

# RULE MAKING ACTIVITIES

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

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

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

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## Department of Agriculture and Markets

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### EMERGENCY RULE MAKING

#### Captive Cervids

**I.D. No.** AAM-44-13-00007-E

**Filing No.** 220

**Filing Date:** 2014-03-13

**Effective Date:** 2014-03-13

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

**Action taken:** Amendment of sections 68.1, 68.2, 68.3, 68.5, 68.7 and 68.8 of Title 1 NYCRR.

**Statutory authority:** Agriculture and Markets Law, sections 18, 72 and 74

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

**Specific reasons underlying the finding of necessity:** The rule prohibits the movement of cervids susceptible to CWD into New York State until August 1, 2018, except movements to a zoo accredited by the Association of Zoos and Aquariums. The rule also provides that prior to August 1, 2018, the Commissioner shall hold hearings to reevaluate the risk and impacts of allowing limited movement of CWD-susceptible cervids into New York State and if warranted, amend the rule to address changes in circumstances. Finally, the rule requires confinement and CWD testing for captive cervids within New York State. This is due to the further spread of CWD.

CWD, Chronic Wasting Disease, is a progressive, fatal, degenerative neurological disease of captive and free-ranging deer, elk, and moose

(cervids) that was first recognized in 1967 as a clinical wasting syndrome of unknown cause in captive mule deer in Colorado. CWD belongs to the family of diseases known as transmissible spongiform encephalopathies (TSEs). The name derives from the pin-point size holes in brain tissue of infected animals which gives the tissue a sponge-like appearance. TSEs include a number of different diseases affecting animals and humans including bovine spongiform encephalopathy (BSE) in cattle, scrapie in sheep and goats and Creutzfeldt-Jacob disease (CJD) in humans. Although CWD shares certain features with other TSEs, it is a distinct disease affecting only deer, elk and moose. There is no known treatment or vaccine for CWD.

The origin of CWD is unknown. The agent that causes CWD and other TSEs has not been completely characterized. However, the theory supported by most scientists is that TSE diseases are caused by proteins called prions. The exact mechanism of transmission is unclear. However, evidence suggests that as an infectious and communicable disease, CWD is transmitted directly from one animal to another through saliva, feces, and urine containing abnormal prions shed in those body fluids and excretions. The species known to be susceptible to CWD are Rocky Mountain elk (*Cervus canadensis*), red deer (*Cervus elaphus*), mule deer (*Odocoileus hemionus*), black-tailed deer (*Odocoileus hemionus*), white-tailed deer (*Odocoileus virginianus*), sika deer (*Cervus nippon*), and moose (*Alces alces*).

CWD is a slow and progressive disease. Because the disease has a long incubation period (1 1/2 to 5 years), deer, elk and moose infected with CWD may not manifest any symptoms for a number of years after they become infected. As the disease progresses, deer, elk and moose with CWD show changes in behavior and appearance. These clinical signs may include progressive weight loss, stumbling, tremors, lack of coordination, excessive salivation and drooling, loss of appetite, excessive thirst and urination, listlessness, teeth grinding, abnormal head posture and drooping ears.

The United States Secretary of Agriculture declared CWD to be an emergency that threatens the livestock industry of the United States and authorized the United States Department of Agriculture to establish a CWD eradication program. This prompted the Department in 2004 to adopt regulations which allow for importation of captive cervids from states with confirmed cases of CWD under a health standard and permit system.

Nonetheless, 22 states, including New York, as well as two provinces in Canada have either CWD detections in free ranging deer or have cases of CWD diagnosed in captive deer. Most recently, in October of 2012, CWD was diagnosed in captive and wild deer in Pennsylvania. Given the proximity of this detection to New York and the apparent further spread of this disease throughout the country, the Department and the Department of Environmental Conservation (DEC) entered into a memorandum of understanding which restricts movement of captive cervids from these other states and the two Canadian provinces into New York State. However, since entities in these states and provinces can still access New York markets by moving deer to states not subject to the ban, it was decided that the best approach to protect New York's deer population was to ban importation until August 1, 2018 of any captive cervids into the State except movements to a zoo accredited by the Association of Zoos and Aquariums.

The regulations are necessary to protect the general welfare, since the effective control of CWD will be accomplished with adoption of this regulation. By banning importation of captive cervids into New York State until August 1, 2018 and requiring confinement and CWD testing of captive deer, the rule will help safeguard animal health as well as protect New York's 14 million dollar captive deer industry and the 780.5-million dollar wild deer hunting industry.

Based on the facts and circumstances set forth above, the Department has determined that the immediate adoption of these amendments is necessary for the preservation of the general welfare and that compliance with subdivision one of section 202 of the State Administrative Procedure Act would be contrary to the public interest.

**Subject:** Captive cervids.

**Purpose:** To prevent the further spread of chronic wasting disease in New York State.

**Text of emergency rule:** Subdivision (f) of section 68.1 of 1 NYCRR is repealed and a new subdivision (f) of section 68.1 of 1 NYCRR is added to read as follows:

(f) *CWD infected zone means:*

(1) *any state which has had a diagnosed case of CWD in captive or wild cervids within the past 60 months;*

(2) *any part of a state which is within 50 miles of a site in another state where CWD has been diagnosed in captive or wild cervids within the past 60 months; or*

(3) *any area designated by the Commissioner as having a high risk of CWD contamination.*

Subdivision (r) of section 68.1 of 1 NYCRR is amended to read as follows:

(r) Official identification means a unique form of individual animal identification approved by [the department] *USDA/APHIS and the Department*. Cervids in a herd under the Herd Certification Plan must have at least one eartag as one [to] of two means of animal identification.

Subdivision (c) of section 68.2 of 1 NYCRR is amended to read as follows:

(c) Movement of captive cervids. No person shall import, move or hold captive cervids into or within New York State except in compliance with the requirements of this Part. A valid certificate of veterinary inspection shall accompany all cervids imported into New York State, with the exception of those moving directly to slaughter. In addition, no person shall import or move captive cervids into the State or within the State for any purpose, including slaughter [and transit through New York State] unless a movement permit authorizing such movement has been obtained from the [d]Department prior to such movement. An application for a movement permit may be obtained by calling the [d]Department during normal business hours. The [d]Department will consult with the New York State Department of Environmental Conservation prior to the issuance of a movement permit. Except for cervids moving directly to slaughter, movement permits shall be issued only for captive cervids that meet the New York State animal health requirements for captive cervids of this Part. All cervids to be moved, other than cervids moving directly to slaughter, must have approved, unique and tamper evident identification prior to movement. The removal or alteration of any official form of animal identification without the prior permission of the [d]Department is prohibited.

Subdivisions (b) and (c) of section 68.3 of 1 NYCRR are repealed and a new subdivision (b) is added to read as follows:

(b) *All movements of CWD susceptible cervids into New York State are prohibited until August 1, 2018, except movements to a zoo accredited by the Association of Zoos and Aquariums, 8403 Colesville Rd., Suite 710, Silver Spring, MD 20910-3314. No such movements shall be made unless approved prior to the movement by the commissioner or his/her designee in consultation with the New York Department of Environmental Conservation. Prior to August 1, 2018, the commissioner shall hold public hearings to reevaluate the risks and impacts of allowing limited movement of CWD susceptible cervids into New York from other states and propose amendments to this Part if needed to prevent the introduction of Chronic Wasting Disease into New York.*

Subdivisions (d), (e), (f) and (g) of section 68.3 of 1 NYCRR are relettered subdivisions (c), (d), (e) and (f).

Subdivision (e) of section 68.3 of 1 NYCRR, as relettered subdivision (d), is amended to read as follows:

[(e)](d) Premises inspection required. All captive cervid facilities and perimeter fencing shall be inspected and approved by a State or Federal regulatory representative. The initial inspection shall be conducted prior to the addition of any cervids. Cervids may not be added to the premises prior to inspection and approval. *For herds which are being enrolled in the CWD Herd Certification Program, physical restraint equipment adequate for the number of cervids to be held in the enclosure shall be in place before the herd is enrolled in the Program.* Facilities and fencing shall be subject to inspection by State and Federal regulatory officials periodically thereafter in order to maintain program participant status.

Subdivision (a) of section 68.5 of 1 NYCRR is amended to read as follows:

(a) CWD monitored herd. All special purpose herds consisting of one or more CWD susceptible cervids shall participate in the CWD Monitored Herd Program if they are not participating in the CWD Certified Herd program. No live cervid sales or movements may be made from CWD monitored herds *except as provided in this section*. Live cervids may not be removed from the premises of a CWD monitored herd except for animals being shipped with a movement permit [for immediate slaughter at an approved facility].

Subparagraphs (i) and (iii) of paragraph (1) of subdivision (b) of section 68.5 of 1 NYCRR are amended to read as follows:

(i) submit for test appropriate CWD samples from all natural deaths of CWD susceptible cervids over [16] 12 months of age;

(iii) submit for test appropriate CWD samples from slaughter and/or harvested cervids so that the total number of cervids sampled on an annual basis (January 1st to December 31st) represents 10 percent or 30, whichever is less, of the total number of susceptible cervids over [16] 12 months within the herd *as of March 31st*. In no case shall the combined number of cervids sampled on an annual basis represent less than 10 percent (rounded [up] down to the next whole number) or 30, whichever is less, of the estimated susceptible test eligible herd population. Notwithstanding this Part, all natural deaths must be submitted for CWD diagnosis.

Paragraph (2) of subdivision (c) of section 68.5 of 1 NYCRR is repealed and a new paragraph (2) is added to read as follows:

(2) *Additions to CWD monitored herds shall be permitted only if they originate from herds that have achieved CWD certified herd status or as provided in section 68.5(f) of this Part.*

Paragraph 3 of subdivision (c) of section 68.5 of 1 NYCRR is repealed. A new subdivision (f) of section 68.5 of 1 NYCRR is added to read as follows:

(f) *Permitted removal of all susceptible species from a CWD Monitored herd.*

*Notwithstanding the provisions of this section, live cervid sales or movements may be made from CWD monitored herds if the owner has signed a herd dispersal agreement containing the following conditions:*

(1) *The owner agrees to remove all susceptible species from the property;*

(2) *A number of cervids as determined by the Commissioner shall be tested prior to the removal of live animals;*

(3) *A permit is obtained from the Department prior to any movement;*

(4) *All animals moved are individually identified with an approved identification tag;*

(5) *The receiving premises must be in a monitored herd program and the owner must agree to provide samples from the cervids within a timeframe as prescribed by the Commissioner; and*

(6) *The Commissioner may add any other conditions to the herd dispersal agreement as required to control CWD.*

Section 68.7 of 1 NYCRR is repealed and section 68.8 of 1 NYCRR is renumbered section 68.7.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. AAM-44-13-00007-EP, Issue of October 30, 2013. The emergency rule will expire May 11, 2014.

**Text of rule and any required statements and analyses may be obtained from:** Dr. David Smith, DVM, Director, Division of Animal Industry, NYS Department of Agriculture and Markets, 10B Airline Drive, Albany, New York 12235, (518) 457-3502, email: david.smith@agriculture.ny.gov

#### **Regulatory Impact Statement**

##### 1. Statutory authority:

Section 18(6) of the Agriculture and Markets Law provides, in part, that the Commissioner may enact, amend and repeal necessary rules which shall provide generally for the exercise of the powers and performance of the duties of the Department.

Section 72 of the Law authorizes the Commissioner to adopt and enforce rules and regulations for the control, suppression or eradication of communicable diseases among domestic animals and to prevent the spread of infection and contagion.

Section 72 of the Law also provides that whenever any infectious or communicable disease affecting domestic animals shall exist or have recently existed outside this State, the Commissioner shall take measures to prevent such disease from being brought into the State.

Section 74 of the Law authorizes the Commissioner to adopt rules and regulations relating to the importation of domestic or feral animals into the State.

##### 2. Legislative objectives:

The statutory provisions pursuant to which these regulations are proposed are aimed at preventing infectious or communicable diseases affecting domestic animals from being brought into the State and controlling, suppressing and eradicating such diseases and preventing the spread of infection and contagion. The Department's proposed amendment of 1 NYCRR Part 68 will further this goal by helping prevent the spread of chronic wasting disease (CWD) in the State.

##### 3. Needs and benefits:

This rule prohibits the movement of cervids susceptible to CWD into New York State until August 1, 2018, except movements to a zoo accredited by the Association of Zoos and Aquariums. The rule provides that prior to August 1, 2018, the Commissioner shall hold hearings to reevalu-

ate the risk and impacts of allowing limited movement of CWD-susceptible cervids into New York State and if warranted, amend the rule to address changes in circumstances.

This rule also addresses the movement of captive cervids within New York State. This is necessary since in the last two years, four states, including Pennsylvania, have had CWD detections in captive cervids. It is believed that the positive finds may have come from contact with infected wild deer or infected deer which were illegally brought into the State from a state with CWD. In order to move captive cervids within New York State, the deer must have CWD monitored herd status. The rule implements requirements in order for a deer herd to have this status. Adequate physical restraint equipment must be used in order to keep the deer securely within an enclosure. Deer 12 months of age or older that die of natural causes must be tested for CWD. Finally, among deer 12 months of age or older, ten percent of the herd or 30 deer, whichever is less, must be tested annually for CWD.

CWD, Chronic Wasting Disease, is a progressive, fatal, degenerative neurological disease of captive and free-ranging deer, elk, and moose (cervids) that was first recognized in 1967 as a clinical wasting syndrome of unknown cause in captive mule deer in Colorado. CWD belongs to the family of diseases known as transmissible spongiform encephalopathies (TSEs). The name derives from the pin-point size holes in brain tissue of infected animals which gives the tissue a sponge-like appearance. TSEs include a number of different diseases affecting animals and humans including bovine spongiform encephalopathy (BSE) in cattle, scrapie in sheep and goats and Creutzfeldt-Jacob disease (CJD) in humans. Although CWD shares certain features with other TSEs, it is a distinct disease affecting only deer, elk and moose. There is no known treatment or vaccine for CWD.

The origin of CWD is unknown. The agent that causes CWD and other TSEs has not been completely characterized. However, the theory supported by most scientists is that TSE diseases are caused by proteins called prions. The exact mechanism of transmission is unclear. However, evidence suggests that as an infectious and communicable disease, CWD is transmitted directly from one animal to another through saliva, feces, and urine containing abnormal prions shed in those body fluids and excretions. The species known to be susceptible to CWD are Rocky Mountain elk (*Cervus canadensis*), red deer (*Cervus elaphus*), mule deer (*Odocoileus hemionus*), black-tailed deer (*Odocoileus hemionus*), white-tailed deer (*Odocoileus virginianus*), sika deer (*Cervus nippon*), and moose (*Alces alces*).

CWD is a slow and progressive disease. Because the disease has a long incubation period (1 ½ to 5 years), deer, elk and moose infected with CWD may not manifest any symptoms of the disease for a number of years after they become infected. As the disease progresses, deer, elk and moose with CWD show changes in behavior and appearance. These clinical signs may include progressive weight loss, stumbling, tremors, lack of coordination, excessive salivation and drooling, loss of appetite, excessive thirst and urination, listlessness, teeth grinding, abnormal head posture and drooping ears.

The United States Secretary of Agriculture declared CWD to be an emergency that threatens the livestock industry of the United States and authorized the United States Department of Agriculture to establish a CWD eradication program. This prompted the Department in 2004 to adopt regulations which allow for importation of captive cervids from states with confirmed cases of CWD under a health standard and permit system.

Nonetheless, 22 states, including New York, as well as two provinces in Canada have either CWD detections in free ranging deer or have cases of CWD diagnosed in captive deer. Most recently, in October of 2012, CWD was diagnosed in captive and wild deer in Pennsylvania. Given the proximity of this detection to New York and the apparent further spread of this disease throughout the country, the Department and the Department of Environmental Conservation (DEC) entered into a memorandum of understanding which restricts movement of captive cervids from these other states and the two Canadian provinces into New York State.

However, since entities in these states and provinces can still access New York markets by moving deer to states not subject to the ban, it was decided that the best approach to protect New York's deer population was to ban importation until August 1, 2018 of any CWD susceptible cervids into the State, except movements to zoos accredited by the Association of Zoos and Aquariums. This will help safeguard animal health and protect New York's 14 million dollar captive deer industry and the 780.5-million dollar wild deer hunting industry. By requiring hearings prior to August 1, 2018, the Commissioner will reevaluate and consider possible changes in the risks and impacts of CWD in the next five years to determine whether limited movement of CWD susceptible cervids into New York State is warranted. This represents a potential benefit to deer farmers seeking to import deer from out of state. Finally, by requiring restraint in an enclosure and annual CWD tests for captive cervids in New York State, the rule will help control the possible transmission of this disease within the State.

#### 4. Costs:

##### (a) Costs to regulated parties:

There are approximately 433 entities raising a total of approximately 9,600 captive deer in New York State. Of these entities, approximately 10 to 15 purchase deer from out of state. Last year, 38 head of deer were purchased out of state by these entities at a cost of \$19,000 to \$190,000 (\$500 to \$5,000 per head). These entities would now have to purchase deer from entities within New York State which would actually result in additional sales for these other New York entities. The entities purchasing the deer may entail additional costs if due to the ban, market forces result in an increase in price for the deer purchased in New York.

For captive cervids, regulated parties will have to pay for adequate restraining devices, the costs for which vary. However, it is anticipated that most regulated parties already have such devices for purposes of restraining deer within an enclosure. Annual CWD tests cost \$26.50 per animal; however, the Department will pay for these tests.

##### (b) Costs to the agency, state and local governments:

There will be no cost to the State or local governments. The Department will pay the cost for the annual CWD tests for captive cervids. In 2012, 723 animals were tested in the State at a cost to the Department of \$19,168.

##### Source:

Costs are based upon data from the records of the Department's Division of Animal Industry as well as observations of the deer industry in New York State.

#### 5. Local government mandates:

The proposed amendments would not impose any program, service, duty or other responsibility upon any county, city, town, village, school district, fire district or other special district.

#### 6. Paperwork:

It is anticipated that the rule will not result in any additional paperwork for regulated parties.

#### 7. Duplication:

The rule does not duplicate any State or federal requirements.

#### 8. Alternatives:

Four alternatives were considered for this emergency rule.

The first alternative is to leave in place the current regulation which prohibits movement of CWD susceptible species into New York from states which have had a diagnosed case of CWD in captive or wild cervids in the past 60 months or any part of a state which is within 50 miles of a site in another state where CWD has been diagnosed in the past 60 months. Given the current spread of CWD throughout the country, it was decided that this rule is inadequate, since deer farmers could circumvent this regulation by moving deer through states not subject to these requirements and in the process, access buyers in New York State.

The second alternative is to allow for importation of captive cervids from states with known cases of CWD if the states meet certain health standards and comply with a permitting system. However, this approach was determined to be inadequate given the apparent continuing spread of CWD in the country. Further, deer farmers could also circumvent New York's current regulation by accessing New York markets through movement of deer through states not subject to the current requirements.

The third alternative is to implement a total ban on the import of CWD susceptible species into New York State. This approach was rejected as too onerous for regulated parties, who would be unable to import deer into New York State at any time, regardless of whether the threat of CWD has lessened at a future date.

The fourth alternative and the one ultimately chosen is to continue the ban on imports until August 1, 2018, except for movement to zoos accredited by the Association of Zoos and Aquariums. The rule also provides that prior to August 1, 2018, the Commissioner shall hold hearings to reevaluate the risk and impacts of allowing limited movement of CWD-susceptible cervids into New York State and if warranted, amend the rule to address changes in future circumstances. Finally, the rule requires confinement and CWD testing of captive cervids within New York State.

Due to the spread of CWD to other states and the threat that this disease poses to the State's captive deer population, it was decided that this fourth alternative as set forth in the rule was the best method of preventing the further introduction of this disease into New York State and permitting it to be detected and controlled if additional cases were to arise within the State. Further, the rule is mindful of regulated parties by requiring that the risks and impacts of CWD be revisited in hearings to be conducted prior to August 1, 2018. If circumstances at that time warrant limited movement of CWD susceptible cervids into New York State, the regulations would be amended accordingly. Regarding restraint and annual CWD testing of captive cervids, this provision of the rule will help control the possible spread of CWD in the State.

#### 9. Federal standards:

The proposed regulations do not exceed any minimum standards of the federal government.

## 10. Compliance schedule:

The rule will be effective immediately.

**Regulatory Flexibility Analysis**

## 1. Effect of rule:

There are approximately 433 small businesses raising a total of approximately 9,600 captive cervids in New York State.

The rule will have no impact on local governments.

## 2. Compliance requirements:

This rule prohibits the movement of cervids susceptible to CWD into New York State until August 1, 2018, except movements to a zoo accredited by the Association of Zoos and Aquariums. The rule provides that prior to August 1, 2018, the Commissioner shall hold hearings to reevaluate the risk and impacts of allowing limited movement of CWD-susceptible cervids into New York State and if warranted, amend the rule to address changes in circumstances.

This rule also addresses the movement of captive cervids within New York State. In order to move captive cervids within the State, the deer must have CWD monitored herd status. The rule implements requirements in order for a deer herd to have this status. Adequate physical restraint equipment must be used in order to keep the deer securely confined within an enclosure. Deer 12 months of age or older that die of natural causes must be tested for CWD. Finally, among deer 12 months of age or older, ten percent of the herd or 30 deer, whichever is less, must be tested annually for CWD.

The rule will have no impact on local governments.

## 3. Professional services:

It is not anticipated that regulated parties will have to secure any professional services in order to comply with this rule.

The rule will have no impact on local governments.

## 4. Compliance costs:

There are approximately 433 entities raising a total of approximately 9,600 captive deer in New York State. Of these entities, approximately 10 to 15 purchase deer from out of state. Last year, 38 head of deer were purchased out of state by these entities at a cost of \$19,000 to \$190,000 (\$500 to \$5,000 per head). These entities would now have to purchase deer from entities within New York State which would actually result in additional sales for these other New York entities. The entities purchasing the deer may entail additional costs if due to the ban, market forces result in an increase in price for the deer purchased in New York.

For captive cervids, regulated parties will have to pay for adequate restraining devices, the costs for which vary. However, it is anticipated that most regulated parties already have such devices for purposes of restraining deer. Annual CWD tests cost \$26.50 per animal; however, the Department will pay for these tests.

The rule will have no impact on local governments.

## 5. Economic and technological feasibility:

The economic and technological feasibility of complying with the proposed amendments has been assessed. The rule is economically feasible. Although the regulation may result in deer farmers paying higher prices for deer purchased within the State than they would if they were to purchase deer from out of state, the economic consequences of the infection or exposure to CWD of the approximately 9,600 captive cervids already in the State would be far greater. The rule is technologically feasible. The 10 to 15 deer farmers who have purchased deer from outside New York State would still be able to purchase animals within the State.

The rule will have no impact on local governments.

## 6. Minimizing adverse impact:

In conformance with State Administrative Procedure Act section 202-b(1), the rule was drafted to minimize economic impact and reporting requirements for all regulated parties, including small businesses. While the ban prohibits approximately 10 to 15 entities from purchasing deer out of state, they would still be able to purchase animals from deer farmers within the State. Market forces may result in higher prices for these purchasers. However, the economic consequences of the infection or exposure to CWD of the approximately 9,600 captive cervids already in the State would be far greater absent the ban on importation set forth in the rule.

The rule will have no impact on local governments.

## 7. Small business and local government participation:

In developing this rule, the Department has consulted with representatives of the Northeast Deer and Elk Farmers as well as the Department of Environmental Conservation (DEC). DEC supports the rule.

Additionally, a hearing on the proposed adoption of the rule on a permanent basis was held on December 19, 2013. 13 people testified at the hearing and 36 comments were submitted during the comment period. Opinion on the regulation is divided. The Department is in the process of reviewing the comments.

Outreach efforts will continue.

The rule will have no impact on local governments.

**Rural Area Flexibility Analysis**

## 1. Types and estimated numbers of rural areas:

The approximately 433 entities raising captive deer in New York State

are located throughout the rural areas of New York, as defined by section 481(7) of the Executive Law.

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

The rule prohibits the movement of cervids susceptible to CWD into New York State until August 1, 2018, except movements to a zoo accredited by the Association of Zoos and Aquariums. The rule provides that prior to August 1, 2018, the Commissioner shall hold hearings to reevaluate the risk and impacts of allowing limited movement of CWD-susceptible cervids into New York State and if warranted, amend the rule to address changes in circumstances.

The rule also addresses the movement of captive cervids within New York State. In order to move captive cervids within the State, the deer must have CWD monitored herd status. The rule implements requirements in order for a deer herd to have this status. Adequate physical restraint equipment must be used in order to keep the deer securely confined within an enclosure. Deer 12 months of age or older that die of natural causes must be tested for CWD. Finally, among deer 12 months of age or older, ten percent of the herd or 30 deer, whichever is less, must be tested annually for CWD.

It is not anticipated that regulated parties will have to secure any professional services in order to comply with the rule.

## 3. Costs:

There are approximately 433 entities raising a total of approximately 9,600 captive deer in New York State. Of these entities, approximately 10 to 15 purchase deer from out of state. Last year, 38 head of deer were purchased out of state by these entities at a cost of \$19,000 to \$190,000 (\$500 to \$5,000 per head). These entities would now have to purchase deer from entities within New York State which would actually result in additional sales for these other New York entities. The entities purchasing the deer may entail additional costs if due to the ban, market forces result in an increase in price for the deer purchased in New York.

For captive cervids, regulated parties will have to pay for adequate restraining devices, the costs for which vary. However, it is anticipated that most regulated parties already have such devices for purposes of restraining deer. Annual CWD tests cost \$26.50 per animal; however, the Department will pay for these tests.

## 4. Minimizing adverse impact:

In conformance with State Administrative Procedure Act section 202-bb(2), the rule was drafted to minimize economic impact and reporting requirements for all regulated parties, including those in rural areas. While the ban prohibits approximately 10 to 15 entities from purchasing deer out of state, they would still be able to purchase animals from deer farmers within the State. Market forces may result in higher prices for these purchasers. However, the economic consequences of the infection or exposure to CWD of the approximately 9,600 captive cervids already in the State would be far greater absent the ban on importation set forth in the rule.

## 5. Rural Area Participation:

In developing this rule, the Department has consulted with representatives of the Northeast Deer and Elk Farmers as well as the Department of Environmental Conservation (DEC). DEC supports the rule.

Additionally, a hearing on the proposed adoption of the rule on a permanent basis was held on December 19, 2013. 13 people testified at the hearing and 36 comments were submitted during the comment period. Opinion on the regulation is divided. The Department is in the process of reviewing the comments.

Outreach efforts will continue.

**Job Impact Statement**

## 1. Nature of Impact:

It is not anticipated that there will be an impact on jobs and employment opportunities.

## 2. Categories and Numbers Affected:

The number of persons employed by the 433 entities engaged in raising captive deer in New York State is unknown.

## 3. Regions of Adverse Impact:

The 433 entities in New York State engaged in raising captive deer are located throughout the State.

## 4. Minimizing Adverse Impact:

By helping to protect the approximately 9,600 captive deer currently raised by approximately 433 New York entities from the further introduction of CWD, this rule will help to preserve the jobs of those employed in this agricultural industry.

**Assessment of Public Comment**

The Department received comments on amendments of sections 68.1, 68.2, 68.3, 68.5, 68.7 and 68.8 of 1 NYCRR, which would help prevent the introduction and spread of chronic wasting disease (CWD) in captive cervids in New York State. The emergency rule took effect upon filing of the Notice of Emergency Adoption and Proposed Rule Making (Notice)

with the NYS Department of State on October 15, 2013. (The emergency rule was subsequently readopted on January 13, 2014). The Notice was published in the State Register on October 30, 2013. A hearing on the amendments was held on December 19, 2013. The Department received comments during the hearing and the public comment period.

**Comments Supporting the Amendments:**

**Comment:** The Humane Society of the United States (HSUS) expressed support for the amendments and urged an import ban on all cervids. HSUS indicated that there are too many unknown variables about CWD and its potential to pose a health risk to all captive cervids as well as wildlife.

**Comment:** David Horn, DVM expressed support for the amendments, contending that the ban should be in place until a live test is developed. Dr. Horn commented that current testing is insufficient to protect the state from the reintroduction of CWD.

**Comment:** The New York State Department of Environmental Conservation (DEC) expressed support for the amendments. DEC opined that the only effective way to protect the wild deer population is to prevent CWD infected animals and infected material from entering the State. DEC commented that were the disease allowed to enter the State, it would also harm deer hunting businesses and affect deer hunters.

**Comment:** Gail Hutten, a deer hunter, expressed support for the amendments, stating that the importation of cervids into the State could put other wild animals at risk, particularly the white-tailed deer. She concluded that it would be irresponsible to allow the importation of cervids into the state that could be potentially infected with CWD.

**Comment:** The New York Chapter of the Wildlife Society (Society) expressed support for the amendments. The Society commented that white-tailed deer are an important ecological, recreational and economic resource which could be devastated by the reintroduction of CWD into New York.

**Comment:** Jeremy Wilber, the Woodstock Town Supervisor, expressed support for the amendments. He stated that trucking animals from other states into New York would increase the chance of spreading CWD to the State's native wildlife population.

**Comment:** The State of New York Conservation Fund Advisory Board (Board) expressed support for the amendments. The Board observed that the wild white-tail deer population generates approximately \$780-million by hunting and associated businesses and \$290-million in State and local taxes. It is the Board's opinion that the amendments will help protect this valuable resource from the impact of CWD.

**Comment:** The New York State Fish and Wildlife Management Board (Board) expressed support for the amendments, noting that recent cases of CWD in other states have shown that currently used precautions -- such as "closed herds," "certified herds" and "double fencing" -- have not prevented the spread of CWD. The Board stated that CWD, besides killing deer, would have a detrimental economic impact on the New York white tail deer industry, which generates about \$780-million in economic activity annually.

**Comment:** Carl Belfiglio, Ulster County Legislator and Chairman of the Ulster County Legislature's Environmental, Energy and Technology Committee, expressed support for the amendments. He also urged a ban on all cervid imports, noting that CWD may pose a risk to the health of other captive cervids and wildlife.

**Comment:** The New York State Conservation Council (Council) expressed support for the amendments. The Council, representing about 330,000 sportsmen, commented that white-tail deer are enjoyed by sportsmen and outdoor enthusiasts. Deer hunting has an economic impact of nearly \$800-million dollars, which would be threatened if CWD were to emerge.

**Comment:** Eileen Jefferson, DVM expressed support for the amendments. She observed that because CWD is not fully understood a "hardline" approach should be taken to control the disease. She concluded that regardless of the threat of legal action by the deer farming industry, the Department should stand firm, adding that the serious risk of the spread of CWD "absolutely trumps" these special interests.

**Comment:** The Quality Deer Management Association (QDMA) expressed support for the amendments, asserting that disease transmission from captive to free-ranging cervids is a major threat to hunting and wildlife management. QDMA also recommended that strict movement regulations and testing protocols be maintained or enhanced.

**Comment:** Christine Hutten, a licensed wildlife rehabilitator, expressed support for the amendments, noting that allowing the import of animals increases the chance of spreading CWD and other diseases. She says CWD would also affect hunting, since people consuming an infected animal might become ill.

**Comment:** The Wildlife Conservation Society (WCS) commented that the health and well being of animals in zoos is of importance to accredited members of the Association of Zoos and Aquariums (AZA). The WCS described the precautions taken by AZA facilities with respect to CWD: animals are observed daily; an animal care staff examines the animals'

behavior; each animal has a permanent health record; fresh food and clean living areas are provided; and fencing and other facilities are in place to prevent animal injury or escape. Further, animals that die at AZA facilities undergo a post mortem, the record of which is maintained at the zoo, and CWD testing is performed on all cervids that die and are 12 months of age or older. Finally, animals that are moved undergo a pre-shipment veterinary examination. The WCS indicated that the movement of cervids from zoo to zoo for breeding is critical for gene exchange in the small populations of cervids at zoos.

**Response:** The Department recognizes the factual support, concerns and opinions offered in comments described above, many of which provide the basis for the proposed amendments designed to help prevent the introduction and spread of chronic wasting disease (CWD) in captive cervids in New York State.

**Comments Opposing the Amendments:**

**Issue/Concern:** One commenter argued that the State does not know enough about CWD to make a "drastic decision."

**Response:** CWD is an incurable and deadly disease. Our lack of knowledge on modes of transmission, incubation periods and live animal testing requires us to be more, not less, restrictive. Deferring the adoption of measures that provide increased protection against the introduction of the disease in this state, in the hope of developing better knowledge about the disease, increases the chance of importing captive animals with the disease. Under current certification programs, the disease still arises in captive cervid populations. CWD continues to spread among the wild populations. Absent action, CWD is certain to return to this state.

**Issue/Concern:** One commenter suggested that CWD existed for many years and its spread cannot be explained by the importation of infected deer. The commenter noted that if CWD lives in the soil, the imposition of burdens on captive deer farmers is wrong.

**Response:** CWD spreads slowly naturally but it has emerged hundreds of miles away from any known infection in New Mexico, Wisconsin, West Virginia, and New York. The emergence in these areas is best explained by the legal and illegal movement of deer and elk and products of deer and elk. The "survivability" of CWD in the soil argues for more restrictive measures to prevent its introduction.

**Issue/Concern:** One commenter noted that there has been only one case of CWD in New York State since 2001 and the deer in question did not come from a monitored farm; and many commenters opposing the proposed amendments expressed the view that the current regulations are working and questioned the need for the new regulations.

**Response:** There were seven CWD positive white-tailed deer discovered in New York in 2005. Five CWD positive animals were found in two herds, four in the index herd and one which was moved from the index herd to the second herd. The two herds were located 3.5 air miles apart. Both herds were enrolled in one of the two CWD herd programs offered by the Department. CWD testing was done to comply with CWD program requirements. The other two CWD positive animals were wild white-tailed deer which were harvested within 10 miles of the two infected captive deer herds.

In other states with regulations similar to New York's (prior to the adoption of the emergency regulations) CWD has been discovered in certified herds. In light of the spread of CWD in both captive and wild cervid population, the Department believes that the risk of reintroducing CWD into the state through the importing of captive cervids is increasing. Were this state to continue to rely on prior regimens that have been unable to contain CWD, and given the current state of affairs, it would only be a matter of time before CWD would be reintroduced into New York State through the importation of captive cervids.

**Issue/Concern:** Several commenters indicated that CWD cannot be transmitted to other animals or people.

**Response:** A paper has just been published that presents evidence that while transmission of CWD to other species appears to be unlikely, there is no biochemical mechanism to prevent it from happening. Nevertheless, we don't know enough about this disease to be certain that CWD cannot be transmitted to humans or other animals. Given the fact that the incubation or latent periods of this disease in people and animals other than deer and elk are unknown, it may be wiser to be cautious and reduce the possibility of exposure. Regardless, these regulations are still necessary to protect wild and captive deer and elk in New York.

**Issue/Concern:** One commenter argued that CWD is not the "massive contagion" that some claim it is.

**Response:** We don't know how extensive an outbreak of CWD would be if it were left unchecked. CWD is a slow moving disease, but one for which there is no approved live animal test, no treatment, and for which no vaccine exists. The general consensus in the scientific community is that without adequate restraints, CWD will affect all areas of North America where white-tailed deer, mule deer, elk and moose are native. While CWD is not a fast moving disease that destroys entire populations of animals in a short time, it does appear to be relentless, once established.

Reports have just been published by the Wisconsin Dept. of Natural Resources that demonstrate that 25% of the male deer in South-Central Wisconsin are now positive for CWD, as are 10% of the female deer there.

**Issue/Concern:** One commenter questioned why there is an emergency now when CWD was first discovered in 1967. The commenter also questioned the science behind prohibiting imports until 2018.

**Response:** Recent outbreaks in West Virginia, Maryland, Virginia, Pennsylvania and Missouri are a concern. We believe the risk of introduction is rising. There is a provision for review of this regulation to be done no later than August 2018. With the increase of scientific knowledge about CWD, the risk of CWD may be reduced by then. If so, the regulation will be amended to meet the new reality. If there are events between now and then that lead us to believe an earlier review is warranted, such a review will be performed.

**Issue/Concern:** Two commenters suggested that rather than implementing the new regulations, the Department should strengthen the current ones by prohibiting, for five years, imports from cervid herds with less than 10 years (up from the current 5 years) of being in a CWD monitoring program and no importation from within 100 miles (up from the current 50 miles) of a known CWD positive deer. After five years, the increased restrictions could be reevaluated.

**Response:** Recent new cases of this disease in other states show that even these restrictions would be inadequate. In 2012, CWD was discovered in captive facilities in Iowa and Pennsylvania for the first time, and in a Minnesota facility holding red deer. The Minnesota facility had been monitoring for CWD for 12 years before one of its red deer tested positive, and the facilities in Iowa and Pennsylvania had been monitored for nine years each. Requiring captive cervids to be imported only from those facilities more than 100 miles from any known CWD case will decrease the chance of exposure of captive cervids to CWD infected wild cervids near the facility of origin. However, this requirement cannot guarantee the herd of origin from unknowingly having or acquiring an infected captive cervid.

**Issue/Concern:** Two commenters suggested that adequate fencing to prevent the comingling of wild and captive deer would prevent the potential spread of CWD from wild to captive deer.

**Response:** There have been many incidents in New York and elsewhere in which poor quality fence construction, inadequate maintenance, gates left open, vandalism and accidents have resulted in captive cervids escaping from enclosures and permitted contact between formerly captive and wild cervids.

**Issue/Concern:** One commenter suggested that the State follow the standards under the federal rule, since New York is one of six states approved for the federal CWD program.

**Response:** New York is one of 23 states with a USDA Approved State CWD Herd Certification Program (HCP) which meets the minimum requirements of the national CWD HCP. The federal standards give states the latitude to enact/enforce standards that exceed the federal minimum standards, so in essence, the Department is following the federal program.

**Issue/Concern:** One commenter suggested that it would be better to test and monitor deer than prohibit importation.

**Response:** This would mean dealing with an incurable, insidious disease after it has been brought into the State. It would be costly, with severe adverse impacts for the captive cervid industry. Due to the large enclosures used in the industry, some deer die without being tested for CWD.

**Issue/Concern:** One commenter indicated that monitoring and inspection of deer carcasses is needed, since one case of CWD entered New York State through carcass scrapings.

**Response:** The most likely explanation of the 2005 detection of CWD in Oneida County is that the prions arrived with taxidermy materials imported from a state where CWD is endemic. The taxidermy materials are believed to have been received by a taxidermist who also kept captive whitetail deer and cared for orphaned wild fawns. As a result of that introduction, the Department of Environmental Conservation (DEC) put into place measures which eliminated the practice of importing from states or provinces with CWD those portions of a carcass, either captive born and raised or wild, which could spread CWD. DEC is rewriting its regulations pertaining to the importation of deer harvested in other states and also for products of deer that originate in other states. The Department supports these increased controls on products of wild deer as a complement to our regulations.

**Issue/Concern:** Two commenters expressed the view that the State chose regulating deer farms as the cheaper alternative to testing wild deer.

**Response:** The Department of Agriculture and Markets has jurisdiction over domestic livestock. CWD is present in captive deer and elk herds in the United States; and it's reintroduction through importation of affected animals to New York would impose a significant burden on the industry and make it more difficult for deer and elk owners to sell animals here in New York and in other states.

The Department does not regulate wild animal health and has no power

to test or regulate wild cervids. The Department, however, does have a responsibility to protect the commonly held wild animal resources of this state from diseases that may be present in captive wildlife and domestic livestock. DEC, which has jurisdiction over wild cervid populations, supports the Department's amendments and is currently considering an appropriate response to CWD for the wild cervid populations, and supports the Department's efforts to address the CWD problem with respect to animals within the Department's jurisdiction.

**Issue/Concern:** A number of commenters expressed the view that deer farms are not responsible for the spread of CWD but, rather, officials should look to wild deer and hunted deer as sources for the disease. One commenter noted that feces from crows feeding on infected carcasses could be a source of CWD.

**Response:** There are probably several ways for CWD to be spread to new areas. This Department has control of one way which allows the disease to spread hundreds of miles. To neglect trying to control this risk because there are other risks we can't directly control is not viable.

**Issue/Concern:** Many commenters said that the regulations would be injurious to deer farms and would hurt the economy since farms may be put out of business resulting in job losses. One commenter indicated that tourism dollars may be lost. Other commenters opposed the regulation because they believe it will increase the price of New York bred and raised deer.

**Response:** The Department is mindful of the economic impact claimed by some commentators opposing the regulations. Significantly, however, no industry group or farmer has provided any financial data of any kind to support the general and conclusory allegations of the economic harm to farm operations that would result from the import ban. Moreover, only a small percentage of cervid farmers actually imports animals, and, accordingly, whatever the predicted impact, it would be experienced by only a very limited number of cervid farmers.

On the other hand, in-state farmers involved in breeding could benefit from increased demand, which may prompt them to expand their herds and hire additional workers to care for their animals and maintain their fences.

**Issue/Concern:** One commenter stated that the regulation would be costly to small businesses, citing the requirement for a restraint system which could cost as much as \$15,000. This commenter observed that anesthesia is much less expensive and just as effective.

**Response:** Repeated handling and darting of animals have substantial risk of harm to both the animals and the handlers. Previously, the Department allowed existing herds to attain CWD Certified herd status before proper facilities were in place. This resulted in some herd owners never building proper facilities and having herd inventories that had to be completed over the span of several visits due to an inability to handle the animals efficiently. These repeated visits are a drain on state resources.

Further, regulations at section 68.2(e) already require adequate handling facilities. While it is possible that proper facilities could cost as much as the commenter claims, a less complex corral and chute system can be built for much less money.

**Issue/Concern:** Many commenters indicated that the interstate movement of deer is needed to improve the genetics and bloodlines of their deer herds. One commenter pointed out that without the ability to import deer, farmers would be unable to breed and produce distinctive and unique animals desired by patrons of the deer and elk farming industry. Those patrons may opt to purchase deer out-of-state. Another commenter indicated that genetic improvement will take longer which would result in the inability of New York farmers to compete with farmers from out-of-state.

**Response:** The Department still permits the importation of semen and embryos from susceptible species, so there will still be means of introducing new bloodlines to New York captive deer herds, other than live animal importations. The cattle, swine, equine, and even turkey industries have all achieved very rapid improvement in herd genetics through the use of artificial insemination (AI). The modern dairy industry would not be possible without AI.

Some New York owners of higher priced cervids have expressed frustration that shooting preserves aren't interested in buying the highest quality animals due to the cost. It may be that having modest quality animals that are affordable for their patrons to shoot is more important than having the very best animals. Convenience seems to be one of the most important considerations for people who opt to hunt at private preserves.

**Issue/Concern:** One commenter stated that the regulations may result in deer farmers being unable to find out-of-state markets for their deer, since out-of-state farmers may not deal with farmers who cannot purchase deer outside of New York State.

**Response:** The commenter provided no factual support for this claim. Even before 2012, there weren't large numbers of deer and elk leaving the state.

In 2013 two white-tailed deer breeders in New York sold 39 high quality shooter bucks to hunt park facilities in three other states because no preserve owners in New York were interested in purchasing their product for their asking price.

**Issue/Concern:** One commenter said that preventing the movement of semen from out-of-state to New York State would undermine the deer farmer's ability to improve their herd's genetics and bloodlines. Another commenter said that the importation of semen should be allowed since there is no proof that CWD is transmitted through semen. One other commenter argued that the use of semen is not a viable alternative since conception occurs only about 50% of the time (as compared to 99% of the time in conventional insemination) and is costly.

**Response:** The importation of deer and elk semen is not prohibited in this regulation.

Sufficient genetic diversity can be maintained through males and females already in New York and through imported semen during the five year period covered by this regulation.

Breeding with live males is obviously easier. We agree that conception runs about 50-60% with artificial insemination. During the hearing and throughout the written comments there was mention of the need to introduce new genetics that couldn't be found in New York in order to prevent inbreeding.

**Issue/Concern:** A number of commenters questioned why zoos are exempt from the requirements of the regulations. One commenter noted that CWD was found in two zoos.

**Response:** AZA (Association of Zoos and Aquariums) zoos are an entirely different level of risk than the average captive deer business. AZA zoos have smaller collections of CWD susceptible species, the animals are monitored throughout the day, escapes are extremely rare, there is a perimeter fence in addition to the animals' primary enclosure, the amount of primary enclosure fence that must be maintained is much less, there is careful veterinary oversight, there are post mortem exams on nearly all mortalities, and CWD sampling opportunities are very seldom missed. We are aware of one zoo in Canada which was able to demonstrate, through tissues it had banked from long dead animals, that several animals in their collection which died between 1975 and 1981 had CWD. No other premises received CWD positive or CWD suspect animals from this facility.

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## Department of Financial Services

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### EMERGENCY RULE MAKING

#### Business Conduct of Mortgage Loan Servicers

**I.D. No.** DFS-13-14-00007-E

**Filing No.** 229

**Filing Date:** 2014-03-17

**Effective Date:** 2014-03-18

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

**Action taken:** Addition of Part 419 to Title 3 NYCRR.

**Statutory authority:** Banking Law, art. 12-D

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

**Specific reasons underlying the finding of necessity:** The legislature required the registration of mortgage loan servicers as part of the Mortgage Lending Reform Law of 2008 (Ch. 472, Laws of 2008, hereinafter, the "Mortgage Lending Reform Law") to help address the existing foreclosure crisis in the state. By registering servicers and requiring that servicers engage in the business of mortgage loan servicing in compliance with rules and regulations adopted by the Superintendent, the legislature intended to help ensure that servicers conduct their business in a manner acceptable to the Department. However, since the passage of the Mortgage Lending Reform Law, foreclosures continue to pose a significant threat to New York homeowners. The Department continues to receive complaints from homeowners and housing advocates that mortgage loan servicers' response to delinquencies and their efforts at loss mitigation are inadequate. These rules are intended to provide clear guidance to mortgage loan servicers as to the procedures and standards they should follow with respect to loan delinquencies. The rules impose a duty of fair dealing on loan servicers in their communications, transactions and other dealings with borrowers. In addition, the rule sets standards with respect to the

handling of loan delinquencies and loss mitigation. The rule further requires specific reporting on the status of delinquent loans with the Department so that it has the information necessary to assess loan servicers' performance.

In addition to addressing the pressing issue of mortgage loan delinquencies and loss mitigation, the rule addresses other areas of significant concern to homeowners, including the handling of borrower complaints and inquiries, the payment of taxes and insurance, crediting of payments and handling of late payments, payoff balances and servicer fees. The rule also sets forth prohibited practices such as engaging in deceptive practices or placing homeowners' insurance on property when the servicers has reason to know that the homeowner has an effective policy for such insurance.

**Subject:** Business conduct of mortgage loan servicers.

**Purpose:** To implement the purpose and provisions of the Mortgage Lending Reform Law of 2008 with respect to mortgage loan servicers.

**Substance of emergency rule:** Section 419.1 contains definitions of terms that are used in Part 419 and not otherwise defined in Part 418, including "Servicer", "Qualified Written Request" and "Loan Modification".

Section 419.2 establishes a duty of fair dealing for Servicers in connection with their transactions with borrowers, which includes a duty to pursue loss mitigation with the borrower as set forth in Section 419.11.

Section 419.3 requires compliance with other State and Federal laws relating to mortgage loan servicing, including Banking Law Article 12-D, RESPA, and the Truth-in-Lending Act.

Section 419.4 describes the requirements and procedures for handling to consumer complaints and inquiries.

Section 419.5 describes the requirements for a servicer making payments of taxes or insurance premiums for borrowers.

Section 419.6 describes requirements for crediting payments from borrowers and handling late payments.

Section 419.7 describes the requirements of an annual account statement which must be provided to borrowers in plain language showing the unpaid principal balance at the end of the preceding 12-month period, the interest paid during that period and the amounts deposited into and disbursed from escrow. The section also describes the Servicer's obligations with respect to providing a payment history when requested by the borrower or borrower's representative.

Section 419.8 requires a late payment notice be sent to a borrower no later than 17 days after the payment remains unpaid.

Section 419.9 describes the required provision of a payoff statement that contains a clear, understandable and accurate statement of the total amount that is required to pay off the mortgage loan as of a specified date.

Section 419.10 sets forth the requirements relating to fees permitted to be collected by Servicers and also requires Servicers to maintain and update at least semi-annually a schedule of standard or common fees on their website.

Section 419.11 sets forth the Servicer's obligations with respect to handling of loan delinquencies and loss mitigation, including an obligation to make reasonable and good faith efforts to pursue appropriate loss mitigation options, including loan modifications. This Section includes requirements relating to procedures and protocols for handling loss mitigation, providing borrowers with information regarding the Servicer's loss mitigation process, decision-making and available counseling programs and resources.

Section 419.12 describes the quarterly reports that the Superintendent may require Servicers to submit to the Superintendent, including information relating to the aggregate number of mortgages serviced by the Servicer, the number of mortgages in default, information relating to loss mitigation activities, and information relating to mortgage modifications.

Section 419.13 describes the books and records that Servicers are required to maintain as well as other reports the Superintendent may require Servicers to file in order to determine whether the Servicer is complying with applicable laws and regulations. These include books and records regarding loan payments received, communications with borrowers, financial reports and audited financial statements.

Section 419.14 sets forth the activities prohibited by the regulation, including engaging in misrepresentations or material omissions and placing insurance on a mortgage property without written notice when the Servicer has reason to know the homeowner has an effective policy in place.

**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 14, 2014.

**Text of rule and any required statements and analyses may be obtained from:** Sam L. Abram, NYS Department of Financial Services, 1 State Street, New York, NY 10004, (212) 709-1658, email: sam.abram@dfs.gov

#### Regulatory Impact Statement

1. Statutory Authority.

Article 12-D of the Banking Law, as amended by the Legislature in the

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

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

A new paragraph (b-1) was added to Subdivision (2) of Section 590 of the Banking Law. This new paragraph prohibits a person or entity from engaging in the business of servicing mortgage loans without first being registered with the Superintendent. The registration requirements do not apply to an "exempt organization," licensed mortgage banker or registered mortgage broker.

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

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

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

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

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

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

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

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

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

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

## 2. Legislative Objectives.

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

The Mortgage Lending Reform Law requires that entities be registered with the Superintendent in order to engage in the business of servicing mortgage loans in this state. The new law further requires mortgage loan

servicers to engage in the business of servicing mortgage loans in conformity with the rules and regulations promulgated by the Banking Board and the Superintendent.

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

Part 418 of the Superintendent's Regulations, initially adopted on an emergency basis on July 1 2009, addresses the first component of the mortgage servicing statute by setting standards and procedures for applications for registration as a mortgage loan servicer, for approving and denying applications to be registered as a mortgage loan servicer, for approving changes of control, for suspending, terminating or revoking the registration of a mortgage loan servicer as well as setting financial responsibility standards for mortgage loan servicers.

Part 419 addresses the business practices of mortgage loan servicers in connection with their servicing of residential mortgage loans. This part addresses the obligations of mortgage loan servicers in their communications, transactions and general dealings with borrowers, including the handling of consumer complaints and inquiries, handling of escrow payments, crediting of payments, charging of fees, loss mitigation procedures and provision of payment histories and payoff statements. This part also imposes certain recordkeeping and reporting requirements in order to enable the Superintendent to monitor servicers' conduct and prohibits certain practices such as engaging in deceptive business practices.

Collectively, the provisions of Part 418 and 419 implement the intent of the Legislature to register and supervise mortgage loan servicers.

## 3. Needs and Benefits.

The Mortgage Lending Reform Law adopted a multifaceted approach to the lack of supervision of the mortgage loan industry, particularly with respect to servicing and foreclosure. It addressed a variety of areas in the residential mortgage loan industry, including: i. loan originations; ii. loan foreclosures; and iii. the conduct of business by residential mortgage loans servicers.

Until July 1, 2009, when the mortgage loan servicer registration provisions first became effective, the Department regulated the brokering and making of mortgage loans, but not the servicing of these mortgage loans. Servicing is vital part of the residential mortgage loan industry; it involves the collection of mortgage payments from borrowers and remittance of the same to owners of mortgage loans; to governmental agencies for taxes; and to insurance companies for insurance premiums. Mortgage servicers also act as agents for owners of mortgages in negotiations relating to loss mitigation when a mortgage becomes delinquent. As "middlemen," moreover, servicers also play an important role when a property is foreclosed upon. For example, the servicer may typically act on behalf of the owner of the loan in the foreclosure proceeding.

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

More than 2,000,000 loans on residential one-to-four family properties are being serviced in New York. Of these over 9% were seriously delinquent as of the first quarter of 2012. Despite various initiatives adopted at the state level and the creation of federal programs such as Making Home Affordable to encourage loan modifications and help at risk homeowners, the number of loans modified, have not kept pace with the number of foreclosures. Foreclosures impose costs not only on borrowers and lenders but also on neighboring homeowners, cities and towns. They drive down home prices, diminish tax revenues and have adverse social consequences and costs.

As noted above, Part 418, initially adopted on an emergency basis on July 1 2009, relates to the first component of the mortgage servicing statute – the registration of mortgage loan servicers. It was intended to ensure that only those persons and entities with adequate financial support and sound character and general fitness will be permitted to register as mortgage loan servicers. It also provided for the suspension, revocation and termination of licensees involved in wrongdoing and establishes minimum financial standards for mortgage loan servicers.

Part 419 addresses the business practices of mortgage loan servicers and establishes certain consumer protections for homeowners whose residential mortgage loans are being serviced. These regulations provide stan-

dards and procedures for servicers to follow in their course of dealings with borrowers, including the handling of borrower complaints and inquiries, payment of taxes and insurance premiums, crediting of borrower payments, provision of annual statements of the borrower's account, authorized fees, late charges and handling of loan delinquencies and loss mitigation. Part 419 also identifies practices that are prohibited and imposes certain reporting and recordkeeping requirements to enable the Superintendent to determine the servicer's compliance with applicable laws, its financial condition and the status of its servicing portfolio.

Since the adoption of Part 418, 67 entities have been approved for registration or have pending applications and nearly 400 entities have indicated that they are a mortgage banker, broker, bank or other organization exempt from the registration requirements.

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

These regulations will improve accountability and the quality of service in the mortgage loan industry and will help promote alternatives to foreclosure in the state.

#### 4. Costs.

The requirements of Part 419 do not impose any direct costs on mortgage loan servicers. Although mortgage loan servicers may incur some additional costs as a result of complying with Part 419, the overwhelming majority of mortgage loan servicers are banks, operating subsidiaries or affiliates of banks, large independent servicers or other financial services entities that service millions, and even billions, of dollars in loans and have the experience, resources and systems to comply with these requirements. Moreover, any additional costs are likely to be mitigated by the fact that many of the requirements of Part 419, including those relating to the handling of residential mortgage delinquencies and loss mitigation (419.11) and quarterly reporting (419.12), are consistent with or substantially similar to standards found in other federal or state laws, federal mortgage modification programs or servicers own protocols.

For example, Fannie Mae and Freddie Mac, which own or insure approximately 90% of the nation's securitized mortgage loans, have similar guidelines governing various aspects of mortgage servicing, including handling of loan delinquencies. In addition, over 100 mortgage loan servicers participate in the federal Making Home Affordable (MHA) program which requires adherence to standards for handling of loan delinquencies and loss mitigation similar to those contained in these regulations. Those servicers not participating in MHA have, for the most part, adopted programs which parallel many components of MHA.

Reporting on loan delinquencies and loss mitigation has likewise become increasingly common. The OCC publish quarterly reports on credit performance, loss mitigation efforts and foreclosures based on data provided by national banks and thrifts. And, states such as Maryland and North Carolina have adopted similar reporting requirements to those contained in section 419.12.

Many of the other requirements of Part 419 such as those related to handling of taxes, insurance and escrow payments, collection of late fees and charges, crediting of payments derive from federal or state laws and reflect best industry practices. The periodic reporting and bookkeeping and recordkeeping requirements are also standard among financial services businesses, including mortgage bankers and brokers (see, for example section 410 of the Superintendent's Regulations).

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

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

#### 5. Local Government Mandates.

None.

#### 6. Paperwork.

Part 419 requires mortgage loan servicers to keep books and records related to its servicing for a period of three years and to produce quarterly reports and financial statements as well as annual and other reports requested by the Superintendent. It is anticipated that the quarterly reporting relating to mortgage loan servicing will be done electronically and would therefore be virtually paperless. The other recordkeeping and reporting requirements are consistent with standards generally required of mortgage bankers and brokers and other regulated financial services entities.

#### 7. Duplication.

The regulation does not duplicate, overlap or conflict with any other regulations. The various federal laws that touch upon aspects of mortgage loan servicing are noted in Section 9 "Federal Standards" below.

#### 8. Alternatives.

The Mortgage Lending Reform Law required the registration of mortgage loan servicers and empowered the Superintendent to prescribe rules and regulations to guide the business of mortgage servicing. The purpose of the regulation is to carry out this statutory mandate to register mortgage loan servicers and regulate the manner in which they conduct business. The Department circulated a proposed draft of Part 419 and received comments from and met with industry and consumer groups. The current Part 419 reflects the input received. The alternative to these regulations is to do nothing or to wait for the newly created federal bureau of consumer protection to promulgate national rules, which could take years, may not happen at all or may not address all the practices covered by the rule. Thus, neither of those alternatives would effectuate the intent of the legislature to address the current foreclosure crisis, help at-risk homeowners vis-à-vis their loan servicers and ensure that mortgage loan servicers engage in fair and appropriate servicing practices.

#### 9. Federal Standards.

Currently, mortgage loan servicers are not required to be registered by any federal agencies, and there are no comprehensive federal rules governing mortgage loan servicing. Federal laws such as the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 et seq. and regulations adopted thereunder, 24 C.F.R. Part 3500, and the Truth-in-Lending Act, 15 U.S.C. section 1600 et seq. and Regulation Z adopted thereunder, 12 C.F.R. section 226 et seq., govern some aspects of mortgage loan servicing, and there have been some recent amendments to those laws and regulations regarding mortgage loan servicing. For example, Regulation Z, 12 C.F.R. section 226.36(c), was recently amended to address the crediting of payments, imposition of late charges and the provision of payoff statements. In addition, the recently enacted Dodd-Frank Wall Street Reform and Protection Act of 2010 (Dodd-Frank Act) establishes requirements for the handling of escrow accounts, obtaining force-placed insurance, responding to borrower requests and providing information related to the owner of the loan. Additionally, the newly created Bureau of Consumer Financial Protection established by the Dodd-Frank Act may soon propose additional regulations for mortgage loan servicers.

#### 10. Compliance Schedule.

Similar emergency regulations first became effective on October 1, 2010.

### **Regulatory Flexibility Analysis**

#### 1. Effect of the Rule:

The rule will not have any impact on local governments. The Mortgage Lending Reform Law of 2008 (Ch. 472, Laws of 2008, hereinafter, the "Mortgage Lending Reform Law") requires all mortgage loan servicers, whether registered or exempt from registration under the law, to service mortgage loans in accordance with the rules and regulations promulgated by the Banking Board or Superintendent. The functions and powers of the Banking Board have since been transferred to the Superintendent of Financial Services, pursuant to Part A of Chapter 62 of the Laws of 2011, Section 89. Of the 67 entities which have been approved for registration or have pending applications and the nearly 400 entities which have indicated that they are exempt from the registration requirements, it is estimated that very few are small businesses.

#### 2. Compliance Requirements:

The provisions of the Mortgage Lending Reform Law relating to mortgage loan servicers has two main components: it requires the registration by the Department of servicers who are not a bank, mortgage banker, mortgage broker or other exempt organizations (the "MLS Registration Regulations"), and it authorizes the Department to promulgate rules and regulations that are necessary and appropriate for the protection of consumers, to define improper or fraudulent business practices, or otherwise appropriate for the effective administration of the provisions of the Mortgage Lending Reform Law relating to mortgage loan servicers (the "Mortgage Loan Servicer Business Conduct Regulations").

The provisions of the Mortgage Lending Reform Law requiring registration of mortgage loan servicers which are not mortgage bankers, mortgage brokers or exempt organizations became effective on July 1, 2009. Part 418 of the Superintendent's Regulations, initially adopted on an emergency basis on July 1 2009, sets for the standards and procedures for applications for registration as a mortgage loan servicer, for approving and denying applications to be registered as a mortgage loan servicer, for approving changes of control, for suspending, terminating or revoking the registration of a mortgage loan servicer as well as the financial responsibility standards for mortgage loan servicers.

Part 419 implements the provisions of the Mortgage Lending Reform Law by setting the standards by which mortgage loan servicers conduct the business of mortgage loan servicing. The rule sets the standards for handling complaints, payments of taxes and insurance, crediting of borrower payments, late payments, account statements, delinquencies and loss mitigation, fees and recordkeeping.

#### 3. Professional Services:

None.

#### 4. Compliance Costs:

The requirements of Part 419 do not impose any direct costs on mortgage loan servicers. Although mortgage loan servicers may incur some additional costs as a result of complying with Part 419, the overwhelming majority of mortgage loan servicers are banks, operating subsidiaries or affiliates of banks, large independent servicers or other financial services entities that service millions, and even billions, of dollars in loans and have the experience, resources and systems to comply with these requirements. Moreover, any additional costs are likely to be mitigated by the fact that many of the requirements of Part 419, including those relating to the handling of residential mortgage delinquencies and loss mitigation (419.11) and quarterly reporting (419.12), are consistent with or substantially similar to standards found in other federal or state laws, federal mortgage modification programs or servicers own protocols.

For example, Fannie Mae and Freddie Mac, which own or insure approximately 90% of the nation's securitized mortgage loans, have similar guidelines governing various aspects of mortgage servicing, including handling of loan delinquencies. In addition, over 100 mortgage loan servicers participate in the federal Making Home Affordable (MHA) program which requires adherence to standards for handling of loan delinquencies and loss mitigation similar to those contained in these regulations. Those servicers not participating in MHA have, for the most part, adopted programs which parallel many components of MHA.

Reporting on loan delinquencies and loss mitigation has likewise become increasingly common. The OCC publishes quarterly reports on credit performance, loss mitigation efforts and foreclosures based on data provided by national banks and thrifts. And, states such as Maryland and North Carolina have adopted similar reporting requirements to those contained in section 419.12.

Many of the other requirements of Part 419 such as those related to handling of taxes, insurance and escrow payments, collection of late fees and charges, crediting of payments derive from federal or state laws and reflect best industry practices. The periodic reporting and bookkeeping and recordkeeping requirements are also standard among financial services businesses, including mortgage bankers and brokers (see, for example section 410 of the Superintendent's Regulations).

Compliance with the rule should improve the servicing of residential mortgage loans in New York, including the handling of mortgage delinquencies, help prevent unnecessary foreclosures and reduce consumer complaints regarding the servicing of residential mortgage loans.

#### 5. Economic and Technological Feasibility:

For the reasons noted in Section 4 above, the rule should impose no adverse economic or technological burden on mortgage loan servicers that are small businesses.

#### 6. Minimizing Adverse Impacts:

As noted in Section 1 above, most servicers are not small businesses. Many of the requirements contained in the rule derive from federal or state laws, existing servicer guidelines utilized by Fannie Mae and Freddie Mac and best industry practices.

Moreover, the ability by the Department to regulate mortgage loan servicers is expected to reduce costs associated with responding to consumers' complaints, decrease unnecessary expenses borne by mortgagors, help borrowers at risk of foreclosure and decrease the number of foreclosures in this state.

#### 7. Small Business and Local Government Participation:

The Department distributed a draft of proposed Part 419 to industry representatives, received industry comments on the proposed rule and met with industry representatives in person. The Department likewise distributed a draft of proposed Part 419 to consumer groups, received their comments on the proposed rule and met with consumer representatives to discuss the proposed rule in person. The rule reflects the input received from both industry and consumer groups.

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

**Types and Estimated Numbers:** Since the adoption of the Mortgage Lending Reform Law of 2008 (Ch. 472, Laws of 2008, hereinafter, the "Mortgage Lending Reform Law"), which required mortgage loan servicers to be registered with the Department unless exempted under the law, 67 entities have pending applications or have been approved for registration and nearly 400 entities have indicated that they are a mortgage banker, broker, bank or other organization exempt from the registration requirements. Only one of the non-exempt entities applying for registration is located in New York and operating in a rural area. Of the exempt organizations, all of which are required to comply with the conduct of business contained in Part 419, approximately 400 are located in New York, including several in rural areas. However, the overwhelming majority of exempt organizations, regardless of where located, are banks or credit unions that are already regulated and are thus familiar with complying with the types of requirements contained in this regulation.

**Compliance Requirements:** The provisions of the Mortgage Lending

Reform Law relating to mortgage loan servicers has two main components: it requires the registration by the Department of servicers that are not a bank, mortgage banker, mortgage broker or other exempt organization (the "MLS Registration Regulations"), and it authorizes the Department to promulgate rules and regulations that are necessary and appropriate for the protection of consumers, to define improper or fraudulent business practices, or otherwise appropriate for the effective administration of the provisions of the Mortgage Lending Reform Law relating to mortgage loan servicers (the "MLS Business Conduct Regulations").

The provisions of the Mortgage Lending Reform Law of 2008 requiring registration of mortgage loan servicers which are not mortgage bankers, mortgage brokers or exempt organizations became effective on July 1, 2009. Part 418 of the Superintendent's Regulations, initially adopted on an emergency basis on July 1, 2010, sets forth the standards and procedures for applications for registration as a mortgage loan servicer, for approving and denying applications to be registered as a mortgage loan servicer, for approving changes of control, for suspending, terminating or revoking the registration of a mortgage loan servicer as well as the financial responsibility standards for mortgage loan servicers.

Part 419 implements the provisions of the Mortgage Lending Reform Law of 2008 by setting the standards by which mortgage loan servicers conduct the business of mortgage loan servicing. The rule sets the standards for handling complaints, payments of taxes and insurance, crediting borrower payments, late payments, account statements, delinquencies and loss mitigation and fees. This part also imposes certain recordkeeping and reporting requirements in order to enable the Superintendent to monitor servicers' conduct and prohibits certain practices such as engaging in deceptive business practices.

**Costs:** The requirements of Part 419 do not impose any direct costs on mortgage loan servicers. The periodic reporting requirements of Part 419 are consistent with those imposed on other regulated entities. In addition, many of the other requirements of Part 419, such as those related to the handling of loan delinquencies, taxes, insurance and escrow payments, collection of late fees and charges and crediting of payments, derive from federal or state laws, current federal loan modification programs, servicing guidelines utilized by Fannie Mae and Freddie Mac or servicers' own protocols. Although mortgage loan servicers may incur some additional costs as a result of complying with Part 419, the overwhelming majority of mortgage loan servicers are banks, credit unions, operating subsidiaries or affiliates of banks, large independent servicers or other financial services entities that service millions, and even billions, of dollars in loans and have the experience, resources and systems to comply with these requirements. Of the 67 entities that have been approved for registration or that have pending applications, only one is located in a rural area of New York State. Of the few exempt organizations located in rural areas of New York, virtually all are banks or credit unions. Moreover, compliance with the rule should improve the servicing of residential mortgage loans in New York, including the handling of mortgage delinquencies, help prevent unnecessary foreclosures and reduce consumer complaints regarding the servicing of residential mortgage loans.

**Minimizing Adverse Impacts:** As noted in the "Costs" section above, while mortgage loan servicers may incur some higher costs as a result of complying with the rules, the Department does not believe that the rule will impose any meaningful adverse economic impact upon private or public entities in rural areas. In addition, it should be noted that Part 418, which establishes the application and financial requirements for mortgage loan servicers, authorizes the Superintendent to reduce or waive the otherwise applicable financial responsibility requirements in the case of mortgage loans servicers that service not more than 12 mortgage loans or more than \$5,000,000 in aggregate mortgage loans in New York and which do not collect tax or insurance payments. The Superintendent is also authorized to reduce or waive the financial responsibility requirements in other cases for good cause. The Department believes that this will ameliorate any burden on mortgage loan servicers operating in rural areas.

**Rural Area Participation:** The Department issued a draft of Part 419 in December 2009 and held meetings with and received comments from industry and consumer groups following the release of the draft rule. The Department also maintains continuous contact with large segments of the servicing industry through its regulation of mortgage bankers and brokers and its work in the area of foreclosure prevention. The Department likewise maintains close contact with a variety of consumer groups through its community outreach programs and foreclosure mitigation programs. The Department has utilized this knowledge base in drafting the regulation.

#### **Job Impact Statement**

Article 12-D of the Banking Law, as amended by the Mortgage Lending Reform Law (Ch. 472, Laws of 2008), requires persons and entities which engage in the business of servicing mortgage loans after July 1, 2009 to be registered with the Superintendent. Part 418 of the Superintendent's Regulations, initially adopted on an emergency basis on July 1,

2009, sets forth the application, exemption and approval procedures for registration as a mortgage loan servicer, as well as financial responsibility requirements for applicants, registrants and exempted persons.

Part 419 addresses the business practices of mortgage loan servicers in connection with their servicing of residential mortgage loans. Thus, this part addresses the obligations of mortgage loan servicers in their communications, transactions and general dealings with borrowers, including the handling of consumer complaints and inquiries, handling of escrow payments, crediting of payments, charging of fees, loss mitigation procedures and provision of payment histories and payoff statements. This part also imposes certain recordkeeping and reporting requirements in order to enable the Superintendent to monitor services' conduct and prohibits certain practices such as engaging in deceptive business practices.

Compliance with Part 419 is not expected to have a significant adverse effect on jobs or employment activities within the mortgage loan servicing industry. The vast majority of mortgage loan servicers are sophisticated financial entities that service millions, if not billions, of dollars in loans and have the experience, resources and systems to comply with the requirements of the rule. Moreover, many of the requirements of the rule reflect derive from federal or state laws and reflect existing best industry practices.

## NOTICE OF ADOPTION

### Audited Financial Statements

**I.D. No.** DFS-13-13-00001-A

**Filing No.** 224

**Filing Date:** 2014-03-14

**Effective Date:** 2014-04-02

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

**Action taken:** Amendment of Part 89 (Regulation 118) of Title 11 NYCRR.

**Statutory authority:** Financial Services Law, sections 202 and 302; and Insurance Law, sections 301 and 307

**Subject:** Audited Financial Statements.

**Purpose:** To comport with the NAIC model rule, upon which section 89.4(c)(2) is based.

**Text or summary was published** in the March 27, 2013 issue of the Register, I.D. No. DFS-13-13-00001-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Buffy Cheung, New York State Department of Financial Services, One State Street, New York, NY 10004, (212) 480-5551, email: buffy.cheung@dfs.ny.gov

#### Revised Job Impact Statement

Amendment of the regulation will not adversely impact job or employment opportunities in New York, or have any adverse impact on self-employment opportunities, because the revision imposes no new or additional requirements on any insurer subject to the rule.

The text of the current rule does not fully comport with the NAIC model rule, upon which the regulation is based. Because the amendment merely clarifies the rule to better express its purpose, no person or entity is likely to object.

The Department of Financial Services believes that the amended rule will not result in any adverse impact.

#### Assessment of Public Comment

The agency received no public comment.

## NOTICE OF ADOPTION

### Special Risk Insurance

**I.D. No.** DFS-49-13-00002-A

**Filing No.** 226

**Filing Date:** 2014-03-14

**Effective Date:** 2014-04-02

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

**Action taken:** Amendment of Part 16 (Regulation 86) of Title 11 NYCRR.

**Statutory authority:** Financial Services Law, sections 202 and 302; and Insurance Law, sections 301, 307, 308 and art. 63

**Subject:** Special Risk Insurance.

**Purpose:** To comport with chapter 75 of the Laws of 2013 upon which Regulation 86 is based and correct minor errors in the current rule.

**Text or summary was published** in the December 4, 2013 issue of the Register, I.D. No. DFS-49-13-00002-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Hoda Nairooz, New York State Department of Financial Services, One State Street, New York, NY 10004, (212) 480-5595, email: hoda.nairooz@dfs.ny.gov

#### Revised Job Impact Statement

Amendment of the regulation will not adversely impact job or employment opportunities in New York, or have any adverse impact on self-employment opportunities, because the revision imposes no new or additional requirements on any insurer subject to the rule. The rule amends section 16.4 to remove certain current requirements in order to conform section 16.9 with the revisions recently made to Insurance Law section 6303(a)(3) by Chapter 75 of the Laws of 2013. The rulemaking also corrects: (1) the reference made in section 16.8(e) to section 16.1(f) to read 16.1(j) and (2) an inadvertent revision that was made to section 16.9(a)(2) when that section was updated as part of the consolidated action to amend multiple Parts of 11 NYCRR to revise references that were outdated as a result of the consolidation of the New York State Insurance and Banking Departments into a new Department of Financial Services.

The Department of Financial Services believes that the amended rule will not result in any adverse job or employment impact.

#### Assessment of Public Comment

The New York State Department of Financial Services ("Department") received only one comment. The comment was submitted by a national trade association that represents property-casualty insurers, supporting the proposed amendments to Insurance Regulation 86.

## NOTICE OF ADOPTION

### Financial Statement Filings and Accounting Practices and Procedures

**I.D. No.** DFS-52-13-00002-A

**Filing No.** 225

**Filing Date:** 2014-03-14

**Effective Date:** 2014-04-02

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

**Action taken:** Amendment of Part 83 (Regulation 172) of Title 11 NYCRR.

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

**Subject:** Financial Statement Filings and Accounting Practices and Procedures.

**Purpose:** To update citations in Part 83 to the Accounting Practices and Procedures Manual as of March 2013.

**Text or summary was published** in the December 24, 2013 issue of the Register, I.D. No. DFS-52-13-00002-P.

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

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

#### Revised Job Impact Statement

The Department does not believe that this rule will have any impact on jobs and employment opportunities, including self-employment opportunities. The amendment merely adopts the most recent edition published by the National Association of Insurance Commissioners ("NAIC") of the Accounting Practices and Procedures Manual As of March 2013 ("2013 Accounting Manual"), replacing the rule's current reference to the Accounting Practices and Procedures Manual As of March 2012. All states require insurers to comply with the 2013 Accounting Manual, which establishes uniform practices and procedures for U.S.-licensed insurers. Adoption of the rule is necessary for the Department to maintain

its accreditation status with the NAIC. The NAIC accreditation standards require that state insurance regulators have adequate statutory and administrative authority to regulate insurers' corporate and financial affairs, and that they have the necessary resources to carry out that authority.

#### Assessment of Public Comment

The agency received no public comment.

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

#### Holding Companies

I.D. No. DFS-13-14-00002-P

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

**Proposed Action:** This is a consensus rule making to amend Subpart 80-1 (Regulation 52) of Title 11 NYCRR.

**Statutory authority:** Financial Services Law, sections 202 and 302; and Insurance Law, sections 301, 1505 and 1506

**Subject:** Holding Companies.

**Purpose:** To conform to amendments made to Insurance Law section 1505(d) by chapter 238 of the Laws of 2013.

**Text of proposed rule:** Section 80-1.5(c) is amended as follows:

(c) For the purposes of Insurance Law section 1505(d)(4), the following transactions between a domestic controlled insurer and any person in its holding company system are deemed to be material transactions:

(1) [Any] *any* sale, purchase, exchange, loan or extension of credit, or investment involving: [one-half of one percent or]

(i) *less than three percent of [the insurer's] a life insurance company's* admitted assets at last year-end that, when added to the respective aggregate of any such other sales, purchases, exchanges, unpaid loans, unpaid extensions of credit, or investments made during the preceding 12 months, causes the aggregate to equal or exceed three percent of the:

(i) one-half of one percent of this insurer's] *company's* admitted assets at last year-end[, if the insurer is subject to article 42 of the Insurance Law]; [or]

(ii) [one percent of the insurer's admitted assets at last year-end, if the insurer is not subject to article 42 of the Insurance Law;] *with respect to an accident and health insurance company or a corporation subject to Insurance Law article 43, less than the lesser of three percent of the company or corporation's admitted assets or 25% of capital and surplus at last year-end, that when added to the respective aggregate of any such other sales, purchases, exchanges, unpaid loans, unpaid extensions of credit, or investments made during the preceding 12 months, causes the aggregate to equal or exceed the lesser of three percent of the company or corporation's admitted assets or 25% of capital and surplus at last year-end; or*

(iii) *with respect to an insurer other than as specified in subparagraphs (i) and (ii) of this paragraph, less than the lesser of three percent of the insurer's admitted assets or 25% of surplus to policyholders at last year-end, that when added to the respective aggregate of any such other sales, purchases, exchanges, unpaid loans, unpaid extensions of credit, or investments made during the preceding 12 months, causes the aggregate to equal or exceed the lesser of three percent of the insurer's admitted assets or 25% of surplus to policyholders at last year-end;*

(2) [Any] *any* lease of real or personal property that does not provide for the rendering of services on a regular and systematic basis and where the aggregate payments to be made, including any renewal or extension thereof, exceeds:

(i) one percent of the insurer's admitted assets at last year-end, if the insurer is subject to article 42 of the Insurance Law; or

(ii) two percent of the insurer's admitted assets at last year-end, if the insurer is not subject to article 42 of the Insurance Law; and

(3) any management agreements, service contracts, tax allocation agreements, guarantees, or cost-sharing arrangements.

Section 80-1.8 is repealed.

Section 80-1.9 is renumbered as section 80-1.8.

**Text of proposed rule and any required statements and analyses may be obtained from:** Joana Lucashuk, New York State Department of Financial Services, One State Street, New York, NY 10004, (212) 480-2125, email: joana.lucashuk@dfs.ny.gov

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

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

#### Consensus Rule Making Determination

This rulemaking conforms section 80-1.5(c) to recent amendments made to Insurance Law section 1505(d) by Chapter 238 of the Laws of

2013, repeals section 80-1.8 because Chapter 238 added similar language to Insurance Law section 1506, and renumbers section 80-1.9 as section 80-1.8.

Because this amendment merely conforms the rule with revisions made to the Insurance Law, no person or entity is likely to object to this rulemaking. Thus, this rulemaking is determined by the agency to be a consensus rulemaking, as defined in State Administrative Procedure Act ("SAPA") § 102(11), and is proposed pursuant to SAPA § 202(1)(b)(i). Therefore, this rulemaking is exempt from the requirement to file a Regulatory Impact Statement, Regulatory Flexibility Analysis for Small Businesses and Local Governments, or Rural Area Flexibility Analysis.

#### Job Impact Statement

Amendment of the regulation will not adversely impact job or employment opportunities in New York, or have any adverse impact on self-employment opportunities, because the revision imposes no new or additional requirements on any insurer subject to the rule. This rulemaking is amended to conform to recent amendments made to Insurance Law sections 1505(d) and 1506 by Chapter 238 of the Laws of 2013. The Department of Financial Services believes that the amended rule will not result in any adverse job or employment impact.

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

#### Reports to Central Organization

I.D. No. DFS-13-14-00003-P

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

**Proposed Action:** This is a consensus rule making to amend Subpart 62-2 of Title 11 NYCRR.

**Statutory authority:** Financial Services Law, sections 202 and 302; and Insurance Law, sections 201, 301, 318, 319, 403, 2601, 3403, 3413 and 3432

**Subject:** Reports to Central Organization.

**Purpose:** To replace outdated references to "PILR" with "central organization."

**Text of proposed rule:** Section 62-2.2 is amended as follows:

(a) [The central organization is hereby designated to be the Property Insurance Loss Register, as administered by the American Insurance Association, hereinafter referred to as PILR.] In order to comply with this Subpart, [all insurers] *every insurer* licensed to write fire insurance in this State [are] *is* hereby required to become a subscriber[s] to [PILR] *the central organization* designated by the superintendent and shall be bound by all of the terms and conditions of subscribership [to PILR] *thereto*.

(b) Reporting and follow-up requirements. Insurers shall report all fire losses in excess of \$1,000 involving applicable property, except losses to vehicles registered for use on public highways, to [PILR] *the central organization* within five business days following receipt of notice of loss. If the insurer has not received a response from [PILR] *the central organization* within 15 calendar days following its submission of the fire loss report [to PILR], the insurer shall continue to complete the adjustment of the loss.

(c) Verification procedures required prior to paying a fire claim. An insurer shall comply with the [PILR] *central organization* reporting procedures prior to [its payment of] paying a fire claim, subject to the rules provided for in this Subpart.

(1) The insurer shall not complete adjustment of the loss until expiration of 15 calendar days from the date of the submission of the fire loss report to [PILR] *the central organization*.

(2) If the [PILR] *central organization's* response indicates insurance coverage by more than one insurer or of a previous fire loss, the insurers shall promptly investigate and resolve such circumstance [and/or] *or* confirm information related to prior losses.

(3) Subject to the provisions of section 62-1.2 of this Part, if the [insurer suspects from the PILR] *central organization* report or other information indicates to the insurer that the fire claim may be fraudulent, the insurer shall suspend processing of the claim pursuant to the provisions of Insurance Law section 2601 [of the Insurance Law].

Section 62-2.4 is amended as follows:

In accordance with the provisions of Insurance Law section 318 [of the Insurance Law], information reported to [PILR] *the central organization* pursuant to this Subpart shall be made available to law enforcement agencies, tax districts [which] *that* have, pursuant to the provisions of section 22 of the General Municipal Law, filed with the superintendent a notice of intention to claim against the proceeds of a policy of fire insurance, and

governmental agencies charged with the responsibility of demolition of structures. [Requests for fire insurance loss information shall be submitted to the Insurance Frauds Bureau. The Insurance Frauds Bureau shall transmit all such requests to PILR for processing. PILR shall furnish all available information compiled from reports required to be made by this Subpart, to the Insurance Frauds Bureau, which in turn will make such information available to the requesting agency.]

**Text of proposed rule and any required statements and analyses may be obtained from:** Jessica Heegan, NYS Department of Financial Services, One State Street, New York, NY 10004, (212) 480-5683, email: jessica.heegan@dfs.ny.gov

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

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

**Consensus Rule Making Determination**

The present rule requires insurers to report fire losses in excess of \$1,000 to a central reporting organization, denominated the Property Insurance Loss Register (“PILR”), as administered by the American Insurance Association (“AIA”). However, since 1997, the actual central reporting organization has been the Insurance Services Office, Inc. (“ISO”), which acquired the PILR database of property claims as part of its acquisition of the American Insurance Services Group, Inc. (“AISG”) from AIA in that year. In 1998, ISO also acquired claims databases from National Insurance Crime Bureau (“NICB”). ISO created a single database (“ISO ClaimSearch®”) that merged the former NICB and AISG databases for multiple purposes: claims administration, fraud detection and prevention, compliance reporting, and assistance with law enforcement efforts, which has been in use for the past 15 years.

This amendment replaces outdated references to “PILR” with “central organization.” This change corrects the rule by removing outdated information, and provides the Superintendent greater flexibility to name a new central organization, if that becomes necessary, without having to make additional revisions to the rule.

This amendment also removes instructions that are no longer operative by removing the last three sentences of section 62-2.4, which currently provides that law enforcement agencies, and certain tax districts and governmental agencies, must make their requests for fire insurance loss information from the Department’s Criminal Investigations Unit, which would transmit such requests to PILR for processing. PILR would then have to furnish all available information compiled from reports required to be made by Subpart 62-2 to the Criminal Investigations Unit, which in turn would make such information available to the requesting agency. Actually, a requesting agency may obtain fire insurance loss information directly from ISO.

Because the amendment merely updates the rule by removing obsolete references and instructions, no person or entity is likely to object.

Accordingly, this rulemaking is determined to be a consensus rulemaking, as defined in State Administrative Procedure Act (“SAPA”) § 102(11), and is proposed pursuant to SAPA § 202(1)(b)(i). Therefore, this rulemaking is exempt from the requirement to file a Regulatory Impact Statement, Regulatory Flexibility Analysis for Small Businesses and Local Governments, or a Rural Area Flexibility Analysis.

**Job Impact Statement**

This amendment merely updates the rule by removing obsolete references and instructions. Amendment of the rule will not adversely impact job or employment opportunities in New York, or have any adverse impact on self-employment opportunities, because the revision imposes no new or additional requirements on any insurer subject to the rule.

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

**Repeal of Parts 175 and 177 and Sections 178.8 and 178.10 of 11 NYCRR, and Renumbering of 11 NYCRR Section 178.9 to 178.8**

**I.D. No.** DFS-13-14-00005-P

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

**Proposed Action:** This is a consensus rule making to repeal Parts 175, 177 and sections 178.8 and 178.10; and renumber section 178.9 to 178.8 of Title 11 NYCRR.

**Statutory authority:** Financial Services Law, sections 202 and 302; Insurance Law, sections 301, 1401, 1403, 1405, 1407, 1410 and 1413; and L. 2008, ch. 71

**Subject:** Repeal of Parts 175 and 177 and sections 178.8 and 178.10 of 11 NYCRR, and renumbering of 11 NYCRR section 178.9 to 178.8.

**Purpose:** To repeal Parts and sections of 11 NYCRR made obsolete by enactment of statutory provisions that supersede and replace them.

**Text of proposed rule:** Part 175 is hereby repealed.

Part 177 is hereby repealed.

Section 178.8 is hereby repealed.

Section 178.9 is hereby renumbered as section 178.8.

Section 178.10 is hereby repealed.

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

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

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

**Consensus Rule Making Determination**

Part 175 (applicable to domestic life insurers) and Part 177 (applicable to property/casualty insurers) were promulgated to permit insurers to engage in hedging and the use of derivatives in limited circumstances. However, the enactment of Insurance Law section 1410 in 1998 (effective July 1, 1999) made Parts 175 and 177 obsolete by establishing statutory provisions allowing insurers to engage in hedging and derivative use transactions. Because Insurance Law section 1410 was made subject to sunset provisions that allowed the statute to expire if not extended by the Legislature, the Department did not at that time repeal Parts 175 and 177, but suspended those Parts until such time as Insurance Law section 1410 was allowed to expire. By Chapter 71 of the Laws of 2008, the Legislature permanently eliminated the sunset provisions of Insurance Law section 1410, making 11 NYCRR Parts 175 and 177 forever obsolete.

Part 178 of 11 NYCRR was promulgated in furtherance of Insurance Law section 1410, and is the only remaining regulatory provision governing derivative transactions by insurers. Chapter 398 of the Laws of 2012 revised Insurance Law section 1410(f) by, among other things, adding a definition for “qualified counterparty,” thus superseding the definition of “qualified counterparty” provided by 11 NYCRR section 178.8.

Section 178.10 of 11 NYCRR provides that should Insurance Law section 1410 expire, Parts 175 and 177 would again become effective and the provisions of Part 178 would be suspended. Because the sunset provisions of Insurance Law section 1410 have been permanently eliminated, 11 NYCRR section 178.10 is also obsolete.

Therefore, this rulemaking repeals Parts 175 and 177 and sections 178.8 and 178.10 of 11 NYCRR, and amends 11 NYCRR Part 178 by renumbering section 178.9 to 178.8.

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

**Job Impact Statement**

The repeal of Parts 175 and 177 and sections 178.8 and 178.10 of 11 NYCRR, and the amendment to 11 NYCRR Part 178, which merely renumbers section 178.9 to 178.8, should not adversely impact job or employment opportunities in New York. This rulemaking repeals Parts and sections of 11 NYCRR that have been made obsolete by the enactment of statutory provisions that supersede and replace those regulatory provisions.

The Department of Financial Services has no reason to believe that the rules will result in any adverse impacts on job or employment opportunities in New York.

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**Department of Health**

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**EMERGENCY  
RULE MAKING**

**Personal Care Services Program (PCSP) and Consumer Directed Personal Assistance Program (CDPAP)**

**I.D. No.** HLT-13-14-00004-E

**Filing No.** 223

**Filing Date:** 2014-03-14

**Effective Date:** 2014-03-14

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

**Action taken:** Amendment of sections 505.14 and 505.28 of Title 18 NYCRR.

**Statutory authority:** Public Health Law, section 201(1)(v); and Social Services Law, sections 363-a(2), 365-a(2)(e) and 365-f

**Finding of necessity for emergency rule:** Preservation of public health.

**Specific reasons underlying the finding of necessity:** Pursuant to the authority vested in the Commissioner of Health by Social Services Law § 365-a(2)(e), the Commissioner is authorized to adopt standards, pursuant to emergency regulation, for the provision and management of services for individuals whose need for such services exceeds a specified level to be determined by the Commissioner.

**Subject:** Personal Care Services Program (PCSP) and Consumer Directed Personal Assistance Program (CDPAP).

**Purpose:** To establish definitions, criteria and requirements associated with the provision of continuous PC and continuous CDPA services.

**Text of emergency rule:** Paragraph (3) of subdivision (a) of section 505.14 is repealed and a new paragraph (3) is added to read as follows:

(3) *Continuous personal care services means the provision of uninterrupted care, by more than one person, for more than 16 hours per day for a patient who, because of the patient's medical condition and disabilities, requires total assistance with toileting, walking, transferring or feeding at times that cannot be predicted.*

Paragraph (4) of subdivision (a) of section 505.14 is amended by adding new subparagraph (iii) to read as follows:

(iii) *Personal care services shall not be authorized if the patient's need for assistance can be met by either or both of the following:*

(a) *voluntary assistance available from informal caregivers including, but not limited to, the patient's family, friends or other responsible adult; or formal services provided by an entity or agency; or*

(b) *adaptive or specialized equipment or supplies including, but not limited to, bedside commodes, urinals, walkers and wheelchairs, when such equipment or supplies can be provided safely and cost-effectively.*

Paragraph (5) of subdivision (a) of section 505.14 is repealed and a new paragraph (5) is added to read as follows:

(5) *Live-in 24-hour personal care services means the provision of care by one person for a patient who, because of the patient's medical condition and disabilities, requires some or total assistance with one or more personal care functions during the day and night and whose need for assistance during the night is infrequent or can be predicted.*

Clause (b) of subparagraph (i) of paragraph (6) of subdivision (a) of section 505.14 is amended to read as follows:

(b) The [initial] authorization for Level I services shall not exceed eight hours per week. [An exception to this requirement may be made under the following conditions:

(1) The patient requires some or total assistance with meal preparation, including simple modified diets, as a result of the following conditions:

(i) informal caregivers such as family and friends are unavailable, unable or unwilling to provide such assistance or are unacceptable to the patient; and

(ii) community resources to provide meals are unavailable or inaccessible, or inappropriate because of the patient's dietary needs.

(2) In such a situation, the local social services department may authorize up to four additional hours of service per week.]

Clause (b) of subparagraph (ii) of paragraph (6) of subdivision (a) of section 505.14 is amended to read as follows:

(b) When continuous [24-hour care] *personal care services* is indicated, additional requirements for the provision of services, as specified in clause (b)(4)(i)(c) of this section, must be met.

Clause (c) of subparagraph (ii) of paragraph (3) of subdivision (b) of section 505.14 is relettered as clause (d) and a new clause (c) is added to read as follows:

(c) *When live-in 24-hour personal care services is indicated, the social assessment shall evaluate whether the patient's home has adequate sleeping accommodations for a personal care aide.*

Subclauses (5) and (6) of clause (b) of subparagraph (iii) of paragraph (3) of subdivision (b) of section 505.14 are renumbered as subclauses (6) and (7), and new subclause (5) is added to read as follows:

(5) *an evaluation whether adaptive or specialized equipment or supplies including, but not limited to, bedside commodes, urinals, walkers and wheelchairs, can meet the patient's need for assistance with personal care functions, and whether such equipment or supplies can be provided safely and cost-effectively;*

Subclause (7) of clause (a) of subparagraph (iv) of paragraph (3) of subdivision (b) of section 505.14 is amended to read as follows:

(7) whether the patient can be served appropriately and more cost-effectively by using *adaptive or specialized medical equipment or supplies* covered by the MA program including, but not limited to, *bedside commodes, urinals, walkers, wheelchairs and insulin pens*; and

Clause (c) of subparagraph (iv) of paragraph (3) of subdivision (b) of section 505.14 is amended to read as follows:

(c) A social services district may determine that the assessments required by subclauses (a)(1) through (6) and (8) of this subparagraph may be included in the social assessment or the nursing assessment.

Clause (c) of subparagraph (i) of paragraph (4) of subdivision (b) of section 505.14 is amended to read as follows:

(c) the case involves the provision of continuous [24-hour] personal care services as defined in paragraph (a)(3) of this section. Documentation for such cases shall be subject to the following requirements:

Subclause (2) of clause (c) of subparagraph (i) of paragraph (4) of subdivision (b) of section 505.14 is amended to read as follows:

(2) The nursing assessment shall document that: the functions required by the patient[.]; the degree of assistance required for each function, *including that the patient requires total assistance with toileting, walking, transferring or feeding*; and the time of this assistance require the provision of continuous [24-hour care] *personal care services*.

Subparagraph (ii) of paragraph (4) of subdivision (b) of section 505.14 is amended to read as follows:

(ii) The local professional director, or designee, must review the physician's order and the social, nursing and other required assessments in accordance with the standards for levels of services set forth in subdivision (a) of this section, and is responsible for the final determination of the level and amount of care to be provided. *The local professional director or designee may consult with the patient's treating physician and may conduct an additional assessment of the patient in the home.* The final determination must be made [within five working days of the request] *with reasonable promptness, generally not to exceed seven business days after receipt of the physician's order and the completed social and nursing assessments, except in unusual circumstances including, but not limited to, the need to resolve any outstanding questions regarding the level, amount or duration of services to be authorized.*

Paragraph (4) of subdivision (b) of section 505.28 is amended to read as follows:

(4) "continuous [24-hour] consumer directed personal assistance" means the provision of uninterrupted care, by more than one consumer directed personal assistant, *for more than 16 hours per day* for a consumer who, because of the consumer's medical condition [or] *and disabilities, requires total assistance with toileting, walking, transferring or feeding at [unscheduled times during the day and night] at times that cannot be predicted.*

Paragraphs (8) through (13) of subdivision (b) of section 505.28 are renumbered as paragraphs (9) through (14) and the renumbered paragraph (9) is amended to read as follows:

(9) "personal care services" means the nutritional and environmental support functions, personal care functions, or both such functions, that are specified in Section 505.14(a)(6) of this Part *except that, for individuals whose needs are limited to nutritional and environmental support functions, personal care services shall not exceed eight hours per week.*

A new paragraph (8) of subdivision (b) of section 505.28 is added to read as follows:

(8) "*live-in 24-hour consumer directed personal assistance*" means the provision of care by one consumer directed personal assistant for a consumer who, because of the consumer's medical condition and disabilities, requires some or total assistance with *personal care functions, home health aide services or skilled nursing tasks during the day and night and whose need for assistance during the night is infrequent or can be predicted.*

Subparagraph (iii) of paragraph (2) of subdivision (d) of section 505.28 is amended, and new subparagraphs (iv) and (v) of such paragraph are added, to read as follows:

(iii) an evaluation of the potential contribution of informal supports, such as family members or friends, to the individual's care, which must consider the number and kind of informal supports available to the individual; the ability and motivation of informal supports to assist in care; the extent of informal supports' potential involvement; the availability of informal supports for future assistance; and the acceptability to the individual of the informal supports' involvement in his or her care [.] *and;*

(iv) *for cases involving continuous consumer directed personal assistance, documentation that: all alternative arrangements for meeting the individual's medical needs have been explored or are infeasible including, but not limited to, the provision of consumer directed personal assistance in combination with other former services or in combination with contributions of informal caregivers; and*

(v) *for cases involving live-in 24-hour consumer directed personal assistance, an evaluation whether the individual's home has adequate sleeping accommodations for a consumer directed personal assistant.*

Subparagraph (i) of paragraph (3) of subdivision (d) of section 505.28 is repealed and a new subparagraph (i) is added to read as follows:

(i) *The nursing assessment must be completed by a registered professional nurse who is employed by the social services district or by a licensed or certified home care services agency or voluntary or proprietary agency under contract with the district.*

Clauses (g) and (h) of subparagraph (ii) of paragraph (3) of subdivision (d) of section 505.28 are relettered as clauses (h) and (i) and a new clause (g) is added to read as follows:

(g) *for continuous consumer directed personal assistance cases, documentation that: the functions the consumer requires; the degree of assistance required for each function, including that the consumer requires total assistance with toileting, walking, transferring or feeding; and the time of this assistance require the provision of continuous consumer directed personal assistance;*

Paragraph (5) of subdivision (d) of section 505.28 is amended to read as follows:

(5) Local professional director review. If there is a disagreement among the physician's order, nursing and social assessments, or a question regarding the level, amount or duration of services to be authorized, or if the case involves continuous [24-hour] consumer directed personal assistance, an independent medical review of the case must be completed by the local professional director, a physician designated by the local professional director or a physician under contract with the social services district. The local professional director or designee must review the physician's order and the nursing and social assessments and is responsible for the final determination regarding the level and amount of services to be authorized. *The local professional director or designee may consult with the consumer's treating physician and may conduct an additional assessment of the consumer in the home.* The final determination must be made with reasonable promptness, generally not to exceed [five] seven business days after receipt of the physician's order and the completed social and nursing assessments, except in unusual circumstances including, but not limited to, the need to resolve any outstanding questions regarding the level, amount or duration of services to be authorized.

Paragraph (1) of subdivision (e) of section 505.28 is amended to read as follows:

(1) When the social services district determines pursuant to the assessment process that the individual is eligible to participate in the consumer directed personal assistance program, the district must authorize consumer directed personal assistance according to the consumer's plan of care. The district must not authorize consumer directed personal assistance unless it reasonably expects that such assistance can maintain the individual's health and safety in the home or other setting in which consumer directed personal assistance may be provided. *Consumer directed personal assistance shall not be authorized if the consumer's need for assistance can be met by either or both of the following:*

(i) *voluntary assistance available from informal caregivers including, but not limited to, the consumer's family, friends or other responsible adult; or formal services provided by an entity or agency; or*

(ii) *adaptive or specialized equipment or supplies including, but not limited to, bedside commodes, urinals, walkers and wheelchairs, when such equipment or supplies can be provided safely and cost-effectively.*

**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 11, 2014.

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

#### **Regulatory Impact Statement**

Statutory Authority:

Social Services Law ("SSL") § 363-a(2) and Public Health Law § 201(1)(v) provide that the Department has general rulemaking authority to adopt regulations to implement the Medicaid program.

The Commissioner has specific rulemaking authority under SSL § 365-a(2)(e)(ii) to adopt standards, pursuant to emergency regulation, for the provision and management of personal care services for individuals whose need for such services exceeds a specified level to be determined by the Commissioner.

Under SSL § 365-a(2)(e)(iv), personal care services shall not exceed eight hours per week for individuals whose needs are limited to nutritional and environmental support functions.

Legislative Objectives:

The Legislature sought to reform the Medicaid personal care services program by controlling expenditure growth and promoting self-sufficiency.

The Legislature authorized the Commissioner of Health to adopt standards for the provision and management of personal care services for Medicaid recipients whose need for such services exceeds a specified

level. The regulations adopt such standards for Medicaid recipients who seek continuous personal care services or continuous consumer directed personal assistance for more than 16 hours per day.

The Legislature additionally sought to promote the goal of self-sufficiency among Medicaid recipients who do not need hands-on assistance with personal care functions such as bathing, toileting or transferring. It determined that recipients whose need for personal care services is limited to nutritional and environmental support functions, such as shopping, laundry and light housekeeping, could receive no more than eight hours per week of such assistance.

Needs and Benefits:

The regulations have two general purposes: to conform the Department's personal care services and consumer directed personal assistance program (CDPAP) regulations to State law limiting the amount of services that can be authorized for individuals who require assistance only with nutritional and environmental support functions; and, to implement State law authorizing the Department to adopt standards for the provision and management of personal care services for individuals whose need for such services exceeds a specified level that the Commissioner may determine.

The term "nutritional and environmental support functions" refers to housekeeping tasks including, but not limited to, laundry, shopping and meal preparation. Department regulations refer to these support functions as "Level I" personal care services. Department regulations have long provided that social services districts cannot initially authorize Level I services for more than eight hours per week; however, an exception permitted authorizations for Level I services to exceed eight hours per week under certain circumstances.

The Legislature has nullified this regulatory exception. The regulations conform the Department's personal care services regulations to the new State law. They repeal the regulatory exception that permitted social services districts to authorize up to 12 hours of Level I services per week, capping such authorizations at no more than eight hours per week.

The regulations similarly amend the Department's CDPAP regulations. Some CDPAP participants are authorized to receive only assistance with nutritional and environmental support functions. Since personal care services are included within the CDPAP, it is consistent with the Legislature's intent to extend the eight hour weekly cap on nutritional and environmental services to that program.

The regulations also implement the Department's specific statutory authority to adopt standards pursuant to emergency regulation for the provision and management of personal care services for individuals whose need for such services exceeds a specified level. The Commissioner has determined to adopt such standards for individuals whose need for continuous personal care services or continuous consumer directed personal assistance exceeds 16 hours per day.

The regulations repeal the definition of "continuous 24-hour personal care services," replacing it with a definition of "continuous personal care services." The prior definition applied to individuals who required total assistance with certain personal care functions for 24 hours at unscheduled times during the day and night. The new definition applies to individuals who require such assistance for more than 16 hours per day at times that cannot be predicted.

Cases in which continuous personal care services are indicated must be referred to the local professional director or designee. Such referrals would now be required in additional cases: those involving provision of continuous care for more than 16 hours per day.

The regulations permit the local professional director or designee to consult with the recipient's treating physician and conduct an additional assessment of the recipient in the home.

The regulations amend the documentation requirements for nursing assessments in continuous personal care services cases.

The regulations add a definition of live-in 24 hour personal care services. This level of service has long existed, primarily in New York City, but has never been explicitly set forth in the Department's regulations. The regulations also require that, for recipients who may be eligible for such services, the social assessment evaluate whether the recipient's home has adequate sleeping accommodations for the live-in aide.

The regulations provide that personal care services shall not be authorized when the recipient's need for assistance can be met by the voluntary assistance of informal caregivers or by formal services or by adaptive or specialized equipment or supplies that can be provided safely and cost-effectively. The regulations require that the nursing assessments that districts currently complete or obtain include an evaluation whether adaptive or specialized equipment or supplies can meet the recipient's need for assistance and whether such equipment or supplies can be provided safely and cost-effectively.

The regulations adopt conforming amendments to the Department's CDPAP regulations.

Costs to Regulated Parties:

Regulated parties include entities that voluntarily contract with social

services districts to provide personal care services to, or to perform certain CDPAP functions for, Medicaid recipients. These entities include licensed home care services agencies, agencies that are exempt from licensure, and CDPAP fiscal intermediaries.

Social services districts may no longer authorize certain Medicaid recipients to receive more than eight hours per week of assistance with nutritional and environmental support functions. To the extent that regulated parties were formerly reimbursed for more than eight hours per week for these services, their Medicaid revenue will decrease. This is a consequence of State law, not the regulations. The regulations do not impose any additional costs on these regulated parties.

**Costs to State Government:**

The regulations impose no additional costs on State government.

The statutory cap on nutritional and environmental support functions will result in cost-savings to the State share of Medicaid expenditures. The estimated annual personal care services and CDPAP cost-savings for subsequent State fiscal years are approximately \$3.4 million.

This estimate is based on 2010 recipient and expenditure data for the personal care services program. According to such data, 2,377 New York City recipients received more than eight hours per week of Level I services, the average being 11 weekly hours of such service. The number of Level I hours that exceeded eight hours per week was thus approximately 370,800 hours (2,377 recipients x 3 hours per week x 52 weeks). Multiplying this hourly total by the 2010 average hourly New York City personal care aide cost (\$17.30) results in total annual savings of \$6.4, or \$3.2 million in State share savings. Application of this calculation to the Rest of State recipient and expenditure data yields an additional \$200,000 in State share savings, or \$3.4 million.

State Medicaid cost-savings are also projected to occur as a result of changes to continuous personal care services authorizations. It is not possible to accurately estimate such savings. However, the Department anticipates that most recipients currently authorized for continuous 24-hour personal care services will continue to receive that level of care. Others may be authorized for continuous services for 16 hours per day or live-in 24 hour personal care services. Still others may be authorized for services for more than 16 hours per day but fewer than 24 hours per day.

The estimated State share savings for this portion of the regulations are \$33.1 million. This comprises approximately \$17.1 million in personal care savings and \$15.9 million in CDPAP savings. This estimate is based on 2010 personal care services and CDPAP recipient and expenditure data. In 2010, 1,809 Medicaid recipients were authorized to receive more than 16 hours of services per day. The assumption is that these recipients were authorized for continuous 24-hour services, which has an average annual per person cost of approximately \$166,000. Assuming that 20 percent were authorized for live-in 24-hour services at an average annual per person cost of approximately \$83,000, and 15 percent were authorized for 16 hours per day at an average hourly cost of between approximately \$17.00 and \$22.00, depending on service and location, the annual State share savings per recipient would range from approximately \$28,000 to \$35,000.

**Costs to Local Government:**

The regulation will not require social services districts to incur new costs. State law limits the amount that districts must pay for Medicaid services provided to district recipients. Districts may claim State reimbursement for any costs they may incur when administering the Medicaid program.

**Costs to the Department of Health:**

There will be no additional costs to the Department.

**Local Government Mandates:**

The regulations require social services districts to refer additional cases to their local professional directors or designees. Currently, the regulations require that such referrals be made for continuous 24 hour care and certain other cases. Under the proposed regulations, such referrals must also be made for recipients who may require continuous services for more than 16 hours.

**Paperwork:**

The regulations specify additional documentation requirements for the social and nursing assessments that districts currently complete or obtain for personal care services and CDPAP applicants and recipients. For persons who may be eligible for live-in 24 hour services, the social assessment must evaluate whether the recipient's home has adequate sleeping accommodations for the live-in aide. The nursing assessments for all personal care services and CDPAP cases, including those not involving continuous services, must include an evaluation whether adaptive or specialized equipment or supplies can meet the recipient's need for assistance and whether such equipment or supplies can be used safely and cost-effectively. The amendments to the CDPAP regulations also specify additional documentation requirements for the social and nursing assessments for cases involving continuous consumer directed personal assistance. These requirements mirror long-standing documentation requirements in the personal care services regulations.

**Duplication:**

The regulations do not duplicate any existing federal, state or local regulations.

**Alternatives:**

With respect to the regulation that caps authorizations for nutritional and environmental support functions to eight hours per week, no alternatives exist. The regulation must conform to State law that imposes this weekly cap. With respect to the regulation that establishes new requirements for continuous services, alternatives existed but were not now pursued. One such alternative may be the repeal of the regulatory authorization for continuous 24-hour services. The Department determined to promulgate further regulatory controls regarding the provision and management of continuous services, rather than repeal such services in their entirety.

**Federal Standards:**

This rule does not exceed any minimum federal standards.

**Compliance Schedule:**

The Department has issued instructions to social services districts advising them of the new State law that limits nutritional and environmental support functions to no more than eight hours per week for certain recipients. Districts should not now be authorizing more than eight hours per week of such assistance and should thus be able to comply with the regulations when they become effective. With regard to the remaining regulations, social services districts should be able to comply with the regulations when they become effective. For applicants, social services districts would apply the regulations when assessing applicants' eligibility for personal care services and the CDPAP. For current recipients, districts would apply the regulations upon reassessing these recipients' continued eligibility for services.

**Regulatory Flexibility Analysis**

**Effect of Rule:**

The regulation limiting authorizations of nutritional and environmental support functions to no more than eight hours per week primarily affects licensed home care services agencies and exempt agencies that provide only such Level I services. These entities are the primary employers of individuals providing Level I services. Most recipients of Level I personal care services are located in New York City. There are currently eight Level I only personal care service providers in New York City, none of which employ fewer than 100 persons.

Fiscal intermediaries that are enrolled as Medicaid providers and that facilitate payments for the nutritional and environmental support functions provided to consumer directed personal assistance program (CDPAP) participants may also experience slight reductions in service hours reimbursed. There are approximately 46 fiscal intermediaries that contract with social services districts. Fiscal intermediaries are typically non-profit entities such as independent living centers but may also include home care services agencies.

With respect to continuous care, a significant majority of existing 24-hour a day continuous care cases are located in New York City. There are currently 60 Level II personal care service providers in New York City, none of which employ fewer than 100 persons.

The regulations also affect social services districts. There are 62 counties in New York State, but only 58 social services districts. The City of New York comprises five counties but is one social services district.

**Compliance Requirements:**

Social services districts currently assess whether Medicaid recipients are eligible for personal care services and the CDPAP. When 24 hour continuous care is indicated, districts are currently required to refer such cases to the local professional director or designee for final determination. The regulations would require districts to refer additional continuous care cases to the local professional director or designee; namely, those cases in which continuous care for more than 16 hours a day is indicated would also be referred to the local professional director or designee. The local professional director or designee would be required to consult with the recipient's treating physician before approving continuous care for more than 16 hours per day.

In addition, the nursing assessments that districts currently complete or obtain for personal care services and CDPAP applicants and recipients would be required to include an evaluation of whether adaptive or specialized equipment or supplies would be appropriate and could be safely and cost-effectively provided. In cases involving the authorization of live-in 24 hour services, the social assessments that districts currently are required to complete would have to include an evaluation whether the recipient's home had sufficient sleeping accommodations for a live-in aide.

**Professional Services:**

No new or additional professional services are required in order to comply with the rule.

**Compliance Costs:**

No capital costs will be imposed as a result of this rule, nor are there any annual costs of compliance.

**Economic and Technological Feasibility:**

There are no additional economic costs or technology requirements associated with this rule.

**Minimizing Adverse Impact:**

The regulations should not have an adverse economic impact on social services districts. Districts currently assess Medicaid recipients to determine whether they are eligible for personal care services or the CDPAP. The regulations modify these assessment procedures. Should districts incur administrative costs to comply with the regulation, they may seek State reimbursement for such costs.

Small businesses providing Level I personal care services and consumer directed environmental and nutritional support functions may experience slight reductions in service hours provided. This is a consequence of State law limiting these services to no more than eight hours per week.

Small businesses currently providing continuous 24-hour services may experience some reductions in service hours provided.

**Small Business and Local Government Participation:**

The Department solicited comments on the regulations from the New York City Human Resources Administration, which administers the personal care services program and CDPAP for New York City Medicaid recipients who are not enrolled in managed care. Most of the State's personal care services and CDPAP recipients reside in New York City. Personal care services provided to New York City recipients comprises approximately 84 percent of Medicaid personal care services expenditures.

Small business and local governments also have the opportunity to provide input into the redesign of New York State's Medicaid program. The Medicaid Redesign Team (MRT) was tasked by Governor Cuomo to find ways to reduce costs and increase quality and efficiency in the Medicaid program for the 2011-12 Fiscal Year. As part of its work, the MRT sought and continues to seek ideas from the public at large, as well as experts in health care delivery and insurance, the health care workforce, economics, business, consumer rights and other relevant areas. The MRT conducted regional public hearings across the State to solicit ideas from the public on ways to reduce costs and improve the quality of the Medicaid program. Additionally, a web page was established, providing a vehicle for all individuals and organizations to provide ideas, comments and recommendations.

**Cure Period:**

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

**Rural Area Flexibility Analysis**

**Types and Estimated Numbers of Rural Areas:**

Rural areas are defined as counties with populations less than 200,000 and, for counties with populations greater than 200,000, include towns with population densities of 150 persons or less per square mile. In 2010, only 6% of all continuous care cases resided in the counties listed below. Currently there are 34 organizations which maintain contracts with local districts to provide consumer directed environmental and nutritional support functions, and 50 individual licensed home care services agencies which maintain contracts with local districts to provide Level I personal care services, within the following 43 counties having populations of less than 200,000:

Allegany	Hamilton	Schenectady
Cattaraugus	Herkimer	Schoharie
Cayuga	Jefferson	Schuyler
Chautauqua	Lewis	Seneca
Chemung	Livingston	Steuben
Chenango	Madison	Sullivan
Clinton	Montgomery	Tioga
Columbia	Ontario	Tompkins
Cortland	Orleans	Ulster
Delaware	Oswego	Warren
Essex	Otsego	Washington
Franklin	Putnam	Wayne
Fulton	Rensselaer	Wyoming
Genesee	St. Lawrence	Yates
Greene		

Reporting, Recordkeeping and Other Compliance Requirements and Professional Services:

Social services districts would be required to refer additional cases to their local professional directors or designees. Currently, the personal care services and CDPAP regulations require that such referrals be made for recipients seeking continuous 24-hour services and in certain other cases. Under the regulations, such referrals must also be made for recipients who require continuous care for more than 16 hours. The regulations also specify additional documentation requirements for the social and nursing assessments that districts currently complete or obtain for personal care services and CDPAP applicants and recipients.

**Costs:**

There are no new capital or additional operating costs associated with the rule.

**Minimizing Adverse Impact:**

It is anticipated the rule will have minimal impact on rural areas as the Department has determined that the preponderance of Level I services in excess of eight hours per week occur in downstate urban areas. Additionally, in 2010, only 6% of all individuals receiving continuous care services resided in those counties listed above. To the extent that social services districts incur administrative costs to comply with the regulations' requirements for referral of continuous care cases and social and nursing assessment documentation requirements, they may seek State reimbursement of such expenses.

**Rural Area Participation:**

Individuals and organizations from rural areas have the opportunity to provide input into the redesign of New York State's Medicaid program. The Medicaid Redesign Team (MRT) is tasked by Governor Cuomo to find ways to reduce costs and increase quality and efficiency in the Medicaid program for the 2011-12 Fiscal Year. As part of its work, the MRT sought and continues to seek ideas from the public at large, as well as experts in health care delivery and insurance, the health care workforce, economics, business, consumer rights and other relevant areas. The MRT conducted regional public hearings across the State to solicit ideas from the public on ways to reduce costs and improve the quality of the Medicaid program. Additionally, a web page was established, providing a vehicle for all individuals and organizations to provide ideas, comments and recommendations.

**Job Impact Statement**

No Job Impact Statement is required pursuant to section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature of the proposed amendment, that it will not have a substantial adverse impact on jobs and employment opportunities.

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## Department of Law

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### NOTICE OF ADOPTION

**Procedures for Requesting Extensions of Time to File Annual Reports with the Attorney General by Charitable Entities**

**I.D. No.** LAW-01-14-00003-A

**Filing No.** 227

**Filing Date:** 2014-03-15

**Effective Date:** 2014-04-02

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

**Action taken:** Repeal of section 91.5(f)(3); and addition of new section 91.5(f)(3) to Title 13 NYCRR.

**Statutory authority:** Executive Law, section 177(1); and Estates, Powers and Trusts Law, section 8-1.4(h)

**Subject:** Procedures for requesting extensions of time to file annual reports with the Attorney General by charitable entities.

**Purpose:** To clarify and simplify procedures for requesting extensions of time to file charitable organizations' annual financial reports.

**Text or summary was published** in the January 8, 2014 issue of the Register, I.D. No. LAW-01-14-00003-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Karin Kunstler Goldman, New York State Department of Law, 120 Boradway - 3rd Floor, New York, NY 10271, (212) 416-8392, email: karin.goldman@ag.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 2017, which is no later than the 3rd year after the year in which this rule is being adopted.

**Assessment of Public Comment**

The agency received no public comment.

**Niagara Falls Water Board**

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

**Adoption of Rates, Fees and Charges**

**I.D. No.** NFW-13-14-00006-EP

**Filing No.** 228

**Filing Date:** 2014-03-17

**Effective Date:** 2014-03-17

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

**Proposed Action:** Amendment of section 1950.20 of Title 21 NYCRR.

**Statutory authority:** Public Authority Law, section 1230-j

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

**Specific reasons underlying the finding of necessity:** The rule making is necessary for the preservation of the public health, safety and general welfare and compliance with the requirements of subdivision one section 202 would be contrary to the public interest. The Board regulations include a schedule of rates, fees and charges imposed upon all persons served by the System. The Board recently considered estimates for its expenses and revenues for fiscal year 2014 commencing on January 1, 2014 and ending on December 31, 2014. As part of this consideration, the Board recognized an increase in expenses of operations and a projection of revenues from its existing rate payers in the City of Niagara Falls and related service area. In addition, the Board considered its debt service and its covenants with its bondholders with respect to bonds that were issued as of the acquisition date. In order to maintain the Board on a sound financial status with sufficient resources to provide necessary water and wastewater services to all persons who sue the System, the Board adopted an increase in the schedule of rates, fees and charges.

**Subject:** Adoption of Rates, Fees and Charges.

**Purpose:** To pay for increased costs necessary to operate, maintain and manage the system and to achieve covenants with the bondholders.

**Text of emergency/proposed rule:** Section 1950.20. Schedule of rates, fees and charges.

(a) This schedule sets forth the rates, fees and other charges applicable to the provision of water supply, wastewater and related services by the Niagara Falls Water Board to all property owners, users and other persons as of January 1, 2014. All property owners, users and other persons who receive services from the water board shall pay to the water board the rates, fees and charges set forth in this schedule.

(b) The following rates shall be charged and collected for the use of water within the city, supplied by the water board as hereby fixed and established:

First 20,000 cu. ft. per quarter, [\$3.05] \$3.13 per 100 cu. ft.  
Next succeeding 60,000 cu. ft. per quarter, [\$2.64] \$2.71 per 100 cu. ft.  
Next succeeding 120,000 cu. ft. per quarter, [\$2.24] \$2.30 per 100 cu. ft.

Over 200,000 cu. ft. per quarter, [\$1.86] \$1.91 per 100 cu. ft.  
The minimum charge for water consumed in any premises within the city for any quarter or portion thereof shall not be less than [\$39.65] \$40.69.

(c) The following rates shall be charged and collected for the use of water outside the city for residential and commercial purposes supplied by the water board as hereby fixed and established:

First 20,000 cu. ft. per quarter, [\$8.16] \$8.37 per 100 cu. ft.  
Next 60,000 cu. ft. per quarter, [\$7.12] \$7.31 per 100 cu. ft.  
Next succeeding 120,000 cu. ft. per quarter, [\$5.94] \$6.09 per 100 cu. ft.

Over 200,000 cu. ft. per quarter, [\$4.99] \$5.12 per 100 cu. ft.  
The minimum charge for water consumed in any premises located outside the city for domestic purposes for any quarter or portion thereof shall not be less than [\$106.08] \$108.81.

(d) Water used for testing fire hoses, filling tanks, swimming pools,

testing sprinkler systems, and like use shall be billed at the highest residential unit rate enumerated in subdivision (b) of this section. The amount used may be either estimated in accordance with the size of the pipe through which taken at the pressure furnished, or determined by the use of a temporary meter rented to the user by the water board. The use of the latter method shall be at the discretion of the director and may require a refundable deposit.

(e) Use of hydrant for any purpose whatsoever shall be subject to a rental charge of \$1.50 per day or partial day.

(f) The cost of hydrant use will include a fee of \$35.00 for backflow device certification, payable at the time of hydrant use application. In addition, daily hydrant and meter rental rates and security deposit amounts shall be established by the director based upon the real cost to the water board.

(g) In addition to the above schedule rates for water consumed there shall be assessed a demand charge for each user's meter as set forth below.

Size and Type	Charge Per Quarter
Under 1" Disc	\$3.70
1" Disc	\$25.00
1½" Disc	\$30.00
2" Disc	\$40.00
2" Compound	\$40.00
3" Compound	\$50.00
4" Compound	\$100.00
6" Compound	\$220.00
8" Compound	\$250.00
10" Compound	\$275.00
12" Compound	\$400.00

(h) The rates set forth in this section, however, shall not apply to any user of water with whom there is now outstanding a valid and binding contract with the city and/or water board to supply water at a rate different than the rates stated in this schedule, or to users obtaining water service from the Village of LaSalle prior to May 4, 1927.

(i) In the event the water board or the director terminates water supply service to any property owner or user, such property owner, user or users located at such property shall pay a reactivation fee in the amount of \$75.00 to the water board prior to the supply of water.

(j) There shall be small meter testing charge of \$100.00 for the bench testing of any meter less than two inches in size.

(k) An account reactivation charge of \$100.00 shall be applied whenever a meter is re-installed and an account reactivated.

(l) The water board shall charge a \$25.00 final read fee for all owner requested meter reads.

(m) A hydrant flow test charge shall be applied whenever an owner, user or his agent requests a hydrant flow test.

(n) The annual availability charge for private fire protection service shall be:

Diameter of Service Connection	Annual Fee
2" or less	\$66.00
3"	\$95.00
4"	\$168.00
6"	\$380.00
8"	\$670.00
10"	\$1,050.00
12"	\$1,510.00

(o) A backflow submittal fee of \$25.00 shall be charged for all backflow plans submitted to the water board for approval and forwarding to the State Health Department.

(p) There shall be a \$120.00 inspection fee for each request for a cross-connection inspection.

(q) There shall be a \$60.00 availability charge applied on a quarterly basis to all accounts inactivated pursuant to section 1950.8(m) of this Part.

(r) In addition to the above rates, fees and charges, the following rates shall apply to all users with respect to sewer or wastewater services prescribed in the water board's wastewater regulations in Part 1960 of this Title. There shall be two user classes as provided in Part 1960 of this title, to wit: commercial/small industrial/residential users (CSIRU) and significant industrial users (SIU).

(l) CSIRU. Sewer rates for the CSIRU class are determined by total

metered water consumption in each quarter. The schedule of quarterly charges for the CSIRU class shall be as follows:

SCHEDULE I

Minimum charge per quarter: [\$49.72] \$53.95 with a usage allowance of up to 1,300 cubic feet

Additional usage in excess of 1,300: [\$4.04] \$4.15 per 100 cubic feet

The following rates shall be charged and collected for the use of sewer outside the city for residential and commercial purposes as determined by total metered water consumption per quarter. The schedule of quarterly charges for the users outside the city shall be as follows:

Minimum charge per quarter: [\$132.77] \$144.43 with a usage allowance of up to 1,300 cubic feet

Additional usage in excess of 1,300: [\$10.83] \$11.11 per 100 cubic feet (2) SIU.

(i) Conventional pollutant parameter charges. Sewer rates for the SIU class each quarter are based on measured quantities of the actual discharge parameters: flow, suspended solids and soluble organic carbon. Such determination shall be made by the water board and shall be based upon five representative 24-hour composite samples taken quarterly, at such locations as are adequate to provide proper representation. The schedule of charges for conventional pollutant parameters shall be as follows:

SCHEDULE II

Pollutant Parameters	Rate
Flow	[\$2,839.56] \$2,913.39 per million gallons
Suspended Solids	\$0.94 per pound
Soluble Organic Carbon	\$1.62 per pound

(ii) Substances of concern parameter charges. SIU's, who have wastewater discharge permits which limit any substance of concern listed in Schedule III contained in this subparagraph, will be billed for discharge of these substances based on the unit rates shown in Schedule III. Discharge loading for billing purposes shall be determined by arithmetic average of the last six acceptable self-monitoring results. At the option of the SIU, increased self-monitoring can be performed. For billing purposes, when six or more acceptable results are obtained over the three month billing period, all such results shall be used in the computation of the arithmetic average, with a requirement that there be at least two sample results for each month. Average discharge loadings will then be multiplied by the corresponding unit rates from Schedule III to obtain total charges per quarter for each substance of concern listed in the SIU's wastewater discharge permit. All substances of concern charges will be added to the charges for conventional parameters, as specified in subparagraph (i) of this paragraph, to computer the total quarterly sewer rate.

SCHEDULE III

SUBSTANCES OF CONCERN UNIT CHARGES

Parameters	Unit Rate
Benzene	\$321.82 per pound
Chloroform	\$57.30 per pound
Dichloroethylenes	\$350.15 per pound
Toluene	\$15.52 per pound
Trichloroethanes	\$72.77 per pound
Trichloroethylene	\$92.88 per pound
Vinyl Chloride	\$46.49 per pound
Monochlorotoluenes	\$3.14 per pound
Tetrachloroethylene	\$43.35 per pound
Total Phenols	\$7.08 per pound

(iii) Billing. SIU charges shall be billed on a monthly basis by the water board. The first and second monthly billings in each quarter shall be estimated and shall be one-third of the total billing in the immediately preceding quarter. The third monthly bill in each quarter shall be based upon actual discharge quantities for that quarter and shall reflect adjustments for the estimated billings in that quarter.

(s) Unless the context specifically indicates otherwise, all terms contained herein shall have the meanings set forth in the regulations adopted by the water board in this Part and Part 1960 of this Title, as applicable.

**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 14, 2014.

**Text of rule and any required statements and analyses may be obtained from:** John J. Ottaviano, Niagara Falls Water Board, 172 East Avenue, Lockport, New York 14094, (716) 438-0488, email: ottaviano@ruppbaase.com

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

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

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

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

Public Service Commission

NOTICE OF ADOPTION

Approving, with Modifications, Con Edison's Tariff Revisions

**I.D. No.** PSC-01-14-00016-A

**Filing Date:** 2014-03-13

**Effective Date:** 2014-03-13

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

**Action taken:** On 3/13/14, the PSC adopted an order approving, with modifications, Consolidated Edison Company of NY, Inc.'s (Con Edison) tariff revisions to its Demand Response Programs contained in PSC No. 10—Electricity.

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

**Subject:** Approving, with modifications, Con Edison's tariff revisions.

**Purpose:** To approve, with modifications, Con Edison's tariff revisions.

**Substance of final rule:** The Commission, on March 13, 2014, adopted an order approving, with modifications, Consolidated Edison Company of New York, Inc.'s tariff revisions to its Demand Response Programs contained in PSC No. 10—Electricity, subject to the terms and conditions set forth in the order.

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

**Text of rule may be obtained from:** Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: deborah.swatling@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (13-E-0573SA1)

PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED

Temporary Annual Assessment

**I.D. No.** PSC-13-14-00008-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 implementation of Chapter 59 Part BB of the Laws of 2013 extending the Temporary Annual Assessment, pursuant to Public Service Law Section 18-a(6).

**Statutory authority:** Public Service Law, sections 66(1), 80(1), (10), 89-c(1) and (10)

**Subject:** Temporary Annual Assessment.

**Purpose:** To extend annual temporary assessment.

**Substance of proposed rule:** The Commission is considering the adoption

of a rule implementing Chapter 59 Part BB of the Laws of 2013 extending a Temporary Annual Assessment, pursuant to Public Service Law § 18-a(6). That section imposes upon public utility companies an Assessment equal to two per centum of the utility's gross intrastate operating revenues, less the amount assessed to pay the costs and expenses of the Commission and the Department of Public Service, as a credit to the state general fund. The revenues subject to the Assessment include revenues derived from sales of electricity and natural gas commodities by third parties. The issues under consideration include how the Commission should extend the authority of utilities to surcharge customers for the Assessment and the how a phase down of the assessment from two per centum to one and one half per centum will be implemented.

**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) 474-6530, email: [secretary@dps.ny.gov](mailto:secretary@dps.ny.gov); Deborah.Swatling@dps.ny.gov

**Data, views or arguments may be submitted to:** Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: [secretary@dps.ny.gov](mailto:secretary@dps.ny.gov)

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

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

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

(09-M-0311SP6)

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## Urban Development Corporation

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

#### New York State Innovation Venture Capital Fund

I.D. No. UDC-13-14-00001-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 4254 to Title 21 NYCRR.

**Statutory authority:** L. 1968, ch. 174, section 9-c; and L. 2013, ch. 59, section 7, Part JJ

**Subject:** New York State Innovation Venture Capital Fund.

**Purpose:** Provide the basis for administration of the New York State Innovation Venture Capital Fund.

**Text of proposed rule: Part 4254**

#### INNOVATION VENTURE CAPITAL FUND

##### 4254.1. Purposes.

*In order to address the legislatively identified needs of the State of New York to attract private sector investment in new research, translate research into marketable products, strengthen university/industry connections, and prepare New York businesses to compete for private-sector venture investment, Part JJ of Chapter 59 of the Laws of 2013 authorized the New York State Urban Development Corporation to establish and administer the New York State Innovation Venture Capital Fund in order to provide critical seed and early-stage funding to incentivize new business formation and growth in the State of New York and facilitate the transition from ideas and research to marketable products.*

##### 4254.2. Definitions.

*The following terms shall have the meanings given below:*

*"Authorizing Legislation" shall mean Part JJ of Chapter 59 of the Laws of 2013, as it may be amended.*

*"Beneficiary Company" shall mean a Seed-Stage Business, Early-Stage Business or Venture-Stage Business that (a) is, or agrees in writing to be, located in State and (b) has the potential to generate additional economic activity in the State (a Beneficiary Company is also referred to as a "Portfolio Company" after it receives a Fund investment).*

*"Corporation" shall mean the New York State Urban Development Corporation d/b/a Empire State Development, a corporate governmental*

*agency of the State, constituting a political subdivision and public benefit corporation created by Chapter 174 of the Laws of 1968, as amended.*

*"Early-Stage Business" shall mean a business, located in or relocating to the State and working in one or more Emerging Technology Fields, that demonstrates a potential for substantial growth and job development, has the potential to generate additional economic activity in the State, and that is post-revenue, is post-prototype, or is poised to expand or that is a Venture-Stage Businesses.*

*"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 technological advances, innovation, transformation or development.*

*"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.*

*"Follow-on Investment" shall mean a subsequent investment made by an investor after an initial round of investment in a Portfolio Company.*

*"Fund" shall mean the New York State Innovation Venture Capital Fund.*

*"Hybrid Investment" shall mean an investment that combines Equity and debt or other features, such as preferred stocks, convertible bonds, convertible notes, or interests in particular assets of a Beneficiary Company.*

*"Investment Entity" shall mean a regional and local economic development organization, technology development organization, research university, or investment fund (including limited partnerships and limited liability companies) that provides or is otherwise qualified to make investments in Seed-Stage Businesses, Early-Stage Businesses or Venture-Stage Businesses.*

*"Portfolio Company" shall mean a Beneficiary Company after it receives the Fund investment.*

*"Seed-Stage Business" shall mean a business, located in or relocating to the State and working in one or more Emerging Technology Fields, that demonstrates a potential for substantial growth and job development, has the potential to generate additional economic activity in the State, and that is developing a prototype, is pre-revenue, has only begun to earn revenue, or has not yet received institutional investments.*

*"State" shall mean the State of New York.*

*"Venture-Stage Business" shall mean a business, located in or relocating to the State, that engages in commercial manufacturing and sales or whose products or services are in production and commercially available, demonstrates significant revenue growth, may or may not be showing a profit, has received institutional investment and has been in business for a substantial time, generally more than three years.*

##### 4254.3. General Requirements

*The Corporation shall use the Fund monies, in accordance with the Authorizing Legislation and other applicable law and regulations, for direct or indirect investments, including Equity investments and Hybrid Investments, in Beneficiary Companies and for all costs and expenses arising from and related to such investments.*

*The documentation for each Fund investment will provide reasonable terms and conditions for recompense to be provided to the Corporation by the Beneficiary Company if it leaves the State within a period of time to be established by the Corporation for such investment, such recompense may include the full or partial repayment of the investment received by the Beneficiary Company or other consideration satisfactory to the Corporation.*

*Any moneys received by or returned to the Corporation with respect to the Fund investments may be used by the Corporation pay for future Fund investments, including new investments and Follow-on Investments, and the costs and expenses arising from and related to any and all Fund investments. In the event of termination of participation in the Fund by any Investment Entity, the Corporation may, on a reasonable basis and with authorization of by the Directors of the Corporation, use all or part of the commitment made to such terminated Investment Entity to make direct or indirect Fund investments or to redeploy to one or more of the other participating Investment Entities all or part of such commitment.*

*The Corporation shall adopt guidelines regarding conflicts of interest with respect to the investment of Fund monies in Beneficiary Companies, including such investments made directly by the Corporation, made with the advice or recommendation of an Investment Entity, or made through an Investment Entity.*

##### 4254.4. Evaluation of Potential Investments

*In evaluating potential Fund investments, the Corporation may consider, among other items and without order of priority: promotion of job development; leveraging and advancing the State's industrial and technical strengths, including, but not limited to, advances in manufacturing, materials, life science, medical devices and Emerging Technologies; commercialization of technology, products, and services; development of*

the State's entrepreneurial ecosystem; coordination with other State innovation programs, including, but not limited to, the New York State Business Incubators and Innovation Hot Spot Program, Academic Tech Transfer offices, the Centers for Advanced Technology and the Centers of Excellence; the potential for a positive return on the investment; the quality of the management team, business plan, financial history, financial projections; a Beneficiary Company's technology, products, and services and the company's prior and potential performance as a technology innovator and as a business; and an Investment Entity's prior performance, expertise, area of investment, and similar information.

#### 4254.5. Investment Process

The Corporation will invest Fund monies in Beneficiary Companies either directly or, through Investment Entities, indirectly. Generally, investments in Seed-Stage Businesses will range from \$25,000 to \$750,000 and investments in Early-Stage Businesses will range from \$750,000 to \$5,000,000. The Corporation may also directly or, through an Investment Entity, indirectly make additional Follow-on Investments. Fund investments may include investments in Seed-Stage Businesses and Early-Stage Businesses made directly, through Investment Entities, along with co-investors, or utilizing one or more large investment fund partners to source similar investments, or larger investments in Venture-Stage Businesses, that agree in writing to relocate to New York State.

In order to identify potential Beneficiary Companies, the Corporation may identify technologies and companies from the State's innovation network and support efforts of other governmental entities and programs in order to attract Beneficiary Companies from outside the State. The process for evaluating prospective Beneficiary Companies for funding will include identifying candidate Beneficiary Companies, conducting due diligence and evaluating the potential financial return, economic value, and considering the significance of the technology. The Corporation may consider advisory recommendations from an advisory committee established in accordance with guidelines approved by the Corporation's Directors. Unless the Corporation's Directors create and empower a special committee to authorize Fund investments, all Fund investments must be authorized by the Corporation's Directors.

The Corporation may invest Fund monies in the Investment Entities that will in turn invest in Beneficiary Companies. For such investments, the Corporation shall perform due diligence with respect to the Investment Entity; provided, however, with respect to investments in Beneficiary Companies made by an Investment Entity, deal sourcing, investment due diligence, and portfolio management and reporting (other than the reports required to be made by the Corporation pursuant to the Authorizing Legislation and other applicable law and regulations) may be performed by Investment Entity.

#### 4254.6. Fees and Costs

The Corporation may negotiate reasonable management fees, promotes (e.g., distributions when certain financial return benchmarks are achieved such as internal rate of return, return on investment, return on earnings, etc.), share of return and other fees and charges with respect to applicants, Beneficiary Companies, Investment Entities and investment professionals and firms. The costs and expenses of the Corporation for its implementation and administration of the Fund shall be paid from Fund monies or such other monies that shall be available to the Corporation.

The Corporation may also impose fees, including without limitation, application fees, processing fees, fees in connection with processing and evaluation of submissions in response to requests for proposals or other types of solicitations, fees for due diligence with respect to investments and prospective investments, administrative fees, legal, accounting, and other out-of-pocket fees and expenses of the Corporation, costs and expenses for compliance with applicable laws and regulations, including environmental review and State and federal securities laws.

#### 4254.7. Reporting

The Corporation shall annually on December 31 submit to the Director of the Division of Budget, the Temporary President of the Senate, the Speaker of the Assembly, and, the Minority Leaders of the Senate and the Assembly a report regarding the Fund detailing: (i) the total amount of funds committed to each applicant (i.e., each Beneficiary Company and Investment Entity) that receives funds and, if applicable, the amount of such funds that has been invested by each such applicant; (ii) the amount of New York State Innovation Venture Capital Fund funds invested and the recipients of such funds; (iii) the location of each Beneficiary Company; (iv) the number of jobs projected to be created or retained; and (v) such other information as the Corporation deems necessary.

#### 4254.8. 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 each Beneficiary Company and Investment Entity shall be confidential and exempt from public disclosures.

Except to the extent permitted by law, including, but not limited to Public Officer's Law Sections 73 and 74, no full-time employee of the State or

any agency, department, division, authority or public benefit corporation thereof shall be eligible to receive assistance under this program.

#### 4254.9. Contractor and Supplier Diversity and Non-Discrimination

Pursuant to New York State Executive Law Article 15-A, the Corporation recognizes its obligation under the law to promote opportunities for maximum feasible participation of certified minority- and women-owned business enterprises ("MWBES") in the performance of the Corporation's contracts. The Corporation's Office of Contractor and Supplier Diversity has determined that it is not practical or feasible to assign MWBE contract goals to expenditures made under this 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, as amended (the "Act") authorizes the New York State Urban Development Corporation d/b/a Empire State Development (the "Corporation") to promulgate rules and regulations in accordance with the State Administrative Procedure Act. Section 7 of Part JJ of Chapter 59 of the Laws of 2013 specifically authorizes the Corporation to promulgate rules and regulations for the New York State Innovation Venture Capital Fund (the "Fund").

2. Legislative Objectives: Part JJ of Chapter 59 of the Laws of 2013 (the "authorizing legislation") finds that there is a need to attract private sector investment in new research and in the translation of the products of that research into marketable products. The Fund was therefore established to strengthen the university/industry connection and prepare New York businesses to compete for private-sector investment. To meet these objectives, the authorizing legislation gives the Corporation, within available appropriations and from other available funding, the power to provide critical seed, early, and venture stage businesses investment funding in order to encourage new business formation and growth and to facilitate the transition from ideas and research to marketable products in New York State. The rule will further these legislative objectives by setting forth the legislatively required definitions, eligibility criteria, evaluation criteria, the investment process, and related matters for the Fund.

3. Needs and Benefits: The rule is necessary in order for the Corporation to implement the Fund in accordance with the authorizing legislation. The rule establishes procedures by which the Corporation may provide investment funding and other assistance to (i) businesses in the seed, early, and venture stages of development and (ii) regional and local economic development organizations, technology development organizations, research universities, and investment funds that make investments in such businesses. The rule further facilitates the administration of the Fund and benefits potential participants by defining eligible and ineligible small businesses and investment entities and by providing evaluation criteria for potential investments and general Fund requirements.

4. Costs: (i) The costs for the implementation of, and continuing compliance with, the rule to regulated persons: Generally, the costs to Fund applicants and participants that are regulated to by the rule should be similar to costs of private sector private equity investment transactions similar to those to be made by the Fund. The Corporation may also require payment of certain costs, including without limitation, application fees, processing fees, fees in connection with processing and evaluation of submissions in response to requests for proposals or other types of solicitations, fees for due diligence with respect to investments and prospective investments, administrative fees, legal, accounting, and other out-of-pocket fees and expenses of the Corporation, costs and expenses for compliance with applicable laws and regulations, including environmental review and State and federal securities laws. The amount of such costs may depend upon the size and/or complexity of the investment or the requirements of applicable law and regulations. (ii) The costs for the implementation of, and continued administration of, the rule to the agency and to the State and its local governments: There should be no costs to local governments or to the State of New York other than costs to the Corporation. The costs to the Corporation may include management fees, promotes (e.g., distributions when certain financial return benchmarks are achieved such as internal rate of return, return on investment, return on earnings, etc.), share of return and other fees and charges with respect to applicants, Beneficiary Companies, Investment Entities and investment professionals and firms. The Corporation may also engage the services of investment, legal, accounting, and other professionals or firms, through direct hire or by contract after a competitive solicitation or otherwise as permitted by law, with demonstrated knowledge and expertise to provide investment advi-

sory services as may be necessary or advisable to implement the Fund and the Fund's investments. (iii) The information, including the source or sources of such information, and methodology upon which the cost analysis is based: The foregoing descriptions and analysis are based on the Corporation's experience with similar programs of the Corporation for equity investment in emerging technology companies, such as the Small Business Technology Investment Fund and the Innovate NY Fund, the Corporation's discussions with both not-for-profit and for-profit entities that make equity investments in emerging technology companies, and the Corporation's participation in conferences and discussions, sponsored by not-for-profit organizations, the federal government, and research universities, regarding equity investment in emerging technology companies.

5. Paperwork / Reporting: Reporting or paperwork requirements for Fund participants as a result of this rule shall be those typically required by investors from companies receiving private sector direct equity investment or from intermediaries that make such equity investments on behalf of private sector investors (e.g., subscription agreements, shareholder agreements, voting rights agreements, convertible debt instruments, limited partnership and limited liability company agreements, financial reports, etc.) and those related to audit by the Corporation with respect to the use of Fund investment proceeds, the presence in the State by companies that receive Fund investment, and the number of jobs projected to be, or actually created or retained in the State.

6. Local Government Mandates: This rule imposes no mandates, programs, services, duties, or responsibilities on any local government, including any city, county, town, village, school district or other special district.

7. Duplication: This rule does not duplicate any existing State or federal requirements.

8. Alternatives: No alternatives were considered in regard to creating a new rule in response to the statutory requirement. The rule implements the statutory requirements of the Fund regarding the definitions, eligibility criteria, evaluation criteria, the investment process, and related matters for the Fund. This action is necessary in order to clarify Fund participation requirements and is required by the legislation establishing the Fund.

9. Federal Standards: Because the Fund is an economic development tool created by State legislation, there are no minimum federal standards applicable to the administration of the Fund. This rule is not inconsistent with any federal standards or requirements.

10. Compliance Schedule: It is anticipated that the Corporation, beneficiary companies, and investment entities will be able to achieve compliance with this rule as soon as it is adopted.

#### **Regulatory Flexibility Analysis**

Participation in the Fund is entirely at the discretion of qualifying Beneficiary Companies and Investment Entities. Neither the statute nor the proposed regulations impose any obligation on any business entity to participate in the Fund. Rather than impose burdens on small business, the Fund is designed to provide equity investment and other assistance to Beneficiary Companies throughout the State. Local governments will still be able to collect tax revenues from Beneficiary Companies and Investment Entities that participate in the Fund. Because it is evident from the nature of the proposed rule that it will have a positive impact on small businesses and local government, no further affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small business and local government is not required and one has not been prepared.

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

Participation in the Fund is open to all Beneficiary Companies and Investment Entities that meet the eligibility requirements. A decision by a Beneficiary Company or Investment Entity to locate its facilities in a rural area would be no impediment to participation; in fact, this rule maximizes geographic participation by not limiting applicants to those located only in urban areas or only in rural areas. Thus, the regulation will not have a substantial adverse economic impact on rural areas, and instead has the potential to generate significant economic activity in upstate rural areas in which Beneficiary Companies and Investment Entities are located. Accordingly, a rural flexibility analysis is not required and one has not been prepared.

#### **Job Impact Statement**

The regulation sets forth the legislatively required definitions, eligibility criteria, evaluation criteria, the investment process, and related matters for the Fund. The Fund was established to provide critical seed, early, and venture stage businesses investment funding in order to encourage new business formation and growth and to facilitate the transition from ideas and research to marketable products in New York State. The regulation will not have a substantial adverse impact on jobs and employment op-

portunities; rather, the program is focused on creating jobs. Because it is evident from the nature of the rulemaking that it will have either no impact or a positive impact on job and employment opportunities, no further 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.

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## Workers' Compensation Board

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### NOTICE OF ADOPTION

#### **Conform Regulations to 12 NYCRR Section 300.22**

**I.D. No.** WCB-04-14-00002-A

**Filing No.** 231

**Filing Date:** 2014-03-18

**Effective Date:** 2014-04-02

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

**Action taken:** Amendment of sections 300.22, 300.26, 300.29, 300.33, 300.37, 312.2, 312.5, 327.3 and 403.1 of Title 12 NYCRR.

**Statutory authority:** Workers' Compensation Law, sections 117 and 141

**Subject:** Conform regulations to 12 NYCRR section 300.22.

**Purpose:** Provide for electronic filing of certain reports and notices.

**Text or summary was published** in the January 29, 2014 issue of the Register, I.D. No. WCB-04-14-00002-P.

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

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

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

The agency received no public comment.