RULE MAKING ACTIVITIES

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

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

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

Department of Agriculture and Markets

NOTICE OF ADOPTION

Incorporation by Reference in 1 NYCRR of the 2013 Edition of National Institute of Standards and Technology (NIST) Handbook 44

I.D. No. AAM-39-13-00005-A
Filing No. 66
Filing Date: 2014-01-17
Effective Date: 2014-02-05

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

Action taken: Amendment of section 220.2(a) of Title 1 NYCRR.

Statutory authority: Agriculture and Markets Law, sections 16, 18 and 179

Subject: Incorporation by reference in 1 NYCRR of the 2013 edition of National Institute of Standards and Technology (NIST) Handbook 44.

Purpose: To incorporate by reference in 1 NYCRR the 2013 edition of NIST Handbook 44.

Text or summary was published in the September 25, 2013 issue of the Register, I.D. No. AAM-39-13-00005-P.

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

Text of rule and any required statements and analyses may be obtained from: Mike Sikula, NYS Department of Agriculture and Markets, 10B Airline Drive, Albany, NY 12235, (518) 457-3452, email: Mike.Sikula@agriculture.ny.gov

Assessment of Public Comment
The agency received no public comment.

Division of Criminal Justice Services

NOTICE OF ADOPTION

Security Guard Instructor Standards and Qualifications

I.D. No. CJS-44-13-00001-A
Filing No. 77
Filing Date: 2014-01-21
Effective Date: 2014-02-05

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

Action taken: Repeal of Part 6029 and addition of new Part 6029 to Title 9 NYCRR.

Statutory authority: Executive Law, sections 837(13), 841-b(1) and 841-c(3)

Subject: Security guard instructor standards and qualifications.

Purpose: Increase the standards and qualifications for certification as a security guard training instructor.

Text or summary was published in the October 30, 2013 issue of the Register, I.D. No. CJS-44-13-00001-P.

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

Text of rule and any required statements and analyses may be obtained from: Natasha M. Harvin, NYS Division of Criminal Justice Services, Alfred E. Smith Office Building, South Swan Street, Albany, NY 12210, (518) 485-0857, email: Natasha.Harvin@dcjs.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.

NOTICE OF ADOPTION

Approved Security Guard Training Schools

I.D. No. CJS-44-13-00002-A
Filing No. 76
Filing Date: 2014-01-21
Effective Date: 2014-02-05

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

Action taken: Repeal of Part 6028 and addition of new Part 6028 to Title 9 NYCRR.

Statutory authority: Executive Law, sections 837(13), 841-b(1) and 841-c(2)

Subject: Approved security guard training schools.

Purpose: Increase the minimum qualifications for approval and establish additional clear and specific requirements for such approval.

Text or summary was published in the October 30, 2013 issue of the Register, I.D. No. CJS-44-13-00002-P.

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

Text of rule and any required statements and analyses may be obtained from: Natasha M. Harvin, NYS Division of Criminal Justice Services, Alfred E. Smith Office Building, South Swan Street, Albany, NY 12210, (518) 485-0857, email: Natasha.Harvin@dcjs.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 Security Guard Act of 1992 requires the registration and training of security guards in New York State. The Division of Criminal Justice Services (Division) provides administrative oversight for mandated security guard training. It was determined that the integrity of the Security Guard Program demands that those involved in the training of security guards be held to high ethical standards and that students be trained in accordance with applicable laws, rules and regulations, Division requirements, and policies and procedures.

The revisions, which were endorsed by the Security Guard Advisory Council, will increase the minimum qualifications for approval as a security guard training school, and establish additional clear and specific requirements for such approval.

One comment was received after the comment period, but the Division accepted it. Firearms Tactics and Training, Inc. raised the following concern:

this proposal requests student primary and secondary identification. Shouldn't it read: primary OR secondary identification? I couldn't imagine a Valid Driver's License not being good enough Identification [sic].

Section 6028.6(e) provides, "[t]he school owner, director, and, if applicable, co-director, shall retain lesson plans, class rosters, examination papers, student primary and secondary identification and all other appropriate records ****." (emphasis supplied). The "and" signifies that both types of identification must be retained. However, both types do not need to be presented. As noted in section 6028.6(f), "[p]rimary identification includes one of the following: (1) valid driver's license; (2) valid United States passport; (3) current government ID; or (4) current Military ID. Secondary identification includes a social security card plus one of the following: (1) employer ID; (2) student photo ID; or (3) other similar photo ID."

Accordingly, and based upon the assessment of the foregoing comment, no changes were made.

Department of Economic Development

EMERGENCY RULE MAKING

START-UP NY Program

I.D. No. EDV-05-14-00006-E

Filing No. 75

Filing Date: 2014-01-21

Effective Date: 2014-01-21

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

Action taken: Addition of Part 220 to Title 5 NYCRR.

Statutory authority: Economic Development Law, art. 21, sections 435-36, L. 2013, ch. 68

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

Specific reasons underlying the finding of necessity: On June 24, 2013, Governor Andrew Cuomo signed into law the SUNY Tax-free Areas to Revitalize and Transform UPstate New York (START-UP NY) program, which offers an array of tax benefits to eligible businesses and their employees that locate in facilities affiliated with New York universities and colleges. The START-UP NY program will leverage these tax benefits to attract innovative start-ups and high tech industries to New York so as to create jobs and promote economic development.

Regulatory action is required to implement the START-UP NY program. The legislation creating the START-UP NY program delegated to the Department of Economic Development the establishment of procedures for the implementation and execution of the START-UP NY program. Without regulatory action by the Department of Economic Development, procedures will not be in place to accept applications from institutions of higher learning desiring to create Tax-Free Areas, or businesses wishing to participate in the START-UP NY program.

Adoption of this rule will enable the State to begin accepting applications from businesses to participate in the START-UP NY program, and represent a step towards the realization of the strategic objectives of the START-UP NY program: attracting and retaining cutting-edge start-up companies, and positioning New York as a global leader in high tech industries.

Subject: START-UP NY Program.

Purpose: Establish procedures for the implementation and execution of START-UP NY.

Substance of emergency rule: START-UP NY is a new program designed to stimulate economic development and promote employment of New Yorkers through the creation of tax-free areas that bring together educational institutions, innovative companies, and entrepreneurial investment.

1) The regulation defines key terms, including: "business in the formative stage," "campus," "competitor," "high tech business," "net new job," "new business," and "underutilized property."

2) The regulation establishes that the Commissioner shall review and approve plans from State University of New York (SUNY) colleges, City University of New York (CUNY) colleges, and community colleges seeking designation of Tax-Free NY Areas and track and report on important aspects of the START-UP NY program, such as eligible space for use as Tax-Free Areas and the number of employees eligible for personal income tax benefits.

3) The regulation creates the START-UP NY Approval Board, composed of three members appointed by the Governor, Speaker of the Assembly and Temporary President of the Senate, respectively. The START-UP NY Approval Board reviews and approves plans submitted by private universities and colleges for the creation of Tax-Free Areas, reviews and approves certain plans from SUNY colleges, CUNY colleges, and community colleges seeking designation of Tax-Free NY Areas, and designates Strategic State Assets affiliated with eligible New York colleges or universities for use in the START-UP NY program. START-UP NY Approval Board members may designate representatives to act on their behalf during their absence. START-UP NY Approval Board members must remain disinterested, and recuse themselves where appropriate.

4) The regulation establishes eligibility criteria for Tax-Free Areas. Eligibility of vacant land and space varies based on whether it is affiliated with a SUNY college, CUNY college, community college, or private college, and whether the land or space in question is located upstate, downstate, or in New York City. The regulation prohibits any allocation of land or space that would result in the closure or relocation of any program or service associated with a university or college that serves students, faculty, or staff.

5) The regulation establishes eligibility requirements for businesses to participate in the START-UP program, and enumerates excluded industries. To be eligible, a business must: be a new business to the State at the time of its application, subject to exceptions for NYS incubators, businesses restoring previously relocated jobs, and businesses the Commissioner has determined will create net new jobs; comply with applicable worker protection, environmental, and tax laws; align with the academic mission of the sponsoring institution (the Sponsor); demonstrate that it will create net new jobs in its first year of operation; and not be engaged in the same line of business that it conducted at any time within the last five years in New York without the approval of the Commissioner. Businesses locating in downstate New York must be in the formative stages of development, or engaged in a high tech business. To remain eligible, the business must, at a minimum, maintain net new jobs and the average number of jobs that existed with the business immediately before entering the program.

6) The regulation describes the application process for approval of a Tax-Free Area. An eligible institution may submit a plan to the Commissioner identifying land or space to be designated as a Tax-Free Area. This plan must: identify precisely the location of the applicable land or space; describe business activities to be conducted on the land or space; establish that the business activities in question align with the mission of the institution; indicate how the business would generate positive community and economic benefits; summarize the Sponsor's procedures for attracting businesses; include a copy of the institution's conflict of interest guidelines; attest that the proposed Tax-Free Area will not jeopardize or conflict with any existing tax-exempt bonds used to finance the Sponsor; and certify that the Sponsor has not relocated or eliminated programs serving students, faculty, or staff to create the vacant land. Applications by private institutions require approval by both the Commissioner and START-UP

NY Approval Board. The START-UP NY Approval Board is to approve applications so as to ensure balance among rural, urban and suburban areas throughout the state.

7) A sponsor applying to create a Tax-Free Area must provide a copy of its plan to the chief executive officer of any municipality in which the proposed Tax-Free Area is located, local economic development entities, the applicable university or college faculty senate, union representatives and the campus student government. Where the plan includes land or space outside of the campus boundaries of the university or college, the institution must consult with the chief executive officer of any municipality in which the proposed Tax-Free area is to be located, and give preference to underutilized properties identified through this consultation. The Commissioner may enter onto any land or space identified in a plan, or audit any information supporting a plan application, as part of his or her duties in administering the START-UP program.

8) The regulation provides that amendments to approved plans may be made at any time through the same procedures as such plans were originally approved. Amendments that would violate the terms of a lease between a sponsor and a business in a Tax-Free Area will not be approved. Sponsors may amend their plans to reallocate vacant land or space in the case that a business, located in a Tax-Free Area, is disqualified from the program but elects to remain on the property.

9) The regulation describes application and eligibility requirements for businesses to participate in the START-UP program. Businesses are to submit applications to sponsoring universities and colleges by 12/31/20. An applicant must: (1) authorize the Department of Labor (DOL) and Department of Taxation and Finance (DTF) to share the applicant's tax information with the Department of Economic Development (DED); (2) allow DED to monitor the applicant's compliance with the START-UP program; (3) provide to DED, upon request, information related to its business organization, tax returns, investment plans, development strategy, and non-competition with any businesses in the community but outside of the Tax-Free Area; (4) certify efforts to ascertain that the business would not compete with another business in the same community but outside the Tax-Free Area, including an affidavit that notice regarding the application was published in a daily publication no fewer than five consecutive days; (5) include a statement of performance benchmarks as to new jobs to be created through the applicant's participation in START-UP; (6) provide a statement of consequences for non-conformance with the performance benchmarks, including proportional recovery of tax benefits when the business fails to meet job creation benchmarks in up to three years of a ten-year plan, and removal from the program for failure to meet job creation benchmarks in at least four years of a ten-year plan; (7) identify information submitted to DED that the business deems confidential, proprietary, or a trade secret. Sponsors forward applications deemed to meet eligibility requirements to the Commissioner for further review. The Commissioner shall reject any application that does not satisfy the START-UP program eligibility requirements or purpose, and provide written notice of the rejection to the Sponsor. The Commissioner may approve the application anytime after receipt; if the Commissioner approves the application, the business applicant is deemed accepted into the START-UP NY Program and can locate to the Sponsor's Tax-Free NY Area, Applications not rejected will be deemed accepted after sixty days. The Commissioner is to provide documentation of acceptance to successful applicants.

10) The regulation allows a business to amend a successful application at any time in accordance with the procedure of its original application. No amendment will be approved that would contain terms in conflict with a lease between a business and a SUNY college when the lease was included in the original application.

11) The regulation permits a business that has been rejected from the START-UP program to locate within a Tax-Free Area without being eligible for START-UP program benefits, or to submit in writing within sixty days a request for reapplication which identifies the reasons for rejection and offers verified factual information or arguments addressing the reasoning of the rejection. Failure to reapply within sixty days waives the applicant's right to resubmit. Upon receipt of a timely resubmission, the Commissioner may use any resources to assess the claim, and must notify the applicant of his or her determination within sixty days. Disapproval of a reapplication is final and non-appealable.

12) With respect to audits, the regulation requires businesses to provide access to DED, DTF, and DOL to all records relating to facilities located in Tax-Free Areas at a business location within New York State during normal business hours. DED, DTF, and DOL are to take reasonable steps to prevent public disclosure of information pursuant to Section 87 of the Public Officers Law where the business has timely informed the appropriate officials, the records in question have been properly identified, and the request is reasonable.

13) The regulation provides for the removal of a business from the program under a variety of circumstances, including violation of New York law, material misrepresentation of facts in its application to the START-UP program, or relocation from a Tax-Free Area. Upon removing a business from the START-UP program, the Commissioner is to notify the business and its Sponsor of the removal decision in writing. This removal notice provides the basis for the removal decision, the effective removal date, and the means by which the affected business may appeal the removal decision. A business shall be deemed served three days after notice is sent. Following a final decision, or waiver of the right to appeal by the business, DED is to forward a copy of the removal notice to DTF, and the business is not to receive further tax benefits under the START-UP program.

14) To appeal removal from the START-UP program, a business must send written notice of appeal to the Commissioner no later than thirty days from the mailing of the removal notice. The notice of appeal must contain specific factual information and all legal arguments that form the basis of the appeal. The appeal is to be adjudicated in the first instance by an appeal officer who, in reaching his or her decision, may seek information from outside sources, or require the parties to provide more information. The appeal officer is to prepare a report and make recommendations to the Commissioner. After receiving the appeal officer's report, the Commissioner is to render a final decision, and to provide reasons for any findings of fact or law that conflict with those of the appeal officer.

15) With regard to disclosure authorization, businesses applying to participate in the START-UP program authorize the Commissioner to disclose any information contained in their application, including the projected new jobs to be created.

16) In order to assess business performance under the START-UP program, the Commissioner may require participating businesses to submit annual reports within thirty days at the end of their taxable year describing the businesses' continued satisfaction of eligibility requirements, jobs data, an accounting of wages paid to employees in net new jobs, and any other information the Commissioner may require. The Commissioner shall prepare annual reports on the START-UP program for the Governor and publication on the DED website, beginning December 31, 2014. Information contained in businesses' annual reports may be published in these reports or otherwise disseminated.

17) The Freedom of Information Law is applicable to the START-UP program, subject to disclosure waivers to protect certain proprietary information submitted in support of an application to the START-UP program.

18) All businesses must keep relevant records for the duration of their participation in the START-UP program, plus three years. DED has the right to inspect all such documents upon reasonable notice.

19) If the Commissioner determines that a business has acted fraudulently in connection with its participation in the START-UP program, the business is to be immediately terminated from the program, subject to criminal penalties, and liable for taxes that would have been levied against the business during the current year.

20) The regulation requires participating universities and colleges to maintain a conflict of interest policy relevant to issues that may arise during the START-UP program, and to report violations of said policies to the Commissioner for publication.

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires April 20, 2014.

Text of rule and any required statements and analyses may be obtained from: Jennifer Chung, NYS Department of Economic Development, 633 Third Avenue, New York, NY 10017, (212) 803-3783, email: jchung@esd.ny.gov

Regulatory Impact Statement

STATUTORY AUTHORITY:

Chapter 68 of the Laws of 2013 requires the Commissioner of Economic Development to promulgate rules and regulations to establish procedures for the implementation and execution of the SUNY Tax-free Areas to Revitalize and Transform UPstate New York program (START-UP NY). These procedures include, but are not limited to, the application processes for both academic institutions wishing to create Tax-Free NY Areas and businesses wishing to participate in the START-UP NY program, standards for evaluating applications, and any other provisions the Commissioner deems necessary and appropriate.

LEGISLATIVE OBJECTIVES:

The proposed rule is in accord with the public policy objectives the New York State Legislature sought to advance by enacting the START-UP NY program, which provides an incentive to businesses to locate critical high-tech industries in New York State as opposed to other competitive markets in the U.S. and abroad. It is the public policy of the State to establish Tax-Free Areas affiliated with New York universities and colleges, and to afford significant tax benefits to businesses, and the employees of those businesses, that locate within these Tax-Free Areas. The tax benefits are designed to attract and retain innovative start-ups and high-tech industries, and secure for New York the economic activity they generate. The proposed rule helps to further such objectives by establishing the ap-

plication process for the program, clarifying the nature of eligible businesses and facilities, and describing key provisions of the START-UP NY program.

NEEDS AND BENEFITS:

The emergency rule is necessary in order to implement the statute contained in Article 21 of the Economic Development Law, creating the START-UP NY program. The statute directs the Commissioner of Economic Development to establish procedures for the implementation and execution of the START-UP NY program.

Upstate New York has faced longstanding economic challenges due in part to the departure of major business actors from the region. This divestment from upstate New York has left the economic potential of the region unrealized, and left many upstate New Yorkers unemployed.

START-UP NY will promote economic development and job creation in New York, particularly the upstate region, through tax benefits conditioned on locating business facilities in Tax-Free NY Areas. Attracting start-ups and high-tech industries is critical to restoring the economy of upstate New York, and to positioning the state as a whole to be competitive in a globalized economy. These goals cannot be achieved without first establishing procedures by which to admit businesses into the START-UP NY program.

The proposed regulation establishes procedures and standards for the implementation of the START-UP program, especially rules for the creation of Tax-Free NY Areas, application procedures for the admission of businesses into the program, and eligibility requirements for continued receipt of START-UP NY benefits for admitted businesses. These rules allow for the prompt and efficient commencement of the START-UP NY program, ensure accountability of business participants, and promote the general welfare of New Yorkers.

The emergency regulations clarify several items. In Section 220.4(b), language was modified to clarify that the START-UP NY Approval Board reviews and approves Plans for approval as a Tax-Free NY Area from certain, not all, SUNY, CUNY, or community college campuses seeking designation of Tax-Free NY Areas as described in Section 220.5.

In Section 220.7 and 220.8, the regulations have been clarified to permit schools to submit information identifying the space or land proposed for designation in digital formats approved by the Commissioner. This change affords greater flexibility in view of the digital mapping software and other related resources available to different schools.

Section 220.10(k) was clarified to note that, upon receipt of an application from a business to participate in the START-UP NY Program, the Commissioner may approve the application anytime after receipt; if the Commissioner approves the application, the business applicant is deemed accepted into the START-UP NY Program and can locate to the Sponsor's Tax-Free NY Area. If the Commissioner does not reject the application within 60 days, the business applicant is deemed accepted into the Program.

COSTS:

I. Costs to private regulated parties (the business applicants): None. The proposed regulation will not impose any additional costs to eligible business applicants.

II. Costs to the regulating agency for the implementation and continued administration of the rule: None.

III. Costs to the State government: None.

IV. Costs to local governments: None.

LOCAL GOVERNMENT MANDATES:

The rule establishes certain property tax benefits for businesses locating in Tax-Free NY Areas that may impact local governments. However, as described in the accompanying statement in lieu of a regulatory flexibility analysis for small businesses and local governments, the program is expected to have a net-positive impact on local government.

PAPERWORK:

The rule establishes application and eligibility requirements for Tax-Free NY Areas proposed by universities and colleges, and participating businesses. These regulations establish paperwork burdens that include materials to be submitted as part of applications, documents that must be submitted to maintain eligibility, and information that must be retained for auditing purposes.

DUPLICATION:

The proposed rule will create a new section of the existing regulations of the Commissioner of Economic Development, Part 220 of 5 NYCRR. Accordingly, there is no risk of duplication in the adoption of the proposed rule.

ALTERNATIVES:

No alternatives were considered in regard to creating a new regulation in response to the statutory requirement. The regulation implements the statutory requirements of the START-UP NY program regarding the application process for creation of Tax-Free NY Areas and certification as an eligible business. This action is necessary in order to clarify program participation requirements and is required by the legislation establishing the START-UP NY program.

FEDERAL STANDARDS:

There are no federal standards applicable to the START-UP NY program; it is purely a State program that offers tax benefits to eligible businesses and their employees. Therefore, the proposed rule does not exceed any federal standard.

COMPLIANCE SCHEDULE:

The affected State agency (Department of Economic Development) and the business applicants will be able to achieve compliance with the regulation as soon as it is implemented.

Regulatory Flexibility Analysis

Participation in the START-UP NY program is entirely at the discretion of qualifying business that may choose to locate in Tax-Free NY Areas. Neither statute nor the proposed regulations impose any obligation on any business entity to participate in the program. Rather than impose burdens on small business, the program is designed to provide substantial tax benefits to start-up businesses locating in New York, while providing protections to existing businesses against the threat of tax-privileged start-up companies locating in the same community. Local governments may not be able to collect tax revenues from businesses locating in certain Tax-Free NY Areas. However, the regulation is expected to have a net-positive impact on local governments in light of the substantial economic activity associated with businesses locating their facilities in these communities.

Because it is evident from the nature of the proposed rule that it will have a net-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

The START-UP NY program is open to participation from any business that meets the eligibility requirements, and is organized as a corporation, partnership, limited liability company, or sole proprietorship. A business's decision to locate its facilities in a Tax-Free NY Area associated with a rural university or college would be no impediment to participation; in fact, START-UP NY allocates space for Tax-Free NY Areas specifically to the upstate region which contains many of New York's rural areas. Furthermore, START-UP NY specifically calls for the balanced allocation of space for Tax-Free NY Areas between eligible rural, urban, and suburban areas in the state. 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 designated as Tax-Free NY Areas. Accordingly, a rural flexibility analysis is not required and one has not been prepared.

Job Impact Statement

The regulation establishes procedures and standards for the administration of the START-UP NY program. START-UP NY creates tax-free areas designed to attract innovative start-ups and high-tech industries to New York so as to stimulate economic activity and create jobs. The regulation will not have a substantial adverse impact on jobs and employment opportunities; 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.

Education Department

EMERGENCY RULE MAKING

Protection of People with Special Needs Act (L. 2012, Ch. 501)

I.D. No. EDU-28-13-00009-E

Filing No. 73

Filing Date: 2014-01-21

Effective Date: 2014-01-21

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

Action taken: Amendment of sections 200.7 and 200.15 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided), 4002(1)-(3), 4212(a), 4308(3), 4314(a), 4355(3), 4358(a), 4401(2), 4402(1)-(7), 4403(3), (11) and (13), 4410(1)-(13); and L. 2012, ch. 501

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

Specific reasons underlying the finding of necessity: The proposed amendment is necessary to conform the Commissioner's Regulations to Chapter 501 of the Laws of 2012 and the regulations, guidelines and procedures established by the Justice Center, which became effective June 30, 2013.

The proposed amendment was adopted as an emergency rule at the June 16-17, 2013 Regents meeting, effective June 30, 2013. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on July 10, 2013. The proposed amendment was subsequently re-adopted by emergency action at the September 16-17, 2013 and November 17-18, 2013 Regents meetings to keep the rule continuously in effect until it can be adopted as a permanent rule.

The State Education Department has continued to work closely with the Justice Center and the other State Oversight Agencies on implementing the provisions of Chapter 501 since it became effective June 30, 2013. It was initially anticipated that the proposed rule would be presented to the Board of Regents for adoption as a permanent rule at their January 13-14, 2014 meeting. However, additional time is needed to determine whether any revisions should be made to the proposed rule based on any further clarification and/or decisions that the Justice Center may be providing in the coming months.

Pursuant to SAPA section 202(6)(b), the November 2013 emergency adoption will expire on January 20, 2014 (sixty days after the date of its filing with the Department of State on November 22, 2013). Therefore, a fourth emergency action is necessary for the preservation of the general welfare in order to ensure that the emergency rule adopted at the June 2013 Regents meeting, and readopted at the September and November 2013 Regents meetings, remains continuously in effect until the effective date of its adoption as a permanent rule at a subsequent Regents meeting, and thereby ensure that students attending residential schools are protected against abuse, neglect and significant incidents that may jeopardize their health, safety and welfare.

It is anticipated that the proposed rule will be presented at the March 10-11, 2014 Regents meeting for either permanent adoption if no substantial revisions are necessary, or for another emergency adoption if substantial revisions must be made to the proposed rule based on further clarification and/or decisions that the Justice Center may be providing in the coming months.

In the event it is determined that substantial revisions must be made to the proposed rule, the revised rule cannot be presented for permanent adoption until the April 28-29, 2014 Regents meeting or later, after publication of the proposed revised rule in the State Register and expiration of the 30-day public comment period for revised rules established by the State Administrative Procedure Act.

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

Purpose: To conform Commissioner's Regulations relating to students attending residential schools to L. 2012, ch. 501.

Substance of emergency rule: The Board of Regents has adopted amendments to sections 200.7 and 200.15 of the Commissioner's Regulations as an emergency rule, effective January 21, 2014, relating to Chapter 501 of the Laws of 2012: "Protection of People with Special Needs Act." The following is a summary of the substance of the emergency amendments.

Consistent with Chapter 501, section 200.7(b)(3) is amended to add that the code of conduct developed by the Justice Center must govern the conduct of custodians with respect to the safety, dignity and welfare of students in residential schools. Section 200.7(b)(6) is amended to require preschool programs and municipalities who contract for related services approved pursuant to section 4410 of the Education Law to conduct personnel screenings in accordance with the provisions of sections 424-a and 495 of the Social Services Law.

Section 200.15 is amended to conform State regulations to Chapter 501 of the NYS Laws of 2012 relating to definitions abuse, neglect and significant incidents; personnel screening procedures; staff supervision; procedures for the protection of students in in-State and out-of-State residential schools from reportable incidents; staff orientation to procedures regarding the protection of students; instruction of students in techniques and procedures to protect themselves from reportable incidents; incident review committees; and access to residential schools and their records necessary to carry out the provisions of Chapter 501.

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. EDU-28-13-00009-EP, Issue of July 10, 2013. The emergency rule will expire March 21, 2014.

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

Education Law section 207 authorizes the Regents and Commissioner to adopt rules and regulations to carry out State laws regarding education.

Education Law section 4002 establishes responsibilities for education of students in child-care institutions.

Education Law sections 4212(a), 4314(a), 4358(a) and 4403(11) authorize Commissioner's Regulations concerning standards for the protection of children in residential care.

Education Law sections 4308(3) and 4355(3) authorize Commissioner's Regulations regarding admission to the State School for the Blind and State School for the Deaf.

Education Law section 4401 authorizes the Commissioner to approve private day and residential programs serving students with disabilities.

Education Law section 4402 establishes the district's duties regarding education of students with disabilities.

Education Law section 4403 outlines the Department's and district's responsibilities regarding special education programs/services to students with disabilities. Section 4403(3) authorizes Department to adopt regulations as Commissioner deems in its best interests. Section 4403(11) authorizes the Commissioner to promulgate regulations concerning standards for the protection of children in residential care from abuse and maltreatment. Section 4403(12) authorizes and directs the State Education Department to cooperate with other departments, divisions and agencies of the state when a report is received to protect the health and safety of children in residential placement.

Education Law section 4410 establishes requirements for education services and programs for preschool children with disabilities. Section 4410(13) authorizes the Commissioner to adopt regulations.

Chapter 501 of the Laws of 2012 establishes the Justice Center for the Protection of People with Special Needs and procedures for the protection of vulnerable persons from abuse, neglect and significant incidents, including pupils in residential care.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment conforms the Commissioner's Regulations to Chapter 501 of the Laws of 2012 and carries out the legislative objectives in the aforementioned statutes to increase protections for students with disabilities in residential care.

3. NEEDS AND BENEFITS:

The proposed amendment is necessary to conform the Commissioner's Regulations to Chapter 501 of the Laws of 2012 and the regulations, guidelines and procedures established by the Justice Center.

Chapter 501 requires the establishment of comprehensive protections for vulnerable persons against abuse, neglect and other harmful conduct. The Act created a Justice Center with responsibilities for effective incident reporting and investigation systems, fair disciplinary processes, informed and appropriate staff hiring procedures, and strengthened monitoring and oversight systems. The Justice Center operates a 24/7 hotline for reporting allegations of reportable incidents (i.e., abuse, neglect and significant incidents) in accordance with Chapter 501's provisions for uniform definitions, mandatory reporting and minimum standards for incident management programs. Working in collaboration with the State Education Department (SED) and other relevant state oversight agencies, the Justice Center is charged with developing and delivering appropriate training for caregivers, their supervisors and investigators.

A Vulnerable Persons' Central Register (VPCR) contains the names of individuals found to have committed substantiated acts of abuse or neglect using a preponderance of evidence standard. All persons found to have committed such acts have the right to a hearing before an administrative law judge to challenge those findings. Persons having committed egregious or repeated acts of abuse or neglect are placed on a staff exclusion list and prohibited from future employment caring for vulnerable persons, and may be subject to criminal prosecution. Less serious acts of misconduct are subject to progressive discipline and retraining. Job applicants with criminal records who seek employment serving vulnerable persons will be individually evaluated as to suitability for such positions.

Pursuant to Chapter 501, the Justice Center is charged with recommending policies and procedures to SED for the protection of students with disabilities in residential care. This effort involves the development of requirements and guidelines in areas including but not limited to incident management, rights of people receiving services, and training of

custodians. In accordance with Chapter 501, these requirements and guidelines must be reflected, wherever appropriate, in SED's regulations. Consequently, the proposed amendments incorporate the requirements in regulations and guidelines recently developed by the Justice Center.

Chapter 501 further requires SED, in consultation with the Justice Center, to promulgate regulations relating to an incident management program.

4. COSTS:

a. Costs to State government: None.

b. Costs to local governments: None.

c. Costs to regulated parties: None.

d. Costs to SED of implementation and continuing compliance: None.

The proposed amendment is necessary to conform the Commissioner's Regulations to recent changes to the Education Law, Social Services Law, and Executive Law (as amended by Chapter 501 of the Laws of 2012) and does not impose any additional costs beyond those imposed by federal and State statutes and regulations.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment is necessary to conform the Commissioner's Regulations to recent changes in State statute (as amended by Chapter 501 of the Laws of 2012), and does not impose any additional program, service, duty or responsibility upon local governments beyond those imposed by federal and State statutes and regulations.

Consistent with Chapter 501, section 200.7(b)(3) is amended to add that the code of conduct developed by the Justice Center must govern the conduct of custodians with respect to the safety, dignity and welfare of students in residential schools. Section 200.7(b)(6) is amended to require preschool programs and municipalities who contract for related services approved pursuant to section 4410 of the Education Law to conduct personnel screenings in accordance with the provisions of sections 424-a and 495 of the Social Services Law.

Section 200.15 is amended to conform State regulations to Chapter 501 of the NYS Laws of 2012 relating to definitions abuse, neglect and significant incidents; personnel screening procedures; staff supervision; procedures for the protection of students in in-State and out-of-State residential schools from reportable incidents; staff orientation to procedures regarding the protection of students; instruction of students in techniques and procedures to protect themselves from reportable incidents; incident review committees; and access to residential schools and their records necessary to carry out the provisions of Chapter 501.

6. PAPERWORK:

Consistent with Chapter 501 of the Laws of 2012, the proposed amendment would add additional paperwork requirements pertaining to reporting reportable incidents to the Justice Center. However, many of the new requirements will predominantly utilize electronic format. The proposed rule adds requirements for in-State residential schools to provide parents with written information regarding reporting responsibilities and processes and to provide a written report of the findings of the investigation of a significant incident to parents or guardians of student(s) named in the report, and the school district of the student(s). In-State residential schools will also be required to provide staff at the time of initial employment, and at least annually thereafter, with a copy of the code of conduct developed by the Justice Center; submit reports of incident patterns and trends to SED; and provide copies of records to the Justice Center when a request is made to the Justice Center for public inspection and copying of records relating to the abuse and neglect of students. The proposed amendment also adds additional paperwork requirements for out-of-State residential schools to forward the findings of abuse and neglect investigations not conducted by the Justice Center to the Justice Center, SED, and the student's committee on special education and, as appropriate, the social services district in NYS.

7. DUPLICATION:

The proposed amendment will not duplicate, overlap or conflict with any other State or federal statute or regulation, and is necessary to implement Chapter 501 of the Laws of 2012.

8. ALTERNATIVES:

The proposed amendment is necessary to conform the Commissioner's Regulations to Chapter 501 of the Laws of 2012, and there are no alternatives and none were considered.

9. FEDERAL STANDARDS:

The proposed amendment is necessary to conform the Commissioner's Regulations to recent changes in State statute and does not exceed any minimum federal standards.

10. COMPLIANCE SCHEDULE:

It is anticipated that regulated parties will be able to achieve compliance with the proposed amendment by the June 30, 2013 effective date.

Regulatory Flexibility Analysis

1. EFFECT OF RULE:

The proposed amendment applies to all approved in-State residential schools, State-operated schools, State-supported schools which have a residential component, special act school districts, approved out-of-State residential schools, and preschool programs and municipalities who contract for related services approved pursuant to section 4410 of the Education Law. In total, the proposed amendment affects approximately 618 public and private providers of special education. The 618 providers includes 115 providers who are public school programs and 57 counties that contract for related services. Not more than 160 programs are small businesses employing less than 100 employees. Most of the provisions of the proposed amendment affect only residential programs of which there are 63 that are located in New York State and 24 that are located out of State. Of the 61 residential programs located in NYS, 17 are located in rural areas. There are approximately 10 special act school districts in the State.

2. COMPLIANCE REQUIREMENTS:

The proposed amendment is necessary to conform the Commissioner's Regulations to recent changes in State statute (as amended by Chapter 501 of the Laws of 2012), and does not impose any additional compliance requirements on small businesses and local governments beyond those imposed by State statutes and regulations.

Consistent with Chapter 501, section 200.7(b)(3) is amended to add that the code of conduct developed by the Justice Center must govern the conduct of custodians with respect to the safety, dignity and welfare of students in residential schools. Section 200.7(b)(6) is amended to require preschool programs and municipalities who contract for related services approved pursuant to section 4410 of the Education Law to conduct personnel screenings in accordance with the provisions of sections 424-a and 495 of the Social Services Law.

Section 200.15 is amended to conform State regulations to Chapter 501 of the Laws of 2012 relating to definitions abuse, neglect and significant incidents; personnel screening procedures; staff supervision; procedures for the protection of students in in-State and out-of-State residential schools from reportable incidents; staff orientation to procedures regarding the protection of students; instruction of students in techniques and procedures to protect themselves from reportable incidents; incident review committees; and access to residential schools and their records necessary to carry out the provisions of Chapter 501.

3. PROFESSIONAL SERVICES:

The proposed amendment is necessary to conform the Commissioner's Regulations Chapter 501 of the Laws of 2012,and does not impose any additional professional service requirements on small businesses or local governments.

4. COMPLIANCE COSTS:

The proposed amendment is necessary to conform the Commissioner's Regulations to recent changes to the Education Law, Social Services Law and Executive Law (as amended by Chapter 501 of the Laws of 2012) and the regulations, guidelines and procedures established by the Justice Center, and does not impose any additional costs beyond those imposed by such statutes and regulations.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any new technological requirements. Economic feasibility is addressed above under compliance costs.

6. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to conform the Commissioner's Regulations to recent changes to the Education Law, Social Services Law and Executive Law (as amended by Chapter 501 of the Laws of 2012) and the regulations, guidelines and procedures established by the Justice Center. The proposed amendment has been carefully drafted to meet State statutory requirements and does not impose any additional costs or compliance requirements on small businesses and local governments beyond those imposed by such statutes and regulations.

7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:

Copies of the proposed amendment have been provided to District Superintendents and the chief officers of the Big 5 city school districts with the request that they distribute them to school districts within their supervisory districts for review and comment.

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

Pursuant to State Administrative Procedure Act section 207(1)(b), the State Education Department proposes that the initial review of this rule shall occur in the fifth calendar year after the year in which the rule is adopted, instead of in the third calendar year. The justification for a five year review period is that the proposed amendment implements and conforms the Commissioner's Regulations to statutory requirements under Chapter 501 of the Laws of 2012, and therefore the substantive provisions of the proposed amendment cannot be repealed or modified unless there is a further statutory change. Accordingly, there is no need for a shorter review period. The Department invites public comment on the proposed five year review period for this rule. Comments should be sent to the agency contact listed in item 10. of the Notice of Proposed Rule Making published herewith, and must be received within 45 days of the State Register publication date of the Notice.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:

The proposed amendment applies to all approved in-State residential schools, State-operated schools, State-supported schools which have a residential component, special act school districts, approved out-of-State residential schools, and preschool programs and municipalities who contract for related services approved pursuant to section 4410 of the Education Law, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with population density of 150 per square miles or less. In total, the proposed amendment affects approximately 618 public and private providers of special education of which not more than 172 are located in rural areas of New York State. The 618 providers includes 115 providers who are public school programs and 57 counties that contract for related services. Not more than 160 programs are small businesses employing less than 100 employees. Most of the provisions of the proposed amendment affect only residential programs of which there are 63 that are located in New York State and 24 that are located out of State. Of the 61 residential programs located in NYS, 17 are located in rural areas.

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

The proposed amendment is necessary to conform the Commissioner's Regulations to recent changes in State statute (as amended by Chapter 501 of the Laws of 2012), and does not impose any compliance requirements upon small businesses and local governments in rural areas beyond those imposed by State statutes and regulations.

Consistent with Chapter 501, section 200.7(b)(3) is amended to add that the code of conduct developed by the Justice Center must govern the conduct of custodians with respect to the safety, dignity and welfare of students in residential schools. Section 200.7(b)(6) is amended to require preschool programs and municipalities who contract for related services approved pursuant to section 4410 of the Education Law to conduct personnel screenings in accordance with the provisions of sections 424-a and 495 of the Social Services Law.

Section 200.15 is amended to conform State regulations to Chapter 501 of the New York State Laws of 2012 relating to definitions abuse, neglect and significant incidents; personnel screening procedures; staff supervision; procedures for the protection of students in in-State and out-of-State residential schools from reportable incidents; staff orientation to procedures regarding the protection of students; instruction of students in techniques and procedures to protect themselves from reportable incidents; incident review committees; and access to residential schools and their records necessary to carry out the provisions of Chapter 501.

3. COSTS:

The proposed amendment is necessary to conform the Commissioner's Regulations to Chapter 501 of the Laws of 2012 and does not impose any additional costs beyond those imposed by federal statutes and regulations and State statutes.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to conform the Commissioner's Regulations to Chapter 501 of the Laws of 2012. The proposed amendment has been carefully drafted to meet State statutory requirements and does not impose any additional costs or compliance requirements on small businesses and local governments in rural areas beyond those imposed by federal law and regulations and State statutes. Since these requirements apply to all in-State residential schools, State-operated schools, State-supported schools which have a residential component, special act school districts, approved out-of-State residential schools, and preschool programs and municipalities who contract for related services approved pursuant to section 4410 of the Education Law in the State, it is not possible to adopt different standards for such entities in rural areas.

5. RURAL AREA PARTICIPATION:

The proposed amendment was submitted for discussion and comment to the Department's Rural Education Advisory Committee, which includes representatives of school districts in rural areas.

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

Pursuant to State Administrative Procedure Act section 207(1)(b), the State Education Department proposes that the initial review of this rule shall occur in the fifth calendar year after the year in which the rule is adopted, instead of in the third calendar year. The justification for a five year review period is that the proposed amendment implements and conforms the Commissioner's Regulations to statutory requirements under Chapter 501 of the Laws of 2012, and therefore the substantive provisions of the proposed amendment cannot be repealed or modified unless there is a further statutory change. Accordingly, there is no need for a shorter review period. The Department invites public comment on the proposed five year review period for this rule. Comments should be sent to the agency contact listed in item 10. of the Notice of Proposed Rule Making published herewith, and must be received within 45 days of the State Register publication date of the Notice.

Job Impact Statement

The proposed amendment is necessary to conform the Commissioner's Regulations to recent changes to the Education Law, Social Services Law and Executive Law, as amended by Chapter 501 of the New York State Laws of 2012 (''Protection of People with Special Needs Act''), and the regulations, guidelines and procedures established by the Justice Center, to ensure that students attending residential schools are protected against abuse, neglect and significant incidents that may jeopardize their health, safety and welfare.

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

Assessment of Public Comment

The agency received no public comment.

Department of Financial Services

EMERGENCY RULE MAKING

Provider Requirements for Insurance Reimbursement of Applied Behavior Analysis

I.D. No. DFS-05-14-00002-E
Filing No. 67
Filing Date: 2014-01-17
Effective Date: 2014-01-17

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

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

Statutory authority: Financial Services Law, sections 202 and 302; Insurance Law, sections 301, 1109, 1124, 3216, 3221, 4303 and 4709; and Public Health Law, section 4406

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

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

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

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

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

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

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

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

Text of emergency rule: *Section 440.0 Purpose.*

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

Section 440.1 Definitions.

For purposes of this Part:

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

(b) ABA aide means an individual who meets at least one of the following requirements:

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

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

(ii) current matriculation in a degree program that is an approved professional preparation program for licensure in psychology, early childhood development, early childhood education, speech language pathology, special or elementary education, or in a degree program necessary for a license, registration, or certification in a profession designated as qualified personnel in 10 NYCRR 69-4.1(ak);

(2) an associate's degree or higher level degree in a profession listed in Education Law Title VIII or in teaching;

(3) certification as a teaching assistant; or

(4) the minimum qualifications set forth in 10 NYCRR 69-4.25(e).

(c) Assistant behavior analyst means:

(1) an individual who is certified as an assistant behavior analyst pursuant to a behavior analyst certification board to provide behavioral health treatment under the supervision of a behavior analyst; or

(2) an ABA aide who meets the education, experience and supervision requirements for assistant behavior analysts as set forth in this Part.

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

(1) an assistant behavior analyst who directly provides ABA pursuant to an ABA treatment plan to an individual diagnosed with autism spectrum disorder;

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

(3) a licensed provider.

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

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

(g) Behavior analyst certification board means:

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

(2) any other entity, acceptable to the superintendent, in consultation with the Commissioners of Health and Education, that has a certification or approval process for behavior analysts.

(h) Behavioral health treatment means, when prescribed or ordered for an individual diagnosed with ASD by a licensed physician or licensed psychologist, counseling and treatment programs when provided by a licensed provider, and ABA when provided or supervised by a behavior analyst, that are necessary to develop, maintain, or restore, to the maximum extent practicable, the functioning of an individual. A treatment program includes an ABA treatment plan developed by a licensed provider and delivered by an ABA provider.

(i) Licensed provider means an individual licensed or certified to practice psychiatry, psychology, clinical social work, or another related profession pursuant to Education Law Title VIII.

Section 440.2 Supervision of assistant behavior analysts.

(a) An assistant behavior analyst must be supervised by a behavior analyst.

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

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

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

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

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

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

(i) performing behavior assessments;

(ii) developing and evaluating individualized ABA services;

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

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

(v) using behavior change procedures and systems supports;

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

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

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

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

(1) developing individual ABA plans in collaboration with, as appropriate, the parents or caregivers of the individual receiving ABA, as well as assistant behavior analysts or licensed providers;

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

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

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

(5) supervising assistant behavior analysts, including:

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

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

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

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

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

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

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

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

Section 440.3 Qualifications for assistant behavior analysts.

An assistant behavior analyst, in addition to the other requirements set forth in this Part, shall meet the following minimum qualifications:

(a) Prior to the provision of any services to any individual without direct, on-site supervision, completion of a child abuse and neglect identification and reporting workshop and a minimum of 20 hours of training or in-service in behavior interventions using ABA techniques within the past five years, including at a minimum:

(1) basic principles of behavior analysis;

(2) the application of these principles in behavior intervention, including collection of data as needed for monitoring progress;

(3) ethical issues related to the delivery of applied behavior interventions; and

(4) overview of autism and pervasive developmental disorder; and

(b) Completion of a minimum of ten hours of additional training or in-service annually in topics pertaining to ABA and ASD.

Section 440.4 Duties of assistant behavior analysts.

Under the supervision and direction of a behavior analyst in accordance with this Part, an assistant behavior analyst shall:

(a) assist in the recording and collection of data needed to monitor progress;

(b) participate in required team meetings; and

(c) complete any other activities as directed by his or her supervisor and as necessary to assist in the implementation of an individual ABA plan.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire April 16, 2014.

Text of rule and any required statements and analyses may be obtained from: Camielle Barclay, NYS Department of Financial Services, One State Street, New York, NY 10004, (212) 480-5299, email: camielle.barclay@dfs.ny.gov

Regulatory Impact Statement

1. Statutory authority: Financial Services Law sections 202 and 302, Insurance Law sections 301, 1109, 1124, 3216, 3221, 4303, and 4709, and Public Health Law section 4406.

Section 301 of the Insurance Law and sections 202 and 302 of the Financial Services Law authorize the Superintendent of Financial Services (the "Superintendent") to prescribe regulations interpreting the provisions of the Insurance Law and to effectuate any power granted to the Superintendent under the Insurance Law.

Insurance Law section 1109 authorizes the Superintendent to promulgate regulations to effectuate the purposes and provisions of the Insurance Law and Article 44 of the Public Health Law with respect to contracts between a health maintenance organization ("HMO") and its subscribers.

Insurance Law section 1124, which applies to student health plans offered by institutions of higher learning, requires that such plans be subject to all consumer protection laws applicable to Article 43 corporations, including minimum requirements of Insurance Law Article 43 and regulations thereunder regarding benefits, contracts, and rates.

Insurance Law section 3216 establishes requirements for individual accident and health insurance policies and sets forth the benefits that must be covered under such policies. Specifically, subsection (i)(25) requires the Superintendent to promulgate regulations setting forth the standards of professionalism, supervision and relevant experience of individuals who provide behavioral health treatment in the form of applied behavior analysis ("ABA"), under the supervision of a certified behavior analyst for insurance coverage under such policies.

Insurance Law section 3221 establishes requirements and standard provisions for group or blanket accident and health insurance policies and sets forth the benefits that must be covered under such policies. Specifically, subsection (l)(17) requires the Superintendent to promulgate regulations setting forth the standards of professionalism, supervision and relevant experience of individuals who provide behavioral health treatment in the form of ABA under the supervision of a certified behavior analyst for insurance coverage under such policies.

Insurance Law section 4303 governs health insurance subscriber contracts written by not-for-profit corporations and sets forth the benefits that must be covered under such contracts. Specifically, subsection (ee) requires the Superintendent to promulgate regulations setting forth the standards of professionalism, supervision and relevant experience of individuals who provide behavioral health treatment in the form of ABA under the supervision of a certified behavior analyst for insurance coverage under such contracts.

Insurance Law section 4709(b), which applies to municipal cooperative health benefit plans, subjects such plans to the same scope and type of coverage as article 43 corporations.

Public Health Law section 4406 provides that the contract between an HMO and an enrollee is subject to regulation by the Superintendent as if it were a health insurance subscriber contract, and that it shall include all mandated benefits required by Article 43 of the Insurance Law.

2. Legislative objectives: In November 2011, Chapters 595 and 596 of the Laws of 2011 amended Insurance Law sections 3216, 3221 and 4303 to expand health insurance coverage for the screening, diagnosis and treatment of autism spectrum disorder ("ASD"). The amendments also directed the Superintendent, in consultation with the Commissioners of Health and Education, to promulgate regulations that set forth the standards of professionalism, supervision and relevant experience of individuals who provide behavioral health treatment in the form of ABA, under the supervision of a certified behavior analyst for insurance coverage pursuant to Insurance Law sections 3216(i)(25), 3221(l)(17), and 4303(ee). Chapters 595 and 596 took effect on November 1, 2012.

3. Needs and benefits: Prior to the enactment of Chapters 595 and 596, state law did not provide health insurers and HMOs sufficient clarity or an affirmative obligation to cover costs related to treatments for ASD. As a result, individuals diagnosed with an ASD who required treatment in addition to an individualized family services plan, individualized education program, or individualized service plan, had to pay out-of-pocket for expensive services. The law, as amended, ensures that insurance coverage is extended to individuals diagnosed with ASD for treatment such as ABA, thus alleviating the financial burdens placed on the parents and caregivers of those individuals. This rule is being promulgated pursuant to the new statutory amendments to establish the education, training and supervision requirements of ABA providers in order for them to be eligible for health insurance reimbursement under the statute, and also to ensure that qualified ABA providers will be rendering services to individuals with ASD.

4. Costs: This rule imposes no compliance costs upon state or local governments, except that, to the extent that local governments participate in municipal cooperative health benefit plans, the rule will impact them, but the costs of providing the coverage are mandated by the statute.

Some private ABA providers may incur additional costs to fulfill the educational and training requirements of the rule in order to become eligible for reimbursement from health insurance coverage for providing ABA. However, many individuals currently providing ABA are not expected to incur such costs and will be able to continue providing ABA as they always have. In addition, any such costs are likely to be offset by the additional revenue obtained from being newly eligible for health insurance reimbursement. Nonetheless, the Department of Financial Services ("Department") is unable to estimate the specific cost of such compliance because the cost depends on the number of ABA providers who intend to provide treatment to individuals with ASD for reimbursement through health insurance, and ABA providers are not regulated by the Department.

Insurers and HMOs also may incur compliance costs from having to develop an ABA provider eligibility database, and will have to expand their networks if they do not include an adequate number of ABA providers. Those costs may be passed on to consumers in the form of higher premiums, but the long-term benefits of having properly credentialed ABA providers to treat individuals with ASD greatly outweigh the costs. Furthermore, the costs for insurers and HMOs are a consequence of the legislation, not this regulation.

5. Local government mandates: This rule imposes no new mandates on any county, city, town, village, school district, fire district or other special district. The rule merely establishes the criteria by which insurers may reimburse ABA providers.

6. Paperwork: Insurers and HMOs submitted to the Department new health insurance policy forms and rates to add the new coverage for the screening, diagnosis and treatment of ASD. The requirement to make such submissions was imposed by the statutory mandate, not this rule.

7. Duplication: There are no federal or other New York State requirements that duplicate, or conflict with this regulation.

8. Alternatives: The Department, in consultation with the Department of Health and the State Education Department, considered various ways to establish the necessary standards of this regulation. The Department previously promulgated on an emergency basis two different versions of this rule. The first emergency regulation, promulgated on October 31, 2012, required an ABA provider both to be certified by a behavior analysis certification board ("board") and to hold a certain type of license issued pursuant to New York Education Law Title VIII, or to be supervised by a person with both such a license and board certification. A number of stakeholders, however, expressed concern that the prior rule would permit very few providers to be eligible for health insurance reimbursement for providing ABA – perhaps less than 100 statewide.

In response to those concerns, the Department made significant changes to the rule when it was again promulgated on an emergency basis on January 28, 2013. That emergency rule eliminated the dual license/board certification requirement and also permitted health insurance reimbursement for ABA provided by licensed providers whose scope of practice includes ABA, certified providers, and ABA aides under the supervision of certified behavior analysts. However, stakeholders expressed concerns that the rule would continue to limit the number of providers eligible to directly provide or supervise ABA, to the detriment of individuals diagnosed with ASD. In addition, because the rule specified that the provider had to be licensed under the New York Education Law, some insurers apparently denied claims for out-of-state providers where services were provided in other states.

To address the concerns of interested parties, the Department made significant changes to the rule. Those changes are reflected in the rule that was promulgated on July 25, 2013. The rule now permits health insurance reimbursement for ABA provided by licensed providers, behavior analysts, and assistant behavior analysts under the supervision of behavior analysts. Behavior analysts must be board certified but are not required to be New York licensed providers. As a result, the rule should significantly

expand the pool of providers eligible to provide and supervise ABA while still ensuring that only properly credentialed ABA providers treat individuals with ASD and that those who require supervision obtain it from highly qualified ABA providers. Also, the rule permits health insurance reimbursement to out-of-state providers who are board certified.

The Department subsequently received comments from stakeholders that the definition of "behavioral health treatment" – as set forth in the rule promulgated on July 25, 2013 – should be clarified because, as written, the definition could be read to suggest that only a licensed provider may develop an ABA treatment plan, which is contrary to current practice. This was not the Department's intent. That provision serves only to clarify that a licensed provider also may provide ABA services as part of a treatment program for individuals with ASD; it does not prohibit a behavior analyst from developing an ABA treatment plan for an individual with ASD.

9. Federal standards: There are no federal minimum standards or regulations regarding professionalism, supervision and relevant experience for individuals who provide ABA under the supervision of a certified behavior analyst as defined under Insurance Law sections 3216(i)(25), 3221(l)(17) and 4303(ee).

10. Compliance schedule: Because the law took effect on November 1, 2012, this rule takes effect upon filing with the Secretary of State.

Regulatory Flexibility Analysis

1. Effect of the rule: This rule will impact insurers and health maintenance organizations ("HMOs") in New York State, but none fall within the definition of "small business" set forth in section 102(8) of the State Administrative Procedure Act, because none are either independently owned or have less than one hundred employees.

However, this rule may affect providers of applied behavior analysis ("ABA") who treat autism spectrum disorder ("ASD"), many of which are small businesses, because some of those ABA providers may be required under the rule to obtain additional education, training and experience in order to become eligible for health insurance reimbursement for rendering ABA. However, the rule should have a positive impact on small business because of the additional revenue to be generated from health insurance reimbursement for ABA services. The Department of Financial Services (the "Department") is unable to quantify the precise number of small businesses affected by this rule because ABA providers are not regulated by the Department. The Department has established no reporting requirements with respect to these small businesses, nor does the Department maintain records of ABA providers in this state.

2. Compliance requirements: This rule does not impose any reporting, recordkeeping, or other compliance requirements on small businesses, sole proprietors or local governments. The rule only establishes standards of professionalism, training and experience for ABA providers so that they can be eligible for insurance reimbursement for providing ABA.

3. Professional services: This rule does not require the use of professional services.

4. Compliance costs: This rule will not impose any compliance costs on local governments but may impose additional costs on small businesses that provide ABA services and want to obtain health insurance reimbursement for those services. In order to do so, some small business ABA providers who do not have the requisite education, training, or experience would have to incur costs of education, training and experience for their employees to become eligible for health insurance reimbursement for providing ABA. However, any such costs that may be incurred are likely to be more than offset by increased revenue as a result of health insurance reimbursement for these services. Nonetheless, the Department is unable to estimate the cost of such compliance because the cost depends on whether the providers already meet such requisites. Moreover, ABA providers are not regulated by the Department.

5. Economic and technological feasibility: Compliance with the rule is economically and technologically feasible for providers.

6. Minimizing adverse impact: Although some ABA providers that are small businesses may incur additional costs to fulfill the requirements of this rule, many will not, and those costs likely will be offset by the additional revenue that will be generated from health insurance reimbursement for providing ABA services.

7. Small business and local government participation: On October 31, 2012, the Department first promulgated this rule on an emergency basis pursuant to a mandate in Chapters 595 and 596 of the Laws of 2011 amending Insurance Law sections 3216, 3221 and 4303, and again on January 28, 2013 and April 26, 2013. The Department received a number of comments from interested parties regarding the rule, particularly with respect to the regulation's requirement that ABA providers and supervisors of ABA providers had to be licensed under the New York Education Law, which would significantly limit the number of eligible ABA providers and supervisors of ABA providers.

In response to those concerns, the Department made significant changes to the rule. Those changes are reflected in the rule that was promulgated on July 25, 2013. The rule now permits health insurance reimbursement for ABA services provided by licensed providers, behavior analysts, and assistant behavior analysts under the supervision of behavior analysts. Behavior analysts will only be required to be certified by a behavior analysis certification board. As a result, the rule should significantly expand the pool of providers eligible to provide ABA services and to supervise ABA providers while still ensuring that only properly credentialed ABA providers treat individuals with ASD and that those who require supervision obtain it from highly qualified ABA providers.

The Department subsequently received comments from stakeholders that the definition of "behavioral health treatment" – as set forth in the rule promulgated on July 25, 2013 – should be clarified because, as written, the definition could be read to suggest that only a licensed provider may develop an ABA treatment plan, which is contrary to current practice. That was not the Department's intent. The rule serves only to clarify that a licensed provider also may provide ABA services as part of a treatment program for individuals with ASD; it does not prohibit a behavior analyst from developing an ABA treatment plan for an individual with ASD.

All interested parties will have a formal opportunity to comment on the rule when the Department files a notice of proposed rulemaking.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: Applied behavior analysis ("ABA") providers, health insurers, and health maintenance organizations ("HMOs") affected by this rule operate throughout this state, including rural areas as defined under State Administrative Procedure Act section 102(10).

2. Reporting, recordkeeping and other compliance requirements, and professional services: This rule will not impose any reporting, recordkeeping, or other compliance requirements on ABA providers located in rural areas. The rule only establishes standards of professionalism, training and experience required to be eligible for insurance reimbursement for providing ABA.

3. Costs: This rule may impose additional costs on some ABA providers located in rural areas who may need additional education, training and experience and certification pursuant to the rule in order to become eligible for health insurance reimbursement for providing ABA services. However, any such costs are likely to be more than offset by increased revenue generated from health insurance reimbursement for the services of ABA providers. Moreover, the education, training and experience requirements need to be uniform within the state, and providing ABA services within rural areas does not negate the need for the providers to satisfy these minimum consumer protection requirements.

Insurers and HMOs submitted to the Department of Financial Services (the "Department") new health insurance policy forms and rates to add the new coverage for the screening, diagnosis and treatment of ASD. The requirement to add such coverage was imposed by the enactment of Chapters 595 and 596 of the Laws of 2011 amending Insurance Law sections 3216, 3221 and 4303. As a result, insurers and HMOs may incur compliance costs from having to develop an ABA provider eligibility database, and may have to expand their networks if they do not include an adequate number of ABA providers. Those costs may be passed on to consumers in the form of higher premiums, but these additional costs are consequences of the statute, not the regulation, and the long-term benefits of having properly credentialed ABA providers to treat individuals with ASD, as well as the prohibitively expensive out-of-pocket costs for ABA services, greatly outweigh any increase in premiums.

4. Minimizing adverse impact: Although some ABA providers in rural areas may incur additional costs to fulfill the requirements of this rule, those costs likely will be offset from the additional revenue that will be generated from health insurance reimbursement for their services. This rule also will enable many behavior analysts and assistant behavior analysts to immediately start providing ABA services covered by health insurance.

5. Rural area participation: On October 31, 2012, the Department first promulgated this rule pursuant to a mandate in Chapters 595 and 596 of the Laws of 2011 amending Insurance Law sections 3216, 3221 and 4303 on an emergency basis, and again on January 28, 2013 and April 26, 2013. The Department received a number of comments from interested parties regarding the rule, particularly with respect to the licensing requirement for ABA providers and supervisors of ABA providers, which would significantly limit the number of eligible ABA providers and supervisors of ABA providers.

In response to those concerns, the Department made significant changes to the rule. Those changes are reflected in the rule that was promulgated on July 25, 2013. The rule now permits health insurance reimbursement for ABA services provided by licensed providers, behavior analysts, and assistant behavior analysts under the supervision of behavior analysts. Behavior analysts will only be required to be certified by a behavior analysis certification board. As a result, the rule should significantly expand the pool of providers eligible to provide ABA services and to supervise

ABA providers while still ensuring that only properly credentialed ABA providers treat individuals with ASD and that those who require supervision obtain it from highly qualified ABA providers.

The Department subsequently received comments from stakeholders that the definition of "behavioral health treatment" – as set forth in the rule promulgated on July 25, 2013 – should be clarified because, as written, the definition could be read to suggest that only a licensed provider may develop an ABA treatment plan, which is contrary to current practice. This was not the Department's intent. That provision serves only to clarify that a licensed provider also may provide ABA services as part of a treatment program for individuals with ASD; it does not prohibit a behavior analyst from developing an ABA treatment plan for an individual with ASD.

All interested parties will have a formal opportunity to comment on the rule when the Department files a notice of proposed rulemaking.

Job Impact Statement

1. Nature of impact: In November 2011, Chapters 595 and 596 of the Laws of 2011 amended Insurance Law sections 3216, 3221 and 4303 to expand health insurance coverage for the screening, diagnosis and treatment of autism spectrum disorder ("ASD"). The amendments also directed the Superintendent of Financial Services, in consultation with the Commissioners of Health and Education, to promulgate regulations that set forth the standards of professionalism, supervision and relevant experience of individuals who provide behavioral health treatment in the form of applied behavior analysis ("ABA"). Chapters 595 and 596 took effect on November 1, 2012.

This rule should have no adverse impact on jobs and employment opportunities because it merely implements the statutory charge to establish standards of professionalism, supervision and relevant experience of individuals who provide behavioral health treatment in the form of ABA. These standards are designed to ensure that individuals with ASD receive treatment from qualified ABA providers. In fact, this rule will provide more job and employment opportunities because it does not require ABA providers to be licensed pursuant to the New York Education Law in order to receive insurance reimbursement for ABA services.

EMERGENCY RULE MAKING

Public Retirement Systems

I.D. No. DFS-05-14-00003-E

Filing No. 68

Filing Date: 2014-01-17

Effective Date: 2014-01-17

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

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

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

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

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

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

This regulation was previously promulgated on an emergency basis on June 18, 2009, September 16, 2009, January 5, 2010, April 2, 2010, May 28, 2010, July 29, 2010, September 23, 2010, November 19, 2010, January 18, 2011, March 21, 2011, May 19, 2011, August 16, 2011, November 10, 2011, February 7, 2012, May 7, 2012, August 3, 2012, October 31, 2012, January 28, 2013, April 26, 2013, July 24, 2013, and October 21, 2013. The Department is currently working with the Governor's Office to make additional revisions to the regulation.

Subject: Public Retirement Systems.

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

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

§ 136-2.2 Definitions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(j) Third party administrator shall mean any person or entity that contractually provides administrative services to the Retirement System, including receiving and recording employer and employee contributions,

maintaining eligibility rosters, verifying eligibility for benefits, paying benefits or maintaining any other Retirement System records. "Administrative services" do not include services provided to the Fund relating to Fund investments.

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

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

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

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

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

(g) The Comptroller shall:

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

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

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

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

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

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire April 16, 2014.

Text of rule and any required statements and analyses may be obtained from: Michael Maffei, New York State Department of Financial Services, One State Street, New York, NY 10004, (212) 480-5027, email: michael.maffei@dfs.ny.gov

Regulatory Impact Statement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Regulatory Flexibility Analysis

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

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

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

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

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

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

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

2. Compliance requirements: None.

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

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

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

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

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

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

Rural Area Flexibility Analysis

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

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

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

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

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

Job Impact Statement

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

Assessment of Public Comment

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

EMERGENCY RULE MAKING

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

I.D. No. DFS-05-14-00005-E

Filing No. 72

Filing Date: 2014-01-17

Effective Date: 2014-01-20

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

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

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

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

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

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

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

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

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

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

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

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

Text of emergency rule: *Part 501*

(BANKING DIVISION ASSESSMENTS)

(Statutory authority: Banking Law § 17; Financial Services Law § 206)

§ 501.1 Background.

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

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

Both Section 17 of the BL and Section 206 of the FSL provide that all expenses (including, but not limited to, compensation, lease costs and other overhead costs) of the Department attributable to institutions subject to the BL are to be charged to, and paid by, such regulated institutions. These institutions ("Regulated Entities") are now regulated by the Banking Division of the Department. Under both Section 17 of the BL and Section 206 of the FSL, the Superintendent is authorized to assess Regulated Entities for its total costs in such proportions as the Superintendent shall deem just and reasonable.

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

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

§ 501.2 Definitions.

The following definitions apply in this Part:

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

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

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

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

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

(c) "Industry Group Operating Cost" means the amount of the Total Operating Cost to be assessed to a particular Industry Group. The amount

is derived from the percentage of the total expenses for salaries and fringe benefits for the examining, specialist and related personnel represented by such costs for the particular Industry Group.

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

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

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

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

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

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

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

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

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

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

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

§ 501.3 Billing and Assessment Process.

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

§ 501.4 Computation of Assessment.

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

§ 501.5 Penalties/Enforcement Actions.

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

§ 501.6 Effective Date.

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire April 16, 2014.

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

Regulatory Impact Statement

1. Statutory authority.

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

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

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

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

2. Legislative objectives.

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

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

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

3. Needs and benefits.

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

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

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

4. Costs.

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

5. Local government mandates.

None.

6. Paperwork.

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

7. Duplication.

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

8. Alternatives.

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

9. Federal standards.

Not applicable.

10. Compliance schedule.

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

Regulatory Flexibility Analysis

1. Effect of the Rule:

The regulation does not have any impact on local governments.

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

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

2. Compliance Requirements:

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

3. Professional Services:

None.

4. Compliance Costs:

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

5. Economic and Technological Feasibility:

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

6. Minimizing Adverse Impacts:

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

7. Small Business and Local Government Participation:

This regulation does not impact local governments.

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

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

Rural Area Flexibility Analysis

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

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

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

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

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

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

Job Impact Statement

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

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

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

Department of Health

EMERGENCY RULE MAKING

Reduction to Statewide Base Price

I.D. No. HLT-45-13-00004-E
Filing No. 65
Filing Date: 2014-01-16
Effective Date: 2014-01-16

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

Action taken: Amendment of section 86-1.16 of Title 10 NYCRR

Statutory authority: Public Health Law, section 2807-c(35)

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

Specific reasons underlying the finding of necessity: It is necessary to issue the proposed regulations on an emergency basis in order to achieve targeted savings.

Public Health Law section 2807-c(35)(b) specifically provides the Commissioner of Health with authority to issue hospital inpatient rate-setting regulations as emergency regulations.

Further, there is compelling interest in enacting these regulations immediately in order to secure federal approval of the associated Medicaid State Plan Amendment.

Subject: Reduction to Statewide Base Price.

Purpose: Continues a reduction to the statewide base price for inpatient services.

Text of emergency rule: Pursuant to the authority vested in the Commissioner of Health by section 2807-c(35)(b) of the Public Health Law, Subdivision (c) of section 86-1.16 of Subpart 86-1 of Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended, to be effective May 1, 2012, to read as follows:

(c)*(1)* For the period effective July 1, 2011 through March 31, 2012, the statewide base price shall be adjusted such that total Medicaid payments are decreased by $24,200,000.

(2) For the period May 1, 2012 through March 31, 2013 and for state fiscal year periods on and after April 1, 2013, the statewide base price shall be adjusted such that total Medicaid payments are decreased for such period and for each such state fiscal year period by $19,200,000.

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. HLT-45-13-00004-P, Issue of November 6, 2013. The emergency rule will expire March 16, 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:

The requirement to implement a modernized Medicaid reimbursement system for hospital inpatient services based upon 2005 base year operating costs pursuant to regulations is set forth in Section 2807-c(35) of the Public Health Law, which states that the Commissioner has the authority to set emergency regulations for general hospital inpatient rates and such regulations shall include but not be limited to a case-mix neutral Statewide base price. Such Statewide base price will exclude certain items specified in the statute and any other factors as may be determined by the Commissioner.

Legislative Objectives:

The Legislature and Medicaid Redesign Team adopted a proposal to reduce unnecessary cesarean deliveries to promote quality care and reduce unnecessary expenditures. Due to industry concerns with the initial proposal, it was determined that a more clinically sound method needed to be developed. To generate immediate savings, however, a $24.2 million gross ($12.1 million State share) reduction in the statewide base price was implemented for 2011-12 while an obstetrical workgroup worked to develop a more clinically sound approach to meet Legislative objectives. Based on the results of workgroup meetings, a new proposal was developed which achieved less savings than required by the Financial Plan ($5 million gross/$2.5 million State share). Therefore, this emergency amendment continues the base price reduction at $19.2 million gross ($9.6 million State share) to account for the difference.

Needs and Benefits:

The proposed amendment appropriately implements the provisions of Public Health Law section 2807-c(35)(b)(xii), which authorizes the Commissioner to address the inappropriate use of cesarean deliveries. Cesarean deliveries are surgical procedures that inherently involve risks; however, elective cesarean deliveries increase the risks unnecessarily. Therefore, high rates of cesarean deliveries are increasingly viewed as indicative of quality of care issues.

Due to industry concerns with the initial proposal, it was determined that a more clinically sound approach to meeting Legislative objectives needed to be developed. To generate immediate savings, however, a $24.2 million gross ($12.1 million State share) reduction in the statewide base price was implemented for 2011-12 while an obstetrical workgroup worked to develop such an approach. Based on the results of those meetings, a new proposal was developed which achieved less savings than required by the Financial Plan ($5 million gross/$2.5 million State share). Therefore, this emergency amendment continues the base price reduction at $19.2 million gross ($9.6 million State share) to account for the difference for periods subsequent to the 2011-12 state fiscal year.

COSTS:

Costs to State Government:

There are no additional costs to State government as a result of this amendment.

Costs of Local Government:

There will be no additional cost to local governments as a result of these amendments.

Costs to the Department of Health:

There will be no additional costs to the Department of Health as a result of this amendment.

Local Government Mandates:

The proposed amendments do not impose any new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district or other special district.

Paperwork:

There is no additional paperwork required of providers as a result of these amendments.

Duplication:

These regulations do not duplicate existing State and Federal regulations.

Alternatives:

No significant alternatives are available at this time. In collaboration with the hospital industry, the State developed a more clinically sound method to achieve savings. However, this amount was less than was required by the Financial Plan. Thus, there is no option to not act on this initiative since the Enacted Budget assumed savings that total $24.2 million.

Federal Standards:

This amendment does not exceed any minimum standards of the federal government for the same or similar subject areas.

Compliance Schedule:

The proposed amendment to section 86-1.16 requires that the statewide base price be reduced by $19,200,000 for the period May 1, 2012, through March 31, 2013 and for each state fiscal year period thereafter.

Regulatory Flexibility Analysis

Effect on Small Business and Local Governments:

For the purpose of this regulatory flexibility analysis, small businesses were considered to be general hospitals with 100 or fewer full time equivalents. Based on recent financial and statistical data extracted from the Institutional Cost Report, seven hospitals were identified as employing fewer than 100 employees.

Health care providers subject to the provisions of this regulation under section 2807-c(35) of the Public Health Law will see a minimal decrease in funding as a result of the reduction in the statewide base price.

This rule will have no direct effect on Local Governments.

Compliance Requirements:

No new reporting, record keeping or other compliance requirements are being imposed as a result of these rules. Affected health care providers will bill Medicaid using procedure codes and ICD-9 codes approved by the American Medical Association, as is currently required. The rule should have no direct effect on Local Governments.

Professional Services:

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

Compliance Costs:

As a result of the new provision of 86-1.16, overall statewide aggregate hospital Medicaid revenues for hospital inpatient services will decrease in an amount corresponding to the total statewide base price reduction.

Economic and Technological Feasibility:

Small businesses will be able to comply with the economic and technological aspects of this rule. The proposed amendments are technologically feasible because it requires the use of existing technology. The overall economic impact to comply with the requirements of this regulation is expected to be minimal.

Minimizing Adverse Impact:

The proposed amendments reflect statutory intent and requirements.

Small Business and Local Government Participation:

Hospital associations participated in discussions and contributed comments through the State's Medicaid Redesign Team process regarding these changes.

Rural Area Flexibility Analysis

Types and Estimated Numbers of Rural Areas:

This rule applies uniformly throughout the state, including rural areas. Rural areas are defined as counties with a population less than 200,000 and counties with a population of 200,000 or greater that have towns with population densities of 150 persons or fewer per square mile. The following 43 counties have a population of less than 200,000 based upon the United States Census estimated county populations for 2010 (http://quickfacts.census.gov). Approximately 17% of small health care facilities are located in rural areas.

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

The following counties have a population of 200,000 or greater and towns with population densities of 150 persons or fewer per square mile. Data is based upon the United States Census estimated county populations for 2010.

Albany County	Monroe County	Orange County
Broome County	Niagara County	Saratoga County
Dutchess County	Oneida County	Suffolk County
Erie County	Onondaga County	

Compliance Requirements:

No new reporting, recordkeeping, or other compliance requirements are being imposed as a result of this proposal.

Professional Services:

No new additional professional services are required in order for providers in rural areas to comply with the proposed amendments.

Compliance Costs:

No initial capital costs will be imposed as a result of this rule, nor is there an annual cost of compliance.

Minimizing Adverse Impact:

The proposed amendments reflect statutory intent and requirements.

Rural Area Participation:

This amendment is the result of discussions with industry associations as part of the Medicaid Redesign team process. These associations include members from rural areas. As well, the Medicaid Redesign Team held multiple regional hearings and solicited ideas through a public process.

Job Impact Statement

A Job Impact Statement is not required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent from the nature and purpose of the proposed rule that it will not have a substantial adverse impact on jobs or employment opportunities. The proposed emergency regulation revises the final statewide base price for the period beginning May 1, 2012, through March 31, 2013 and for each state fiscal year thereafter.

EMERGENCY RULE MAKING

Statewide Pricing Methodology for Nursing Homes

I.D. No. HLT-45-13-00006-E
Filing No. 70
Filing Date: 2014-01-17
Effective Date: 2014-01-17

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

Action taken: Addition of section 86-2.40 to Title 10 NYCRR.

Statutory authority: Public Health Law, section 2808(2-c)

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

Specific reasons underlying the finding of necessity: It is necessary to issue the proposed regulations on an emergency basis in order to implement the new Medicaid reimbursement methodology for nursing homes. The new methodology will replace an overly complex and burdensome methodology with a transparent pricing methodology that will stabilize the nursing home industry by timely providing predictable rate setting information that can be effectively used by providers to plan and manage their operations. In addition, implementing the pricing methodology will also mitigate the retroactive cash flow impact of reconciling rates that are paid today to the new pricing rates.

Proceeding with the proposed regulations on an emergency basis is in accordance with the provisions of Public Health Law section 2808 (2-c) which provides the Commissioner of Health the explicit authority to issue these emergency regulations.

Further, there is compelling interest in enacting these regulations immediately in order to secure and retain federal approval of the associated Medicaid State Plan Amendment.

Subject: Statewide Pricing Methodology for Nursing Homes.

Purpose: To establish a new Medicaid reimbursement methodology for Nursing Homes.

Substance of emergency rule: This regulation establishes a new reimbursement methodology for the operating component of non-specialty residential health care facilities (nursing homes). The operating component of the price is based upon allowable costs and is the sum of the direct price, indirect price and a facility-specific non-comparable price. The direct and indirect prices are a blend of a statewide price and a peer group price. There are two peer groups: 1) all non-specialty hospital-based facilities and non-specialty freestanding facilities with certified beds capacities of 300 or more, and 2) non-specialty freestanding facilities with certified bed capacities of less than 300 beds. The direct price is subject to a case mix adjustment and a wage index adjustment. The new case mix adjustment methodology also contains mechanisms to safeguard the integrity of case mix data reporting. If reported case mix data indicates a change in the facility's case mix of more than five percent, the payment adjustment associated with the change over five percent may be held, pending an audit to verify the accuracy of the reported data. Also, facilities are required to formally certify to the accuracy of their case mix data reporting on an annual basis. The indirect price is subject to a wage index adjustment. Per-diem adjustments to the operating component of the rate include add-ons for bariatric, traumatic brain-injured (TBI) extended care, and dementia residents; adjustments for the reporting of quality data; and transition payments. Non-specialty facilities will transition to the price over a five-year period (2012-2016), with prices fully implemented beginning in 2017. The non-capital component of the rate for specialty facilities, which are not subject to the new reimbursement methodology, will be the rates in effect for such facilities on January 1, 2009.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt 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. HLT-45-13-00006-P, Issue of November 6, 2013. The emergency rule will expire March 17, 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:

The statutory authority for this regulation is contained in Section 2808(2-c) of the Public Health Law (PHL) as enacted by Section 95 of Part H of Chapter 59 of the Laws of 2011, which authorizes the Commissioner to promulgate emergency regulations, with regard to Medicaid

reimbursement rates for residential health care facilities. Such rate regulations are set forth in Subpart 86-2 of Title 10 (Health) of the Official Compilation of Codes, Rules, and Regulation of the State of New York.

Legislative Objectives:

Subpart 86-2 of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulation of the State of New York, will be amended by adding a new section 2.40 to establish a new Medicaid reimbursement methodology for nursing homes. The reimbursement methodology is based on a blend of statewide prices and peer group prices, with adjustments for case mix, regional wage differences, add-ons for certain patients, and quality incentives and payments. To ensure a smooth transition to the new pricing methodology by mitigating significant fluctuations (increases or decreases) in the amount of Medicaid revenues received by nursing homes, per diem transition rate adjustments will be included to phase-in the new pricing methodology over a five-year period, with full implementation in the sixth year. The new and streamlined methodology will significantly reduce administrative burdens on both nursing homes and the Department and, by limiting the potential bases of subsequent administrative rate appeals and audit adjustments, enhance the stability and certainty of initial Medicaid payments and reduce the likelihood of litigation.

Needs and Benefits:

The new pricing reimbursement methodology reforms and replaces an outdated, complex, and administratively burdensome (to both providers and the Department) rate-setting system with a stable, predictable and transparent methodology that rewards efficiencies and incentivizes quality outcomes. The new pricing system will also provide a good foundation for the transition of nursing home residents to managed care that will occur over the next several years. The new methodology will also, by limiting the potential bases of subsequent administrative rate appeals and audit adjustments, enhance the stability and certainty of initial Medicaid payments and reduce the likelihood of litigation. The new methodology also contains mechanisms to safeguard the integrity of case mix data reporting. If reported case mix data indicates a change in the facility's case mix of more than five percent, the payment adjustment associated with the change over five percent may be held, pending an audit to verify the accuracy of the reported data. Also, facilities are required to formally certify to the accuracy of their case mix data reporting on an annual basis.

Costs to Private Regulated Parties:

There will be no additional costs to private regulated parties. The only additional data requested from providers would be reporting quality measures in their annual cost report.

Costs to State Government:

There is no additional aggregate increase in Medicaid expenditures anticipated as a result of these regulations.

Costs to Local Government:

Local districts' share of Medicaid costs is statutorily capped; therefore, there will be no additional costs to local governments as a result of this proposed regulation.

Costs to the Department of Health:

There will be no additional costs to the Department of Health as a result of this proposed regulation.

Local Government Mandates:

The proposed regulation does not impose any new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district or other special district.

Paperwork:

The proposed regulation does not create new or additional paperwork responsibility of any kind.

Duplication:

These regulations do not duplicate existing state or federal regulations.

Alternatives:

The Department is required by the Public Health Law section 2808 2-c to implement the new pricing methodology. The department worked closely with the Nursing Home Industry Associations to develop the details of the pricing methodology to be implemented by the regulation.

Federal Standards:

The proposed regulation does not exceed any minimum standards of the federal government for the same or similar subject area.

Compliance Schedule:

The new prices will be published by the department and transmitted to the EMedNY system. There are no new compliance efforts required by the nursing homes.

Regulatory Flexibility Analysis

Effect of Rule:

For the purpose of this regulatory flexibility analysis, small businesses were considered to be residential health care facilities with 100 or fewer employees. Based on recent financial and statistical data extracted from Residential Health Care Facility Cost Reports, approximately 60 residential health care facilities were identified as employing fewer than 100 employees.

To ensure a smooth transition and mitigate significant swings in Medicaid revenues, the new Medicaid reimbursement methodology for nursing homes implemented by this regulation will be phased-in over a five year period (full implementation in the sixth year). Of the 60 nursing homes, 36 nursing homes that are subject to this regulation will experience a decrease in Medicaid revenues. The losses in Medicaid revenues will occur gradually – and will increase from.473% of total operating revenue in year one to 5.4% of total operating revenue in year six. Twenty-four nursing homes that are subject to this regulation will experience an increase in Medicaid revenues. The gains in Medicaid revenues will occur gradually – and will increase from 1.2% of total operating revenue in year one to 2% of total operating revenue in year six. In addition, the new methodology will also, by limiting the potential bases of subsequent administrative rate appeals and audit adjustments, enhance the stability and certainty of initial Medicaid payments and reduce the likelihood of litigation.

This rule will have no direct effect on local governments.

Compliance Requirements:

There are no new compliance requirements.

Professional Services:

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

Compliance Costs:

No additional compliance costs are anticipated as a result of this rule.

Economic and Technological Feasibility:

The proposed rule doesn't require additional technological or economic requirements.

Minimizing Adverse Impact:

To ensure a smooth transition to the new pricing methodology by mitigating significant fluctuations (increases or decreases) in the amount of Medicaid revenues received by nursing homes, per diem transition rate adjustments will be included to phase-in the new pricing methodology over a five-year period, with full implementation in the sixth year. The new methodology will also, by limiting the potential bases of subsequent administrative rate appeals and audit adjustments, enhance the stability and certainty of initial Medicaid payments and reduce the likelihood of litigation.

Small Business and Local Government Participation:

The State filed a Federal Public Notice, published in the State Register, prior to the effective date of the change. The Notice provided a summary of the action to be taken and instructions as to where the public, including small businesses and local governments, could locate copies of the corresponding proposed State Plan Amendment. The Notice further invited the public to review and comment on the related proposed State Plan Amendment. The Department worked closely with the major nursing home industry associations to develop the details of the pricing methodology to be implemented by the regulation. In addition, contact information for the Department was provided for anyone interested in further information.

Rural Area Flexibility Analysis

Effect on Rural Areas:

Rural areas are defined as counties with populations less than 200,000 and, for counties with populations greater than 200,000, include towns with population densities of 150 persons or less per square mile. The following 43 counties have populations of less than 200,000:

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

The following nine counties have certain townships with population densities of 150 persons or less per square mile:

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

Compliance Requirements:

There are no new compliance requirements as a result of the proposed rule.

Professional Services:

No new additional professional services are required in order for providers in rural areas to comply with the proposed amendments.

Compliance Costs:

No additional compliance costs are anticipated as a result of this rule.

Minimizing Adverse Impact:

To ensure a smooth transition to the new pricing methodology by mitigating significant fluctuations (increases or decreases) in the amount of Medicaid revenues received by nursing homes, per diem transition rate adjustments will be included to phase-in the new pricing methodology over a five-year period, with full implementation in the sixth year. The new methodology will also, by limiting the potential bases of subsequent administrative rate appeals and audit adjustments, enhance the stability and certainty of initial Medicaid payments and reduce the likelihood of litigation.

Rural Area Participation:

The Department, in collaboration with the major nursing home industry associations (which include representation of rural nursing homes), worked collaboratively to develop the key components of the statewide pricing methodology. In addition, a Federal Public Notice, published in the New York State Register invited comments and questions from the general public.

Job Impact Statement

A Job Impact Statement is not required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is not expected that the proposed rule to establish a new Medicaid reimbursement methodology for nursing homes will have a material impact on jobs or employment opportunities across the nursing home industry. To ensure a smooth transition to the new pricing methodology by mitigating significant fluctuations (increases or decreases) in the amount of Medicaid revenues received by nursing homes, per diem transition rate adjustments will be included in the proposed regulations to phase-in the new pricing methodology over a five-year period, with full implementation in the sixth year.

EMERGENCY RULE MAKING

Episodic Pricing for Certified Home Health Agencies (CHHAs)

I.D. No. HLT-46-13-00006-E

Filing No. 71

Filing Date: 2014-01-17

Effective Date: 2014-01-17

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

Action taken: Amendment of section 86-1.44 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 3614(13)

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

Specific reasons underlying the finding of necessity: It is necessary to issue the proposed regulations on an emergency basis in order to ensure an appropriate level of reimbursement to those Certified Home Health Agencies (CHHAs) that provide services to a special needs population of medically complex children, adolescents and young disabled adults and to those CHHAs that serve primarily patients who are eligible for OPWDD services.

Section 111 of Part H of Chapter 59 of the Laws of 2011 provides the Commissioner of Health with authority to issue regulations such as these emergency regulations.

Further, there is compelling interest in enacting these regulations immediately in order to secure federal approval of the associated Medicaid State Plan Amendment.

Subject: Episodic Pricing for Certified Home Health Agencies (CHHAs).

Purpose: To exempt services to a special needs population from the episodic payment system for CHHAs.

Text of emergency rule: Subdivisions (a) and (c) and the opening paragraph of subdivision (b) of section 86-1.44 of title 10 of NYCRR are amended to read as follows:

(a) Effective for services provided on and after [April 1] *May 2*, 2012, Medicaid payments for certified home health care agencies ("CHHA"), except for such services provided to children under eighteen years of age *and except for services provided to a special needs population of medically complex and fragile children, adolescents and young disabled adults by a CHHA operating under a pilot program approved by the Department*, shall be based on payment amounts calculated for 60-day episodes of care.

(b) An initial statewide episodic base price, to be effective [April 1] *May 2*, 2012, will be calculated based on paid Medicaid claims, as determined by the Department, for services provided by all certified home health agencies in New York State during the base period of January 1, 2009 through December 31, 2009.

(c) The base price paid for 60-day episodes of care shall be adjusted by an individual patient case mix index as determined pursuant to subdivision (f) of this section; and also by a regional wage index factor as determined pursuant to subdivision (h) of this section. *Such case mix adjustments shall include an adjustment factor for CHHAs providing care primarily to a special needs patient population coming under the jurisdiction of the Office of People With Developmental Disabilities (OPWDD) and consisting of no fewer than two hundred such patients.*

Section 86-1.44 of title 10 of NYCRR is amended by adding a new subdivision (k) to read as follows:

(k) Closures, mergers, acquisitions, consolidations, and restructurings.

(1) The commissioner may grant approval of a temporary adjustment to rates calculated pursuant to this section for eligible certified home health agencies.

(2) Eligible certified home health agency providers shall include:

(i) providers undergoing closure;

(ii) providers impacted by the closure of other health care providers;

(iii) providers subject to mergers, acquisitions, consolidations or restructuring; or

(iv) providers impacted by the merger, acquisition, consolidation or restructuring of other health care facilities.

(3) Providers seeking rate adjustments under this subdivision shall demonstrate through submission of a written proposal to the commissioner that the additional resources provided by a temporary rate adjustment will achieve one or more of the following:

(i) protect or enhance access to care;

(ii) protect or enhance quality of care;

(iii) improve the cost effectiveness of the delivery of health care services; or

(iv) otherwise protect or enhance the health care delivery system, as determined by the commissioner.

(4)(i) Such written proposal shall be submitted to the commissioner at least sixty days prior to the requested effective date of the temporary rate adjustment and shall include a proposed budget to achieve the goals of the proposal. Any temporary rate adjustment issued pursuant to this subdivision shall be in effect for a specified period of time as determined by the commissioner, of up to three years. At the end of the specified timeframe, the provider shall be reimbursed in accordance with the otherwise applicable rate-setting methodology as set forth in applicable statutes and applicable provisions of this Subpart. The commissioner may establish, as a condition of receiving such a temporary rate adjustment, benchmarks and goals to be achieved in conformity with the provider's written proposal as approved by the commissioner and may also require that the provider submit such periodic reports concerning the achievement of such benchmarks and goals as the commissioner deems necessary. Failure to achieve satisfactory progress, as determined by the commissioner, in accomplishing such benchmarks and goals shall be a basis for ending the provider's temporary rate adjustment prior to the end of the specified timeframe.

(ii) The commissioner may require that applications submitted pursuant to this section be submitted in response to and in accordance with a Request For Applications or a Request For Proposals issued by the commissioner.

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. HLT-46-13-00006-P, Issue of November 13, 2013. The emergency rule will expire March 17, 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:

The authority for implementation of an episodic payment system for

Certified Home Health Agency services pursuant to regulations is set forth in section 3614(13) of the Public Health Law and in section 111(t) of part H of chapter 59 of the laws of 2011, which authorizes the Commissioner to promulgate regulations, including emergency regulations, with regard to Medicaid reimbursement rates for certified home health agencies. Section 3614(13) also exempts the application of the episodic payment system to Medicaid reimbursement for "children under eighteen years of age and other discrete groups as may be determined by the commissioner pursuant to regulations".

Legislative Objectives:

The Legislature chose to address the issue of over-utilization of Certified Home Health Agency services as a result of the recommendations submitted by the Medicaid Redesign Team and accepted by the Governor. Pursuant to statute, an episodic payment system based on 60-day episodes of care, with payments tied to patient acuity, was chosen as one of the vehicles to address this issue. The legislation also exempted Medicaid payments for children from the new payment system and, further, gave the Commissioner of Health authority to exempt other discrete groups through regulation.

In addition, Section 86-1.44 of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulation of the State of New York, will be amended to add subdivision (k), which provides the Commissioner authority to grant temporary rate adjustments to eligible Article 36 certified home health agency providers subject to or affected by the closure, merger, acquisition, consolidation, or restructuring of a health care provider in their service delivery area. In addition, the proposed regulation sets forth the conditions under which a provider will be considered eligible, the requirements for requesting a temporary rate adjustment, and the conditions that must be met in order to receive a temporary rate adjustment. The temporary rate adjustment shall be in effect for a specified period of time, as approved by the Commissioner, of up to three years. This regulation is necessary in order to maintain beneficiaries' access to services by providing needed relief to providers that meet the criteria.

Proposed subdivision (k) requires providers seeking a temporary rate adjustment to submit a written proposal demonstrating that the additional resources provided by a temporary rate adjustment will achieve one or more of the following: (i) protect or enhance access to care; (ii) protect or enhance quality of care; (iii) improve the cost effectiveness of the delivery of health care services; or (iv) otherwise protect or enhance the health care delivery system, as determined by the Commissioner. The proposed amendment permits the Commissioner to establish benchmarks and goals, in conformity with a provider's written proposal as approved by the Commissioner, and to require the provider to submit periodic reports concerning its progress toward achievement of such. Failure to achieve satisfactory progress in accomplishing such benchmarks and goals, as determined by the Commissioner, shall be a basis for ending the provider's temporary rate adjustment prior to the end of the specified timeframe.

Needs and Benefits:

The proposed amendments to subdivisions (a), (b), and (c) will exempt services provided to a special needs population of medically complex children, adolescents and young disabled adults by a CHHA operating under a pilot program approved by the Department from the episodic payment system and will also provide for an adjustment of the case mix index for CHHAs serving primarily patients who are eligible for OPWDD services when such CHHAs have over 200 such patients. These amendments reflect a Health Department determination that the more stringent cost containment mechanism of episodic pricing, already deemed by the legislature to be an inappropriate reimbursement mechanism for CHHA services for children, is also not appropriate for special needs populations consisting of young adults as well as children and adolescents being cared for pursuant to an approved pilot program. These amendments will thus help assure that agencies primarily serving certain special needs populations will receive a level of reimbursement from the Medicaid system to maintain both adequate access and quality of care for members of these populations.

With regard to the new subdivision (k), in the center of a changing health care delivery system, the closure, merger, acquisition, consolidation or restructuring of a health care provider within a community often happens without adequate planning of resources for the impact on health care providers in the service delivery area. In addition, maintaining access to needed services while also maintaining or improving quality becomes challenging for the impacted providers. The additional reimbursement provided by this adjustment will support the impacted Article 36 certified home health agency providers in achieving these goals, thus improving quality while reducing health care costs.

Costs:

The regulated parties (providers) are not expected to incur any additional costs as a result of the proposed rule change. There are no additional costs to local governments for the implementation of and continuing compliance with this amendment. It is anticipated there will be a slight decrease to the total state fiscal savings which were budgeted for the Episodic Payment System.

Local Government Mandates:

The proposed amendment does not impose any new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district or other special district.

Paperwork:

There is no additional paperwork required of providers as a result of this amendment.

Duplication:

These regulations do not duplicate existing state or federal regulations.

Alternatives:

No significant alternatives are available that will protect the special needs populations identified in this amendment. With regard to the new subdivision (k), no significant alternatives are available. Any potential certified home health agency provider project that would otherwise qualify for funding pursuant to the revised regulation would, in the absence of this amendment, either not proceed or would require the use of existing provider resources.

Federal Standards:

This amendment does not exceed any minimum standards of the federal government for the same or similar subject areas.

Compliance Schedule:

There are no significant actions which are required by the affected providers to comply with the amendments to subdivisions (a), (b) and (c). With regard to the new subdivision (k), the proposed regulation provides the Commissioner of Health the authority to grant approval of temporary adjustments to rates calculated for Article 36 certified home health care providers that are subject to or affected by the closure, merger, acquisition, consolidation, or restructuring of a health care provider, for a specified period of time, as determined by the Commissioner, of up to three years.

Regulatory Flexibility Analysis

No regulatory flexibility analysis is required pursuant to section 202-(b)(3)(a) of the State Administrative Procedure Act. The proposed amendment does not impose an adverse economic impact on small businesses or local governments, and it does not impose reporting, recordkeeping or other compliance requirements on small businesses or local governments.

Rural Area Flexibility Analysis

No rural area flexibility analysis is required pursuant to section 202-bb(4)(a) of the State Administrative Procedure Act. The proposed amendment does not impose an adverse impact on facilities in rural areas, and it does not impose reporting, recordkeeping or other compliance requirements on facilities in rural areas.

Job Impact Statement

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

Office for People with Developmental Disabilities

NOTICE OF ADOPTION

Change to Previous Regulations on Reimbursement of Prevocational Services Delivered in Sheltered Workshops

I.D. No. PDD-29-13-00014-A

Filing No. 74

Filing Date: 2014-01-21

Effective Date: 2014-02-05

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

Action taken: Amendment of section 635-10.5 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 13.07, 13.09(b), 16.00 and 43.02

Subject: Change to previous regulations on reimbursement of prevocational services delivered in sheltered workshops.

Purpose: To allow reimbursement for individuals who were enrolled in prevocational services in sheltered workshops before July 1, 2013.

Text or summary was published in the July 17, 2013 issue of the Register, I.D. No. PDD-29-13-00014-ERP.

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

Text of rule and any required statements and analyses may be obtained from: Barbara Brundage, Director, Regulatory Affairs Unit, OPWDD, 44 Holland Ave., Albany, NY 12229, (518) 474-1830, email: RAU.Unit@opwdd.ny.gov

Additional matter required by statute: Pursuant to the requirements of the State Environmental Quality Review Act, OPWDD, as lead agency, has determined that the action described herein will have no effect on the environment, and an E.I.S. is not needed.

Assessment of Public Comment

The agency received no public comment.

Public Service Commission

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Clarification of a Prior Commission Order

I.D. No. PSC-05-14-00001-EP

Filing Date: 2014-01-16

Effective Date: 2014-01-16

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

Proposed Action: The Public Service Commission adopted an order clarifying the cost estimates and requirements for the public letting of engineering contracts of a prior order authorizing a financing agreement with the Environmental Facilities Corporation for the reconstruction of the West Valley Crystal Water Company distribution system.

Statutory authority: Public Service Law, sections 89-f and 110

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

Specific reasons underlying the finding of necessity: This action is taken on an emergency basis, under Public Service Law §§ 89-f and 110, to clarify the requirements of a November 29, 2012 Commission Order (2012 Order) that authorized West Valley Crystal Water Company, Inc. (West Valley) to enter into a financing agreement with the Environmental Facilities Corporation (EFC) to fund the reconstruction of West Valley's infrastructure. The 2012 Order required the public letting of engineering contracts and included projections for the cost elements of the reconstruction. Due to irregularities in the bidding process and a winning bid that was significantly higher than 2012 Order's projection, EFC requested clarification of the Order's terms from the Secretary to the Commission, and would not release the reconstruction funds until its concerns were met.

Because the Secretary does have the authority to answer EFC's questions, the Commission issued an order clarifying the terms of the 2012 Order. This is being done an emergency basis because West Valley's system is in danger of failing and works needs to begin on its reconstruction as soon as possible to ensure there is no loss of service for its ratepayers.

Subject: The clarification of a prior Commission Order.

Purpose: To clarify the terms of a prior Commission Order to allow for the timely release of reconstruction funds.

Substance of emergency/proposed rule: The Public Service Commission adopted an Order clarifying, on an emergency basis, the terms of a November 29, 2012 Commission Order (2012 Order) that authorized West Valley Crystal Water Company, Inc. (West Valley) to enter into a financing agreement with the Environmental Facilities Corporation (EFC) to fund the reconstruction of West Valley's infrastructure. The 2012 Order required the public letting of engineering contracts and included projections for the cost elements of the reconstruction. The EFC requested clarification of the 2012 Order's terms to confirm that the bidding process carried out by West Valley complies with the 2012 Order and that individual cost elements may deviate from the 2012 Order's projections provided that the total cost of the loan is below the authorized amount. The Commission's Order states that the bidding process as carried out in this case satisfies the terms of the 2012 Order and that individual cost elements.

This notice is intended: to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire April 15, 2014.

Text of rule may be obtained from: Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: Deborah.Swatling@dps.ny.gov

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

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

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

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

(11-W-0059EP1)

NOTICE OF ADOPTION

Authorizing the Transfer of Property from O&R to the Town of Goshen

I.D. No. PSC-15-13-00018-A

Filing Date: 2014-01-16

Effective Date: 2014-01-16

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

Action taken: On 1/16/14, the PSC adopted an order authorizing the transfer of property from Orange and Rockland Utilities, Inc. (O&R) to the Town of Goshen.

Statutory authority: Public Service Law, section 70(1)

Subject: Authorizing the transfer of property from O&R to the Town of Goshen.

Purpose: To authorize the transfer of property from O&R to the Town of Goshen.

Substance of final rule: The Commission, on January 16, 2014, adopted an order authorizing the transfer of real property and property interests from Orange and Rockland Utilities, Inc. to the Town of Goshen, 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-0146SA1)

NOTICE OF ADOPTION

Approving Champlain Hudson's Requests for Lightened Regulatory Treatment and Approval of a Prior Transfer of Ownership

I.D. No. PSC-43-13-00016-A

Filing Date: 2014-01-21

Effective Date: 2014-01-21

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

Action taken: On 1/16/14, the PSC approved the petition of Champlain Hudson Power, Inc. (Champlain Hudson) and CHPE Properties, Inc. for both a declaratory ruling and an order for lightened regulation and a prior transfer of ownership.

Statutory authority: Public Service Law, sections 4(1), 66(1) and 70

Subject: Approving Champlain Hudson's requests for lightened regulatory treatment and approval of a prior transfer of ownership.

Purpose: To approve Champlain Hudson's requests for lightened regulatory treatment and approval of a prior transfer of ownership.

Substance of final rule: The Commission, on January 16, 2014, adopted

an order approving the petition of Champlain Hudson Power Express, Inc. requesting a declaratory ruling for a prior transfer of ownership and an order providing for lightened ratemaking regulation, 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-0392SA1)

NOTICE OF ADOPTION

Authorizing NYSEG to Procure RSS and Cost Recovery from Cayuga

I.D. No. PSC-47-13-00007-A

Filing Date: 2014-01-16

Effective Date: 2014-01-16

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

Action taken: On 1/16/14, the PSC adopted an order approving New York State Electric & Gas Corporation (NYSEG) to procure Reliability Support Services (RSS) and cost recovery from Cayuga Operating Company, LLC's (Cayuga) generation facility units in Lansing, NY.

Statutory authority: Public Service Law, sections 4(1), 5(1)(b), (2), 65(1), (2), (3), 66(1), (2), (3), (4), (5), (6), (8), (9), (10), (11), (12), (12-a), (12-b), (16) and (20)

Subject: Authorizing NYSEG to procure RSS and cost recovery from Cayuga.

Purpose: To approve NYSEG to procure RSS and cost recovery from Cayuga.

Substance of final rule: The Commission, on January 16, 2014, adopted an order approving the petition of New York State Electric and Gas Corporation to procure Reliability Support Services (RSS) from Cayuga Operating Company, LLC's generating facility located in Lansing, New York, and to recover the costs associated with the RSS, 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.

(12-E-0400SA2)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Agricultural Consumer Electricity Cost Discount

I.D. No. PSC-05-14-00007-P

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

Proposed Action: The Commission is considering a filing by Niagara Mohawk Power Corporation d/b/a National Grid proposing revisions to the Company's rules and regulations contained in P.S.C. No. 220 Electricity regarding ReCharge NY Residential Consumer Discount Program.

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

Subject: Agricultural Consumer Electricity Cost Discount.

Purpose: Tariff revisions to implement the Agricultural Consumer Electricity Cost Discount.

Substance of proposed rule: Section 1005, subdivision 13-b, of the New York Public Authorities Law requires that the New York Power Authority reserve up to $8 million of the ReCharge New York Residential Consumer Discount Program to divide among Niagara Mohawk Power Corporation d/b/a National Grid, New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation to be used to provide a discount to residential agricultural producers.

On January 8, 2014, Niagara Mohawk Power Corporation d/b/a National Grid (NMPC) filed revisions to its electric tariff schedule, P.S.C. No. 220, implementing the Agricultural Consumer Electricity Cost Discount pursuant to Commission Notice to Submit Proposed Tariff Leaves issued November 27, 2013 in Case 11-E-0176. The Agricultural Consumer Electric Cost Discount will apply to residential agricultural producers. The filing has a proposed effective date of September 1, 2014. The Commission may approve, modify or reject, in whole or in part, NMPC's proposed filing.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website http://www.dps.ny.gov/f96dir.htm. For questions, contact: Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: deborah.swatling@dps.ny.gov

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

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

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

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

(11-E-0176SP13)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Agricultural Consumer Electricity Cost Discount

I.D. No. PSC-05-14-00008-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 a filing by Rochester Gas and Electric Corporation proposing revisions to the Company's rules and regulations contained in P.S.C. No. 19 Electricity regarding ReCharge NY Residential Consumer Discount Program.

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

Subject: Agricultural Consumer Electricity Cost Discount.

Purpose: Tariff revisions to implement the Agricultural Consumer Electricity Cost Discount.

Substance of proposed rule: Section 1005, subdivision 13-b, of the New York Public Authorities Law requires that the New York Power Authority reserve up to $8 million of the ReCharge New York Residential Consumer Discount Program to divide among Niagara Mohawk Power Corporation d/b/a National Grid, New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation to be used to provide a discount to residential agricultural producers.

On January 8, 2014, Rochester Gas and Electric Corporation (RG&E) filed revisions to its electric tariff schedule, P.S.C. No. 19, implementing the Agricultural Consumer Electricity Cost Discount pursuant to Commission Notice to Submit Proposed Tariff Leaves issued November 27, 2013 in Case 11-E-0176. The Agricultural Consumer Electric Cost Discount will apply to residential agricultural producers. The filing has a proposed effective date of September 1, 2014. The Commission may approve, modify or reject, in whole or in part, RG&E's proposed filing.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website http://www.dps.ny.gov/f96dir.htm. For questions, contact: Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: deborah.swatling@dps.ny.gov

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

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

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement
Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(11-E-0176SP14)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Reform of Originating Intrastate Access Charges and Revenue Recovery for Certain Telephone Carriers

I.D. No. PSC-05-14-00009-P

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

Proposed Action: The Commission is considering a proposal to reduce originating intrastate access charges over seven years beginning July 1, 2014 and to provide cost recovery for certain telephone carriers of the forgone originating access charge revenue.

Statutory authority: Public Service Law, sections 4, 5, 90, 91, 92, 94 and 97

Subject: Reform of originating intrastate access charges and revenue recovery for certain telephone carriers.

Purpose: Reform of originating intrastate access charges and financial support for certain telephone carriers.

Substance of proposed rule: By Order to Show Cause issued January 21, 2014, the Commission proposes a method for reforming originating intrastate access charges, including a schedule by which such charges should be phased out, commencing July 1, 2014, and a process by which Affected Carriers, as defined in the Order, can recover forgone revenue from the access charge reductions. The Commission may accept, reject or modify the proposal or adopt an alternate resolution proposed in responses to the Order to Show Cause or otherwise related to the Order to Show Cause.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website http://www.dps.ny.gov/f96dir.htm. For questions, contact: Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: Deborah.Swatling@dps.ny.gov

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

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

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement
Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(09-M-0527SP7)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

New York State Reliability Council's Revisions to Its Rules and Measurements

I.D. No. PSC-05-14-00010-P

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

Proposed Action: The Commission is considering whether to adopt, modify, or reject, in whole or in part, revisions to the rules and measurements of the New York State Reliability Council (NYSRC) contained in Version 32 of the NYSRC's Reliability Rules.

Statutory authority: Public Service Law, sections 4(1), 5(2), 65(1), 66(1), (2), (4) and (5)

Subject: New York State Reliability Council's revisions to its rules and measurements.

Purpose: To adopt revisions to various rules and measurements of the New York State Reliability Council.

Substance of proposed rule: The Public Service Commission (PSC) is considering whether to adopt, modify, or reject, in whole or in part, revisions to the rules and measurements of the New York State Reliability Council (NYSRC) contained in Version 32 of the NYSRC's Reliability Rules, which were filed with the PSC on March 22, 2013.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website http://www.dps.ny.gov/f96dir.htm. For questions, contact: Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: deborah.swatling@dps.ny.gov

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

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

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement
Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(05-E-1180SP13)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Agricultural Consumer Electricity Cost Discount

I.D. No. PSC-05-14-00012-P

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

Proposed Action: The Commission is considering a filing by New York State Electric & Gas Corporation (NYSEG) proposing revisions to the Company's rules and regulations contained in P.S.C. No. 120 Electricity regarding ReCharge NY Residential Consumer Discount Program.

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

Subject: Agricultural Consumer Electricity Cost Discount.

Purpose: Tariff revisions to implement the Agricultural Consumer Electricity Cost Discount.

Substance of proposed rule: Section 1005, subdivision 13-b, of the New York Public Authorities Law requires that the New York Power Authority reserve up to $8 million of the ReCharge New York Residential Consumer Discount Program to divide among Niagara Mohawk Power Corporation d/b/a National Grid, New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation to be used to provide a discount to residential agricultural producers.

On January 8, 2014, New York State Electric & Gas Corporation (NYSEG) filed revisions to its electric tariff schedule, P.S.C. No. 120, implementing the Agricultural Consumer Electricity Cost Discount pursuant to Commission Notice to Submit Proposed Tariff Leaves issued November 27, 2013 in Case 11-E-0176. The Agricultural Consumer Electric Cost Discount will apply to residential agricultural producers. The filing has a proposed effective date of September 1, 2014. The Commission may approve, modify or reject, in whole or in part, NYSEG's proposed filing.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website http://www.dps.ny.gov/f96dir.htm. For questions, contact: Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: deborah.swatling@dps.ny.gov

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

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

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement
Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(11-E-0176SP12)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Petition for Submetering of Electricity

I.D. No. PSC-05-14-00013-P

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

Proposed Action: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Two Cooper Square, LLC to submeter electricity at 37 East 4th Street, New York.

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

Subject: Petition for submetering of electricity.

Purpose: To consider the request of Two Cooper Square, LLC to submeter electricity at 37 East 4th Street, New York.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Two Cooper Square, LLC to submeter electricity at 37 East 4th Street, New York, located in the territory of Consolidated Edison of New York, Inc.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website http://www.dps.ny.gov/f96dir.htm. For questions, contact: Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: Deborah.Swatling@dps.ny.gov

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

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

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

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

(14-E-0005SP1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

To Establish a Remedy to Provide Safe, Adequate, and Reliable Service to Customers of Scott Acres Water Co., Inc.

I.D. No. PSC-05-14-00014-P

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

Proposed Action: The Commission is considering a petition by the Scott Acres Water Users Association, Inc. to be appointed Temporary Operator of the abandoned Scott Acres Water Co., Inc. and to charge a monthly flat rate of $60.00 to be billed in advance.

Statutory authority: Public Service Law, sections 4(1), 5(1)(f), 89-b(1), 89-c(1), (10) and 112-a

Subject: To establish a remedy to provide safe, adequate, and reliable service to customers of Scott Acres Water Co., Inc.

Purpose: Assuring the provision of safe, adequate, and reliable service to the customers of Scott Acres Water Co., Inc.

Substance of proposed rule: The Commission is considering whether to approve, modify or reject, in whole or in part, a petition by the Scott Acres Water Users Association, Inc. to be appointed Temporary Operator of the abandoned Scott Acres Water Co., Inc. and to charge a monthly flat rate of $60.00 to be billed in advance.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website http://www.dps.ny.gov/f96dir.htm. For questions, contact: Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: Deborah.Swatling@dps.ny.gov

Data, views or arguments may be submitted to: Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 408-1978, email: secretary@dps.ny.gov

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

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

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

(14-W-0007SP1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Main Tier of the Renewable Portfolio Standard Program

I.D. No. PSC-05-14-00015-P

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

Proposed Action: Petitioners ask the Commission to change contracting methods for the Main Tier of RPS Program and direct the New York State Energy Research and Development Authority to immediately publish a schedule of RPS Main Tier solicitations.

Statutory authority: Public Service Law, sections 4(1), 5(2) and 66(1)

Subject: Main Tier of the Renewable Portfolio Standard Program.

Purpose: To provide NYSERDA flexibility in making changes to the Main Tier solicitations and to publish a schedule of solicitations.

Substance of proposed rule: The Commission is considering whether to adopt, modify, or reject, in whole or in part, the request of Pace Energy and Climate Center, Alliance for Clean Energy New York, Sierra Club, Natural Resources Defense Council, Renewable Energy Long Island, New York League of Conservation Voters, New York Public Interest Research Group, Vote Solar Initiative, Citizens Campaign for the Environment, and Environmental Advocates of New York (Joint Petitioners) to change the rules of the Main Tier program under the Renewable Portfolio Standard (RPS). In particular, the Commission is considering the Joint Petitioners' "Petition For An Order Modifying Main Tier Solicitation Process And Resolving Main Tier Issues" dated December 16, 2013, which proposes, among other things, that Staff and NYSERDA evaluate alternative incentive structures and contracting terms for procuring Main Tier renewable resources in lieu of the existing 10 year attribute contracts. Further, the petition requests that the Commission direct NYSERDA to publish a minimum schedule of three Main Tier solicitations between now and the end of 2015 with a new incentive structure. The Commission may resolve the petition and may make other changes to the RPS program.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website http://www.dps.ny.gov/f96dir.htm. For questions, contact: Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: Deborah.Swatling@dps.ny.gov

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

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

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

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

(03-E-0188SP45)

Workers' Compensation Board

EMERGENCY RULE MAKING

Methodology for Determining Annual Assessments

I.D. No. WCB-05-14-00004-E
Filing No. 69
Filing Date: 2014-01-17
Effective Date: 2014-01-17

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

Action taken: Addition of Part 500 to Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 117 and 151

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

Specific reasons underlying the finding of necessity: This amendment is adopted as an emergency measure because time is of the essence. The Board is required, as specified in the statute cited below to establish an assessment rate by November 1, 2013 and assess that rate by January 1, 2014. Specifically, Section 151 (2) WCL states:

"on the first day of November two thousand thirteen, and annually thereafter, the chair shall establish an assessment rate for all affected employers in the state of New York in an amount expected to be sufficient to produce assessment receipts at least sufficient to fund all estimated annual expense pursuant to subdivision one of this section except those expenses for which an assessment is authorized for self- insurance pursuant to subdivision five of section fifty of this chapter. Such rate shall be assessed effective the first of January of the succeeding year and shall be based on a single methodology determined by the chair."

The assessment rate funds statutorily required programs such as the Board's administrative expenses (151 WCL), the liabilities of the Special Disability Fund (15-8 WCL), the Fund for Reopened Cases (25-a WCL) and the Special Fund for Disability Benefits (214 WCL).

Accordingly, emergency adoption of this rule is necessary.

Subject: Methodology for determining annual Assessments.

Purpose: Annual assessments to fund administrative costs and special fund payments provided for in the Workers' Compensation Law (WCL).

Substance of emergency rule: The proposed regulation adds new Sections 500.00-500.12 to comply with Chapter 57 of the Laws of 2013 which requires the Board to streamline the manner in which it collects its administrative and special fund assessments to one that will be consistent among the various categories of payers and will be based upon active coverage.

Section 500.2 states that the assessment rate will be established by November 1st annually and apply to policies effective on or before January 1st of the next calendar year.

Section 500.3 establishes that the rate will apply to standard premium and defines the expenses to be covered by the assessment rate.

Section 500.4 states that the rate established by November 1st of each year for the succeeding calendar year shall be applied to a base of standard premium as defined below.

Standard premium is defined as follows:

(a) Carriers and State Insurance Fund – For employers securing workers' compensation coverage via a policy issued either by an authorized carrier or the State Insurance Fund, standard premium shall mean the full annual value of premiums booked for each policy written or renewed during a specific reporting period as determined on forms prescribed by the Chair.

(b) Private and Public Self-Insured Employers – Standard written premium for self-insured employers shall be determined by applying payroll by classification codes to applicable loss cost rates. Loss cost rates for self-insured employers shall be furnished by the Chair based, in whole or in part at the discretion of the Chair, upon comparable rates applicable to carrier policies which may be adjusted for administrative expenses. To the extent there are no corresponding class codes for one or more classifications of payroll, the Chair shall establish an equivalent rate.

Estimated statewide premiums shall be determined by combining the standard premium for all employers.

Section 500.5 establishes that the assessment rate shall be a percentage of standard premiums and calculated as follows:

Total estimated annual expenses as defined in 500.3, Divided By, Total estimated statewide premiums as defined in 500.4.

The estimated statewide premiums may, where appropriate, reflect projected changes in overall premium levels that may result from loss cost rate changes approved by the Department of Financial Services.

Section 500.6 establishes that rate adjustments will be addressed as follows:

(a) If the rate established for any given year results in the collection of assessments which exceed the amounts described herein, the assessment rate for the next calendar year shall be reduced accordingly. However, the assessment rate for each calendar year shall ensure that the clearing account described in section 500.7 maintains a balance of at least ten percent of the annual projected assessments.

(b) If it appears that the rate established for any given year will not produce assessment revenue sufficient to meet all estimated annual expenses as described herein, the Board may make adjustments to the existing published rate prior to the beginning of the next calendar year. Any such mid-year rate adjustments must be published at least 45 days prior to becoming effective and will apply to policies with effective dates between the effective date of the adjusted rate through December 31 of that calendar year or until the Board issues a new rate, whichever is later.

Section 500.7 establishes that all assessment monies received shall first be deposited into a clearing account established for the purpose of receiving assessments. Assessment revenue will be applied pursuant to WCL § 151.8 in accordance with each then applicable financing agreement prior to application for any other purpose. Once any and all amounts required by applicable financing agreements have been met for the year, assessments will then be applied from the clearing account, at the discretion of the Chair, to the administrative and special fund expenses described herein.

Section 500.8 establishes that assessment should be remitted as follows:

(a) The assessment rate established by the Board shall apply to all employers required to secure compensation for their employees.

(b) Until such time as the Board can establish a direct employer payment process, the remittance to the Board of all required assessments shall be as follows:

1. For those employers obtaining coverage: (a) through a policy with the State Insurance Fund; (b) through a policy with an authorized carrier; (c) through a county self-insurance plan under Article V of the WCL; or (d) through a private or public group self-insurer; such assessment amounts shall be collected from the employer and remitted to the Board by the State Insurance Fund, carrier, county plan, or self-insured group. The State Insurance Fund, carrier, county plan, or self-insured group shall complete the reports identified in section 500.9 herein, apply the applicable assessment rate as established by the Board and timely remit both the report and the corresponding payment to the Board on the schedule set forth in paragraph (c) below.

2. For those private or public employers that self-insure individually, said employers shall pay assessment amounts directly to the Board. Such employers shall complete the report identified in section 500.9 herein, apply the applicable assessment rate as established by the Board and, timely remit both the report and the corresponding payment to the Board on the schedule set forth in paragraph (c) below.

(c) Both the report identified in section 500.9 below and the required assessment payment shall be remitted to the Board in accordance with the following schedule:

Assessments related to the quarter ending March 31 postmarked on or before April 30.

Assessments related to the quarter ending June 30 postmarked on or before July 31.

Assessments related to the quarter ending September 30 postmarked on or before October 31.

Assessment related to the quarter ending December 31 postmarked on or before January 31.

(d) If the above cited due dates fall on a weekend or holiday the remittances shall be due the next following business day.

(e) In addition at any time prior to March 31, June 30, September 30, or December 31, the Board may identify any employer that has refused or neglected to pay assessments pursuant to WCL § 50(3-a)(7)(b). In such instance the Board shall calculate a charge to be imposed on such employer in addition to the assessment required herein. Such charge shall be a percentage of the standard premium as defined herein and shall range from between 10 and 30 percent based upon: 1) the length of time the employer has been delinquent in its WCL § 50(3-a)(7)(b) assessment obligations; 2) the amount of the WCL § 50(3-a)(7)(b) assessment delinquency; and 3) the amount of the insolvent group self-insurance trust's obligations that remain unmet at the time of the calculation of the surcharge, the Board shall inform the employer's current provider of coverage of the neglect or delinquency. The employer's current provider of coverage shall collect and remit such additional surcharge in the manner provided for above. All monies recovered from the payment of such charge shall be credited to: 1) the employer's unmet obligations under the WCL; and 2) the group self-insurance Trusts' unmet obligations under the WCL.

Section 500-9 describes the required reports:

(a) The assessment payment remitted quarterly shall be accompanied by reports prescribed by the Chair. Depending upon whether the remitter is a carrier, the State Insurance Fund, private or public self-insured employer, or private or public group self-insured employer, these reports may contain but not be limited to: written premium; total payroll; payroll by classification; adjustments from prior periods; etc. Annual reports prescribed by the Chair may also be required.

(b) All such prescribed reports will require an attestation by an authorized representative that all information is true, correct and complete. A payer that knowingly makes a material misrepresentation of information related to assessments shall be guilty of a Class E Felony.

(c) To the extent that a payer is also required to report the information requested by this section, or substantially similar values, to other governmental entities including but not limited to state and federal agencies, then the information reported by the payer to the Board shall be consistent with the payer's reporting to other entities. To the extent that the payer's reporting to the Board is materially inconsistent with the payer's reports to other governmental entities, then the payer shall disclose such inconsistency in the reports submitted to the Board and supply an explanation for such inconsistency.

Section 500.10 establishes that, in the event of a carrier, the State Insurance Fund, a private or public self-insured employer, or a private or public group self-insured employer's failure to remit assessment payments and reports in accordance with the requirements contained herein the Board may undertake any or all of the following collection activities with respect to the assessments:

(a) Refer the matter to the Office of the Attorney General for commencement of a collection action; assessment.

(b) Withhold any and all payments to the carrier, the State Insurance Fund, private or public self-insured employer or private or public group self-insured employer including but not limited to special fund reimbursements, until such time as all assessments have been paid in full;

(c) The failure of a private or public self-insured employer or private or public group self-insured employer to timely remit assessments and required reports shall constitute good cause for the Board to revoke said self-insurers self-insured status.

In the event that a carrier, the State Insurance Fund, a private or public self-insured employer, or a private or public group self-insured employer has underpaid an assessment as the result of inaccurate reporting, such payer shall pay all overdue assessments in full within 30 days of notification by the Board and may be subject to interest at a rate of 9% annually on the unpaid amount. Further, in the event that it is determined that the payer knew or should have known that the reported information was inaccurate an additional penalty of up to 20% of the unpaid amount may be imposed by the Board against such carrier, the State Insurance Fund, private or public self-insured employers.

Section 500.11 establishes that on an annual basis in conjunction with the November 1 publication of the assessment rate, the Board will prepare a report which supports the assessment rate established for policies effective in the succeeding calendar year. Such report shall also be prepared in the event an assessment rate modification is required pursuant to Section 500.6. Such report will include a summary of the projections or estimates made in the development of the assessment rate including the expenses covered by the rate and underlying assessment base.

Section 500.12 establishes that the Chair may conduct periodic audits on employers, self-insurers, carriers and the State Insurance Fund concerning any information or payment related to assessments.

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires April 16, 2014.

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

Regulatory Impact Statement

1. Statutory authority:

Workers' Compensation Law Section 117(1) authorizes the Chair to make reasonable regulations consistent with the provisions of the Workers' Compensation Law and the Labor Law. Chapter 57 of the Laws of 2013 amends several sections of the WCL including section 151 which is repealed and a new section added.

Section 151 WCL directs the Board to promulgate an assessment rate by November 1, 2013 and assess that rate by January 1, 2014. Specifically, Section 151 (2) WCL states:

"on the first day of November two thousand thirteen, and annually thereafter, the chair shall establish an assessment rate for all affected employers in the state of New York in an amount expected to be sufficient to produce assessment receipts at least sufficient to fund all estimated annual expense pursuant to subdivision one of this section except those expenses for which an assessment is authorized for self- insurance pursuant to subdivision five of section fifty of this chapter. Such rate shall be assessed effective the first of January of the succeeding year and shall be based on a single methodology determined by the chair." The assessment rate funds statutorily required programs such as the Board's administrative expenses (151 WCL), the liabilities of the Special Disability Fund (15-8 WCL), the Fund for Reopened Cases (25-a WCL) and the Special Fund for Disability Benefits (214 WCL).

2. Legislative objectives:

The legislation enacted sweeping reforms to the manner in which the WCB collects its assessments.

The WCB currently issues bills for the liabilities associated with each of the assessments noted above which, in total, are approximately $1.2 billion for 2013. The new process will eliminate the need for the WCB to issue bills for these assessments and instead move towards a "pass through" assessment whereby employers ultimately remit their share of the assessment directly to the WCB. As written, the legislation envisions an employer based assessment process. Ultimately, it is expected that the assessments will be collected directly from employers. However, it is not feasible to go directly from a carrier based to employer based assessment, particularly given the aggressive timeframes imposed by the legislation which mandate a new process by January 1, 2014.

A transitional period is anticipated in the legislation as evidenced by the language which states that until such time as the WCB establishes a direct employer payment process, assessments shall be remitted to the WCB by carriers, the SIF, county plans and groups. Individual private and public self-insurers shall continue to pay assessments directly. Finally, the legislation also allows the WCB to enter into an agreement with the Dormitory Authority and issue up to $900 million in bonds to address unmet self-insured obligations. The debt service costs of any such bonds issued would be included in the annual rate. The debt service for these bonds as well as the WAMO bonds would take priority over the administrative expenses, special funds and interdepartmental funds.

3. Needs and benefits:

The new legislation and supporting regulations will address many issues with the current process. Specifically:

- Currently, a disconnect exists between the amounts that carriers collect from their policy holders and the amounts that the WCB bills those carriers. The new rule will result in the WCB no longer issuing assessment bills and instead promulgating a rate that will fund the required programs. Carriers will collect the amount driven by the rate from their policyholders and remit that amount to the Board. Eventually, the employers will remit to the Board directly.
- The base factors currently used to calculate the various payers proportionate share of assessments are not currently audited and/or verified. The new process will include mechanisms to audit the data including verification of amounts included on other State mandated forms like the NYS-45 required by the Departments of Tax and Finance and Labor.
- The current process of assessments being based on paid indemnity for certain payers requires the accrual and funding of significant long term liabilities. This requires carriers, SIF and self-insured's to hold aside monies to pay assessment liabilities that they will not have to actually remit until several years later.
- The current process is administratively onerous and lacks transparency for both the WCB and the various payers. The new process will result in more verification and audit of the data submitted.
- Each carrier, SIF, private and public self-insurer is receiving as many as 23 invoices from the WCB annually. Also, the data collection used to apportion the different assessments is manual and paper-based. The system used to calculate and bill the assessments is a custom module to the financial system used by the WCB that is difficult to maintain, particularly when upgrades and/or legislative changes are necessary. The WCB will no longer issue invoices and eventually a system will be implemented to allow payers to view and pay their assessments electronically.

4. Costs:

This proposal will not impose any new costs on the regulated parties, the Board, the State or local governments since all of these entities are currently required to pay assessments. The total projected need for 2014 of $893 million is significantly less than the average amounts billed for assessments for the past three years of more than $1 billion. The Fund for Reopened Cases was closed to new cases and for the short term will not be included in the assessment rate because the fund balance will support the claims. Additionally, roughly $7.4 million was billed on average related to the administration of the Disability Benefits program; these amounts will be rolled into the workers' compensation assessment rate. Although many of the payers of the DB assessment will still be paying WCB assessments (as they also write workers' compensation or have an active self-insurance program) they will no longer be paying a separate assessment related to DB. This adjustment adds to the administrative efficiency of the new

method as it is not cost beneficial to have a separate rate and/or assessment for less than 1% of the overall amounts collected in a given year. Collectively, it is estimated that the municipal self-insurers will pay $90 million less in assessments for 2014. However, the impact on the specific payers will be determined based on actual payroll.

For policies effective for calendar year 2014, the rate will be established as a percentage of standard premiums as follows: Total Estimated Annual Expenses Divided by Total Estimated Statewide Premiums. The estimated annual expenses to be covered by the rate total $893 million. Statewide standard premiums are projected to be $6.4 billion. Accordingly, the assessment rate for 2014 will be set at 13.8%.

5. Local government mandates: Since local governments have always been required to pay WCB assessments, this law does not impose any new requirements on these entities.

6. Paperwork: This proposed rule modifies the reporting requirements for municipalities, but does not impose additional reporting requirements. Eventually, it is the Board's intent to streamline the reporting process and allow entities to report and pay their assessments electronically, but this is not an enhancement we could offer at the outset given the abbreviated timeframes for implementation.

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

8. Alternatives: The legislation directed the Board to promulgate an assessment rate and rules and regulations to establish the process by which carriers, self-insured's, SIF and the political subdivisions would pay the assessments to the Board. Because of the short timeframes to implement a new assessment process, and the ultimate goal of transitioning to an employer based payment stream, the only practical basis on which to calculate the assessment in the short term is premium. Premium information is readily available for the vast majority (more than 80%) of employers that obtain a policy from a carrier or the SIF. A standard premium equivalent can be determined for the self-insured employers (both private and municipal) thus providing a similar basis for all employers, regardless of what type of coverage they maintain.

9. Federal standards: There are no federal standards applicable to this proposed rule.

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

Regulatory Flexibility Analysis

1. Effect of rule:

Pursuant to Section 50 WCL, most businesses and local governments are required to carry workers' compensation coverage for their employees. They may obtain a policy from the State Insurance Fund, apply to, and become self-insured or obtain a policy from an insurance carrier licensed to write workers' compensation in New York. All entities that carry workers compensation are required to pay assessments to the Workers Compensation Board. There are approximately 1,900 payers in New York currently paying assessments including the carriers, SIF, private and public self-insurers. Most small businesses and local governments are currently paying WCB assessments. Depending on how they secure their workers compensation will determine the impact of the apportionment methodology and new rate on their assessment amounts. However, virtually all categories of payers will see a net decrease in their assessments in 2014 whether they are carrier covered or self- insured.

2. Compliance requirements:

There is minimal impact on local governments and small businesses to comply with this rule.

3. Professional services:

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

4. Compliance costs:

This proposal will not impose any compliance costs on small business or local governments.

5. Economic and technological feasibility:

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

6. Minimizing adverse impact: Because the net result of the change in the assessment methodology, the proposed rule would be beneficial to local governments and small businesses. This rule provides only a benefit to small businesses and local governments.

7. Small business and local government participation:

The Board received input from various stakeholder groups which provide coverage for many small businesses and local governments. A decrease in assessments was recognized as a major benefit to these groups.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

This rule applies to all carriers, the State Insurance Fund, self-insured employers and political subdivisions in all areas of the state.

2. Reporting, recordkeeping and other compliance requirements:

This rule applies to all carriers, the State Insurance Fund, self-insured employers and political subdivisions in all areas of the state. Impact on reporting and compliance for all entities is minimal.

3. Costs:

This proposal will not impose any compliance costs on rural areas.

4. Minimizing adverse impact:

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

5. Rural area participation: The Board consulted with carriers and some municipalities on the rule making process.

Job Impact Statement

The proposed regulation will not have an adverse impact on jobs. The regulation merely changes the apportionment and methodology for entities to calculate and pay their required assessments to the Workers' Compensation Board. These regulations ultimately benefit the participants to the workers' compensation system by streamlining the assessment process and reducing their liability in 2014.