal rule.

8. Alternatives: While larger financial institutions can potentially provide small business financing and the community based lending organizations already provide small business financing, access to financing remains limited. The State has established the Program in order to enhance the access of such financing to small businesses, and the proposed rule provides the regulatory basis for providing funding for loan loss reserves to financial institutions, including community based lending organizations, for lending to small businesses in accordance with the statutory requirements of the Program.

9. Federal Standards: There are no minimum federal standards related to this regulation. The regulation is not inconsistent with any federal standards or requirements. Federal funds through US Treasury's State Small Business Credit Initiative are being used for this program and all regulations associated with SSBCI will be followed.

10. Compliance Schedule: The regulation shall take effect immediately upon adoption.

Regulatory Flexibility Analysis

1. Effects of Rule: In the rule: "Small business" is defined as a business that is resident and authorized to do business in the State, independently owned and operated, not dominant in its field, and employs one hundred or fewer persons on a full time basis; "Community Based Lending Organization" is defined as including community development financial institutions, small business lending consortia, certified development companies, providers of United States department of Agriculture business and industrial guaranteed loans, United States Small Business Administration loan providers, community development credit unions, and community banks; and "Financial Institution" is defined as any bank, trust company, savings bank, savings and loan association or cooperative bank chartered by the State or any national banking association, federal savings and loan association or federal savings bank or any Community Based Lending Organization, provided, however, that such entity has its principal office lo-

cated in the State. The rule will facilitate the statutory Program's purpose of having New York State Urban Development Corporation d/b/a Empire State Development (the "Corporation") assist small businesses that otherwise find it difficult to obtain regular or sufficient bank financing, through the funding of loan loss reserves for loans made to such small businesses by participating financial institutions.

2. Compliance Requirements: There are no compliance requirements for local governments in these regulations. Small businesses must comply with the compliance requirements applicable to all participating lending institutions regardless of size. This is a voluntary program. Lending institution not wishing to undertake the compliance obligations need not participate.

3. Professional Services: Applicants do not need to obtain professional services to comply with these regulations.

4. Compliance Costs: There are no compliance costs for local governments in these regulations. With respect to small business lending institutions, they must comply with the compliance cost requirements applicable to all participating lending institutions regardless of size. This is a voluntary program. Lending institutions not wishing to undertake the compliance obligations need not participate.

5. Economic and Technological Feasibility: There are no compliance costs for small businesses and local governments in these regulations so there is no basis for determining the economic and technological feasible for compliance with the rule by small businesses and local governments.

6. Minimizing Adverse Impact: This rule has no adverse impacts on small businesses or local governments because it is designed to provide access to capital through the funding of loan loss reserves for loans made to small businesses by participating financial institutions.

7. Small Business and Local Government Participation: A number of banks and community lending organizations were surveyed by the Corporation and were supportive of the program and its structure.

Rural Area Flexibility Analysis

1. Types and Estimated Numbers of Rural Areas: Community development financial institutions serving all of the 44 counties defined as rural by the Executive Law § 481(7), are eligible to apply for the Capital Access Program (the "Program") assistance pursuant to a State-wide request for proposals.

2. Reporting, Recordkeeping and Other Compliance Requirements and Professional Services: The rule will not impose any new or additional reporting or recordkeeping requirements other than those that would be required of any financial institution receiving a similar loan regarding such matters as financial condition, required matching funds, and utilization of Program funds, and the statutorily required annual report on the use of Program funds; no affirmative acts will be needed to comply other than the said reporting requirements and the making of loans to small businesses in the normal course of the business for any financial institution that receives Program assistance; and, it is not anticipated that applicants will have to secure any professional services in order to comply with this rule.

3. Costs: The costs to financial institutions that participate in the Program would depend on the extent to which they choose to participate in the Program, including the amount of required matching funds for their Program loans to small businesses and the administrative costs in connection with such small business loans and the fees, if any, charged to small businesses in connection with loans to such businesses that include Program funds.

4. Minimizing Adverse Impact: The purpose of the Program is to provide loans to financial institutions in order to enhance the ability of these entities to make loans to small businesses, especially those small businesses that may otherwise not be able to borrow funds at acceptable rates. This rule provides a basis for cooperation between the State and financial institutions, including lending institutions that serve rural areas of the State, in order to maximize the Program's effectiveness and minimize any negative impacts for such financial institutions and the small businesses, including small businesses located in rural areas of the State, that such financial institutions serve.

5. Rural Area Participation: This rule maximizes geographic participation by not limiting applicants to those located only in urban areas or only in rural areas. A number of financial institutions that engage in lending to rural and urban small businesses responded to a survey circulated by the Corporation regarding implementation of the Program. Their comments were considered in the rulemaking process.

Job Impact Statement

These regulations will not adversely affect jobs or employment opportunities in New York State. The regulations are intended to improve the economy of New York by providing greater access to capital for main street everyday small businesses. The Program includes minorities, women and other New Yorkers who have difficulty accessing regular credit markets.

There will be no adverse impact on job opportunities in the state.

Workers' Compensation Board

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Independent Medical Examinations, Examiners, Entities, and Reports Made Without Physical Examination

I.D. No. WCB-12-13-00004-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 300.2 of Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 13-a, 13-k, 13-l, 13-m, 13-n, 117, 137 and 141

Subject: Independent Medical Examinations, Examiners, Entities, and reports made without physical examination.

Purpose: Clarify the process and procedure for the conduct and reporting of independent medical examinations.

Substance of proposed rule (Full text is posted at the following State website: www.wcb.ny.gov): The proposed amendments to section 300.2 of 12 NYCRR modify the rules governing independent medical examinations (IME), independent medical examiners, IME entities and reports made without physical examination.

Paragraphs (1) and (2) of subdivision (b) of section 300.2 of 12 NYCRR are amended to clarify that a physician or provider who has examined the claimant for the sole purpose of a consultation or diagnostic examination or test is not an attending physician or provider within the meaning of the Workers' Compensation Law, and to clarify that a physician or provider who conducts a records review must be authorized by the Chair or the Workers' Compensation Board (Board).

Paragraph (6) of subdivision (b) of section 300.2 of Title 12 NYCRR is repealed and a new paragraph (6) is added to provide a definition for an IME entity.

Paragraphs (9) and (11) of subdivision (b) are amended. Paragraph (9) requires that when an authorized provider is not available for a records review, then a qualified provider must be selected. Paragraph (11) has been amended to clarify that a "substantive communication" for the purposes of determining whether a request for information must be filed with the Board does not include documents that are already part of the Board's file.

Paragraph (12) of subdivision (b) has been added to supply a definition for "Reports made without physical examination" or "Records review."

Paragraph (3) of subdivision (c) sets forth the procedures for retaining authorization privileges and removal of a provider from the list of authorized examiners.

Paragraph (1) of subdivision (d) is amended to provide that notice of an independent medical examination must be mailed to the Board on the same day it is mailed to the claimant, that an overnight delivery service may be used, and sets forth rules for use of an overnight delivery service.

Paragraph (3) of subdivision (d) is repealed and new paragraphs (3), (4), (5) and (6) are added. Paragraphs (4) and following are renumbered. Paragraph (3) of subdivision (d) requires that information, as that term is defined, that is supplied to an independent medical examiner must be part of the Board file. The information must be submitted to the Board no later than the day that information is first sent to an independent medical examiner or IME entity. Paragraph (4) of subdivision (d) sets forth the requirements for the contents and service of the report of independent medical examination. Paragraph (5) of subdivision (d) sets for the requirements for service of requests for information. Paragraph (6) of subdivision (d) sets forth the requirement for reports filed by an IME entity, as well as stating what services may be supplied by an IME entity.

Newly renumbered paragraphs (7), (8), (10), (12) and (14) of subdivision (d) of Title 12 NYCRR are amended. Paragraph (7) of subdivision (d) clarifies the process for videotaping an examination. Paragraph (8) of subdivision (d) addresses the limited patient-physician or provider relationship that exists between a claimant and the examiner. Paragraph (10) of subdivision (d) clarifies that the reasons for use of a qualified provider are also applicable to records reviews. Paragraph (12) of subdivision (d) is amended to require that an objection that a report does not substantially comply with Workers' Compensation Law section 137 or this section must be raised in a timely manner. Paragraph (14) states that a report must be

filed within 10 business days of the examination and that a report is filed with the Board when it has been received by the Board.

Paragraph (1) of subdivision (e) is repealed and a new paragraph (1) added that describes the mandatory registration process for IME entities. Mandatory registration must occur every three years. Paragraphs (2), (3), (4) and (5) of subdivision (e) have been amended. The changes are minor and include a requirement in Paragraph (3) that an IME entity comply fully with any investigation by the Chair. New paragraph (6) has been added to subdivision (e). It describes the basis and procedures for removal of a registered IME entity. New paragraph (7) provides for imposition of a \$10,000 penalty and revocation of an IME entity's registration when the Chair finds that an IME entity has materially altered an IME report or caused a material alteration.

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

The Workers' Compensation Board (hereinafter referred to as Board) is authorized to amend 12 NYCRR 300.2. Section 117(1) of the Workers' Compensation Law authorizes the Chair to make reasonable regulations consistent with the provisions of the Workers' Compensation Law and the Labor Law. Section 141 of the Workers' Compensation Law authorizes the Chair to make administrative regulations and orders providing, in part, for the receipt, indexing and examining of all notices, claims and reports. Section 137 of the Workers' Compensation Law mandates requirements for the notice, conduct and reporting of independent medical examinations. Sections 13-a, 13-k, 13-l and 13-m of the Workers' Compensation Law authorize the Chair to prescribe by regulation such information as may be required of physicians, podiatrists, chiropractors and psychologists submitting reports of independent medical examinations. Section 13-n of the Workers' Compensation Law authorizes the Chair to revoke the registration of entities that derive income from IMEs and to penalize such entities when the entity has materially altered a report of an IME or caused the material alteration of such a report.

2. Legislative objectives:

Chapter 473 of the Laws of 2000 amended Sections 13-a, 13-b, 13-k, 13-l and 13-m of the Workers' Compensation Law and added Sections 13-n and 137 to the Workers' Compensation Law to require authorization by the Chair of physicians, podiatrists, chiropractors and psychologists who conduct IMEs, guidelines for IMEs and reports, and mandatory registration with the Chair of entities that derive income from IMEs. In addition, Chapter 6 of the Laws of 2007 amended section 13-n of the Workers' Compensation Law to permit revocation of the registration of and imposition of a penalty on entities that derive income from IMEs in certain instances. These proposed rules would amend the regulations adopted in 2001 to implement Chapter 473 of the Laws of 2000 in order: to permit independent medical examiners more time to file reports of their examinations; to ensure that all relevant medical records are made part of the Board file while eliminating the waste and expense caused by duplicate filing of records already contained in the Board file; to create a process for removal from the list of authorized providers when the provider does not meet the threshold statutory requirements for authorization; and to create a process whereby the Chair may rescind the registration of an entity that derives income from IMEs pursuant to section 13-n of the Workers' Compensation Law.

3. Needs and benefits:

Prior to the adoption of Chapter 473 of the Laws of 2000, there were limited statutory and regulatory provisions applicable to independent medical examiners or examinations. With the passage of the law in 2000, the Legislature directed the Board to regulate authorization of independent medical examiners, conduct of independent medical examinations, provision of reports of such examinations, and registration of entities that derive income from such examinations. In 2001, the Board adopted regulations to clarify definitions, procedures and standards that were not expressly addressed by the Legislature.

Over the last ten years, the Board and its stakeholders have observed several problems with the use of independent medical examinations in the system. First, carriers have expressed concerns that IME reports are regularly precluded on procedural grounds because of the difficulty of complying with very tight notice and filing timeframes. The proposed regulations would change the timeframe to file a report of independent medical examination from ten calendar days to ten business days, which would allow ten full days to complete the process when offices are open and mail service available.

Second, observers have documented instances of poor quality exams and examiners as well as improper interference with the results of the exam by IME entities. While the Board diligently monitors the Department of Education records to ensure that all authorized providers of independent medical examinations have a valid license in New York State and required Board certifications, the existing regulation does not provide for the removal of a provider's name from the list of those authorized to conduct independent medical examinations when he or she no longer satisfies the statutory requirements of license and Board certification. The proposed regulations authorize removal of authorization when an examiner ceases to satisfy the requirements for authorization and authorizes the Board to consider disciplinary actions taken by medical licensing authorities in other states. Subdivision (3) of Workers' Compensation Law section 13-n, now authorizes the Board to revoke the registration of entities that derive income from the conduct of independent medical examinations when the entity has materially altered a report of independent medical examination or contributed to such alteration. As a result, the Board has developed a standard process if the Board is seeking revocation of an entity's registration.

Third, it has become apparent that independent medical examiners and entities that derive income from independent medical examinations are duplicating the entire Board medical file and re-filing it as a supplement to the report of independent medical examination; this is wasteful and expensive for the Board as well as for the independent medical examiners. The regulations clarify that duplicate copies of existing medical records do not need to be filed with the Board, though communications between the IME entity and the examiner and other records that are not in the Board file must be submitted to the Board.

Finally, the adoption of Medical Treatment Guidelines by the Board in December 2010, has increased the prevalence of medical reports based solely on a review of records rather than a physical examination of the claimant. Reports based on a review of records are used as evidence in support of the denial of medical treatment to a claimant (they are used in response to a variance request and a request for authorization for treatment). Accordingly, it has become apparent that a review of records must adhere to minimal standards to ensure that the medical opinion is rendered by a qualified medical provider and has not been altered. These reviews of records must be arranged by entities that have registered with the Board and are fully aware of the legal and medical standards for reports generated following a review of records. In addition, to avoid further delays in the adjudication of claims, the Board will now require that such reviews of records be supplied 10 business days before the hearing where they will be presented as evidence. This affords the opposing party the ability to appear at that hearing prepared to proceed.

4. Costs:

The proposal does not alter the registration fee of \$250 that is paid by IME entities. However the proposal requires that IME entities register with the Board every three years. The registration fee will be payable every three years. Currently there are one-hundred-eighty registered IME entities. Section 13-n of the Workers' Compensation Law authorizes the Chair to impose a registration fee to be used for the purpose of administering IME entities. By requiring the registration fee of \$250 to be payable every three years the Board will be able to recover a small portion of the costs associated to regulation of IME entities. This proposal will not impose any new costs on any of the other regulated parties, the Board, the State or local governments for its implementation and continuation.

It is the Board's best estimate that the overall savings that could be achieved through the elimination of duplicate filing could range between \$1.2 million and \$1.6 million per year or \$300,000-\$400,000 per quarter. This was determined by adding the number of IME-3 forms to the number of attachments submitted with the IME-3 in the current fiscal year, and then multiplying the result by 32.999 cents per page, which is the cost of scanning each page into an electronic case folder under the Board's current contract with its scanning vendor.

The extension in the time to file the report from 10 days to 10 business days significantly reduces the number of reports of medical examination that are precluded for reasons that have nothing to do with the diligence and competence of the independent medical examiner. While the costs of this change are difficult to estimate, they are believed to be substantial because the change would eliminate unwarranted duplication of exams.

The removal of the name of a provider from the list of those authorized to conduct independent medical examinations will reduce the costs of administrative hearings to revoke the authorization and will reduce the cost of unnecessary litigation when a provider possesses authorization to conduct independent medical examinations but no longer has a valid license or Board certification.

The process to revoke the registration of entities that derive income from independent medical examinations that are found to have materially altered a report of independent medical examination or caused such alteration will reduce the costs associated with fraud. While it is difficult to

estimate these exact costs, the cost of fraud is always significant not only to the specific claim affected but also to the integrity of the workers' compensation system as a whole.

5. Local government mandates:

Approximately 2,300 political subdivisions currently participate as municipal employers in self-insured programs for workers' compensation coverage in New York State. These self-insured municipal employers will be affected by the proposed rule in the same manner as all other employers who are self-insured for workers' compensation coverage.

6. Paperwork:

This proposed rule does not add any new reporting requirements. The requirements for these proposed amendments are set forth in sections 137 and section 13-n of the Workers' Compensation Law. It is anticipated that the proposed amendment will significantly reduce the amount of paperwork currently being generated under the regulation.

7. Duplication:

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

8. Alternatives:

One alternative discussed was to take no action. However, due to the concerns and problems raised by many participants, the Board felt it was more prudent to take action. In reviewing the law and regulations, the Board felt the proposed changes were best.

While some participants to the system recommended a longer period in which to file an IME report or that a report be deemed filed when mailed, the Board felt any time period longer than that provided would unduly delay a claim. Since IME reports are used to decide issues such as need for medical treatment, the Board felt the 10 business day rule was prudent. With respect to the suggestion that a report be deemed filed when mailed, the Board declined to follow this alternative as it is not consistent with other provisions of the regulations and WCL.

Based on comments received from participants in the system, the Board amended the regulation to permit notice of the independent medical examination to be delivered to the claimant by overnight delivery service, so long as the claimant receives such notice within the seven days required by section 137 of the Workers' Compensation law. This change comports to similar provisions in the Civil Practice Laws and Rules.

The Board considered requiring that carriers file a list of all documents supplied to the examiner. However, as the proposed amendment provides for the examiner to list every document reviewed and for the carrier to file all medical records supplied to the examiner that are not already in the Board file with the Board prior to the independent medical examination, the Board determined that the purpose and intent regarding the Request for Information process defined in section 137 of the Workers' Compensation Law had been met.

9. Federal standards:

There are no federal standards applicable to this proposed rule.

10. Compliance schedule:

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

Regulatory Flexibility Analysis

1. Effect of rule:

Approximately 2300 political subdivisions currently participate as municipal employers in self-insured programs for workers' compensation coverage in New York State. These self-insured local governments will experience no adverse effects under the proposed amendments to the rule which are designed to ease the strict technical requirements of the regulation while upholding the underlying purpose and requirements.

For the same reasons, small businesses that are self-insured will also be unaffected by the proposed rule.

Small businesses that derive income from independent medical examinations (IME entities) are a regulated party and the proposed regulation creates a process for rescinding their registration as an entity authorized to derive income from independent medical examinations. Rescinding such an entity's registration effectively ends the entity's ability to derive income from independent medical examinations. There are currently one-hundred-eighty IME entities registered with the Board. Since the adoption of this regulation in 2001, [5] five IME entities have had their registration rescinded and thirteen have voluntarily withdrawn their registration. The process for such rescission in the proposed regulation provides for notice and fair hearing prior to a decision regarding rescission of such registration. This protects an IME entity's due process rights.

Individual providers of independent medical examinations who own their own practices or are engaged in partnerships or are members of corporations that conduct independent medical examinations also constitute small businesses that will be affected by the proposed rule. As stated previously, the proposed amendments are designed to ease some of the technical requirements of the existing regulations.

2. Compliance requirements:

Entities that derive income from independent medical examinations

will be required to adhere to the rules governing the conduct of independent medical examinations and all other legal requirements or risk losing their registration with the Board.

3. Professional services:

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

4. Compliance costs:

This proposal will not impose any compliance costs on local governments. The proposed amendment does not increase the registration fee of \$250 for IME entities. However such registration fee will be payable every three years by small businesses that are IME entities. The registration fee is intended to defray some of the Board's costs in administering IME entities.

It is the Board's best estimate that the overall savings that could be achieved through the implementation of this regulation could range between \$1.2 million and \$1.6 million per year or \$300,000 - \$400,000 per quarter. This was determined by adding the number of IME-3 forms to the number of attachments submitted with the IME-3, and then multiplying the result by 32.999 cents per page.

5. Economic and technological feasibility:

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

6. Minimizing adverse impact:

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

The proposed amendments do increase the registration fee for IME entities that may be small businesses. Furthermore, such increase is necessary to defray the Board's costs for administering IME entities. Every IME entity is required to post the registration fee, thus no one group's burden is increased. Calculation of the \$250 registration fee as an annual cost is little more than \$80 per year. As each independent medical examination costs at least several hundred dollars, \$80 should not significantly impact even a small IME entity that is in business for a year.

In addition, several of the IME entities that have had their registration rescinded or have voluntarily withdrawn their registration, did so because they failed to pay the examiners conducting the IMEs and other bills associated with running an IME entity. The requirement that every IME entity pay a registration fee of \$250 at the time it registers would discourage proliferation of IME entities that are undercapitalized.

The alternative would be to leave the registration fee as a one-time payment. This would result in the Board and ultimately the taxpayers of New York State absorbing the costs of administration of this for-profit industry.

7. Small business and local government participation:

The Board received input from a number of entities who derive income from independent medical examinations as well as providers of independent medical examinations. Not only did the Board receive written communication but met with IME entities and spoke with some examiners.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

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

2. Reporting, recordkeeping and other compliance requirements; and professional services:

All regulated parties will have additional time to file their reports. No specialized/professional services will be needed in order to comply with this proposed amendment.

3. Costs:

This proposal will not impose any compliance costs on rural areas. It is the Board's best estimate that the overall savings that could be achieved through the implementation of this regulation with respect to reduction in duplicate filing of medical records could range between \$1.2 million and \$1.6 million per year or \$300,000 - \$400,000 per quarter. This was determined by adding the number of IME-3 forms to the number of attachments submitted with the IME-3, and then multiplying the result by 32.999 cents per page. 32.999 cents per page is the cost of scanning a single page into the Board's electronic case folder as charged under the current vendor

4. Minimizing adverse impact:

These proposed amendments to the rule are designed to minimize adverse impact for all businesses and local government regardless of geographic location. There is no difference between the impact on rural areas and other more densely populated areas of the state.

5. Rural area participation:

The Board received input from a number of entities who derive income from independent medical examinations as well as providers of independent

medical examinations. Not only did the Board receive written communication but met with IME entities and spoke with some examiners.

Job Impact Statement

The proposed amendments to the regulation will not have an adverse impact on jobs in New York State.

(1) The amendments to 300.2(b) and (d) change the regulation to require that independent medical examiners limit their review of medical reports to those reports that are already part of the Board case file. This change ensures that all parties have access to the same information in accordance with Workers' Compensation Law § 137(1), while limiting the expense and waste caused by unnecessary duplication of records. It is not anticipated that this change will have any impact on jobs in New York State.

(2) The amendment to 300.2(c)(3) allows the Board to remove a provider from the list of those authorized to conduct independent medical examinations, following notice to the affected provider, whenever the provider fails to possess a state license and Board certifications as required by Workers' Compensation Law § 137(3)(a). It is not anticipated that this change will have any impact on jobs in New York State.

(3) The amendment to (d)(11) makes permanent an emergency rule that has been in effect since January 2004. The change was necessary to ensure that there was sufficient time to prepare and file reports of independent medical examination following the conduct of the examination. The emergency regulation has not had any impact on jobs in New York State. Accordingly, the identical permanent regulation should not have any impact on jobs in New York State.

(4) New paragraph (e)(6) creates procedures to rescind (revoke) the registration of an IME entity. These procedures are designed to ensure that due process is observed. Commencing an action of this nature usually only occurs in extreme cases and is based upon noncompliance with the requirements of Workers' Compensation Law § 137, and/or violations of Workers' Compensation Law § 13-a(6) and/or new subparagraph (3) of § 13-n of the Workers' Compensation Law. While there may be an adverse impact on jobs at a given IME entity when its registration is rescinded (revoked) by the Board, rescission (revocation) of registration is a necessary safeguard to protect injured workers, health care providers and insurance carriers from recalcitrant or fraudulent IME entities. Further, the rescission (revocation) of an IME entity will not affect the independent medical examiner's ability to continue to provide independent medical examination services since the Board separately authorizes all such health care providers and recognizes their services by their individual license and authorization number, not by their affiliation with an IME entity. Rescission (revocation) of the registration of an IME entity is authorized by subparagraph (3) of section 13-n and 141 of the Workers' Compensation Law and these proposed changes simply add the procedures to be followed by the Board. Thus the regulation itself should have no impact on jobs in New York State.