

# RULE MAKING ACTIVITIES

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

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

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

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## New York State Gaming Commission

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

#### Implementation of Rules Pertaining to Sanctions for the Unlawful Acceptance of Public Assistance Benefits at Certain Facilities

**I.D. No.** SGC-24-14-00001-EP

**Filing No.** 448

**Filing Date:** 2014-05-29

**Effective Date:** 2014-05-29

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

**Proposed Action:** Amendment of sections 4009.3, 4122.3, 4500.9, 5113.1, 5113.5, 5113.7 and 5113.8; and addition of sections 4404.18, 4822.25 and 5117.7 to Title 9 NYCRR.

**Statutory authority:** L. 2014, ch. 58, part F, section 3; Racing, Pari-Mutuel Wagering and Breeding Law, sections 104(1), (19), 235(1), 310 and 520(1); Executive Law, section 435(1)(a) and (d); and Tax Law, sections 1604 and 1617-a(a)

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

**Specific reasons underlying the finding of necessity:** The Commission has determined that immediate adoption of these rules is necessary for the preservation of the general welfare. Part F of Chapter 58 of the Laws of 2014 takes effect on May 30, 2014 and restricts the acceptance of public

assistance benefits in certain facilities, including horse racetracks, off-track horse betting facilities, video lottery facilities and commercial bingo establishments. Section 3 of Part F provides explicitly that “the New York state gaming commission shall be authorized to promulgate regulations on an emergency basis and immediately take such other actions as necessary to implement the provisions of this act.”

The immediate adoption of these rules is necessary to implement sanctions for violations of the law as of the date the law takes effect.

**Subject:** Implementation of rules pertaining to sanctions for the unlawful acceptance of public assistance benefits at certain facilities.

**Purpose:** To implement the restrictions and prohibitions contained in part F of chapter 58 of the Laws of 2014.

**Text of emergency/proposed rule:** Section 4009.3 of Part 4009 of Subchapter A of Chapter I of Subtitle T of Title 9, Executive, of the NYCRR is amended to classify the existing text as subdivision (a) and add a new subdivision (b) as follows:

#### PART 4009

##### Pari-Mutuel Operation

§ 4009.3. Sale, exchange of tickets.

(a) No pari-mutuel tickets shall be sold except at regular ticket windows, properly designated by signs, except that tickets may be issued by automated ticket machines or bets may be sold by designated couriers according to procedures approved by the commission. No such tickets shall be exchanged.

(b) Any track conducting pari-mutuel wagering that cashes or accepts any public assistance check or electronic benefit transfer device issued by a public welfare official or department, or agent thereof, as and for public assistance, as proscribed by section 151 of the Social Services Law, shall be disciplined by the commission. Such discipline may include one or more of the following actions:

(1) revocation of a license;

(2) suspension of a license;

(3) a fine; or

(4) issuance of a public or private letter of reprimand to be placed in the file of the licensee.

Section 4122.3 of Part 4122 of Subchapter B of Chapter I of Subtitle T of Title 9, Executive, of the NYCRR is amended to add a new subdivision (d) as follows:

#### PART 4122

##### Pari-Mutuel Wagering

§ 4122.3. Sale of pari-mutuel tickets.

(a) Only one method of selling pari-mutuel tickets shall be used for the sale of tickets on individual heats or races during any racing day.

(b) No pari-mutuel tickets shall be sold except through regular ticket windows properly designated by signs showing type of tickets sold at that particular window, except that tickets may be issued by automated ticket machines, or bets may be sold by designated couriers, according to procedures approved by the commission.

(c) No pari-mutuel selling windows shall be closed nor shall the sale of pari-mutuel tickets be limited or restricted in any way for the purpose of impeding public participation in any wagering pool.

(d) Any track conducting pari-mutuel wagering that cashes or accepts any public assistance check or electronic benefit transfer device issued by a public welfare official or department, or agent thereof, as and for public assistance, as proscribed by section 151 of the Social Services Law, shall be disciplined by the commission. Such discipline may include one or more of the following actions:

(1) revocation of a license;

(2) suspension of a license;

(3) a fine; or

(4) issuance of a public or private letter of reprimand to be placed in the file of the licensee.

Part 4404 of Subchapter F of Chapter I of Subtitle T of Title 9, Executive, of the NYCRR is amended to add a new section 4404.18 as follows:

PART 4404

Operation of a Corporation

§ 4404.18. *Restrictions on acceptance of public assistance.*

Any facility conducting off-track pari-mutuel wagering that cashes or accepts any public assistance check or electronic benefit transfer device issued by a public welfare official or department, or agent thereof, as and for public assistance, as proscribed by section 151 of the Social Services Law, shall be disciplined by the commission. Such discipline may include one or more of the following actions:

- (a) revocation of a license;
- (b) suspension of a license;
- (c) a fine; or
- (d) issuance of a public or private letter of reprimand to be placed in the file of the licensee.

Subdivision (c) of section 4500.9 of Part 4500 of Subchapter G of Chapter I of Subtitle T of Title 9, Executive, of the NYCRR is amended to add a new paragraph (6) as follows:

PART 4500

Internet and Telephone Account Wagering

§ 4500.9. Conduct of wagering.

(a) Account wagers shall be transacted through only an account wagering center.

(b) The authorized pari-mutuel wagering entity may accept account wagers via any wired or wireless communications device, including but not limited to wireline telephones, wireless telephones, and the internet subject to applicable laws, rules and the approved plan of operation.

(c) The authorized pari-mutuel wagering entity shall:

(1) require the account holder to provide the account wagering identification number and PIN before an account wager is accepted.

(2) confirm all account wagering transactions before acceptance of an account wager.

(3) verify that the account has sufficient funds to pay for the wager. No wager or portion of wager shall be accepted if the account fails to have sufficient funds to cover the wager.

(4) debit the total amount of the wager from the account immediately after verifying wager.

(5) not accept any account wager if the recording devices are inoperable; and

(6) not cash or accept any public assistance check or electronic benefit transfer device issued by a public welfare official or department, or agent thereof, as and for public assistance, as proscribed by section 151 of the Social Services Law. Any entity that violates this paragraph shall be disciplined by the commission. Such discipline may include one or more of the following actions:

- (i) revocation of a license;
- (ii) suspension of a license;
- (iii) a fine; or
- (iv) issuance of a public or private letter of reprimand to be placed in the file of the licensee.

Part 4822 of Subchapter E of Chapter II of Subtitle T of Title 9, Executive, of the NYCRR is amended to add a new section 4822.25 as follows:

PART 4822

General Conduct of Bingo in Leased Premises

§ 4822.25. *Restrictions on acceptance of public assistance.*

Any organization conducting bingo in a leased premises, or any lessor of premises for the conduct of bingo, that cashes or accepts any public assistance check or electronic benefit transfer device issued by a public welfare official or department, or agent thereof, as and for public assistance, as proscribed by section 151 of the Social Services Law, shall be disciplined by the commission. Such discipline may include one or more of the following actions:

- (a) revocation of a license;
- (b) suspension of a license;
- (c) a fine; or
- (d) issuance of a public or private letter of reprimand to be placed in the file of the licensee.

Sections 5113.1, 5113.5, 5113.7 and 5113.8 of Part 5113 and the title of Part 5113 of Subchapter A of Chapter IV of Subtitle T of Title 9, Executive, of the NYCRR are amended as follows:

PART 5113

Suspensions, [and] Revocations and Other Discipline

§ 5113.1. Suspension and revocation of a license [issued pursuant to the video lottery gaming law] or discipline of a licensee.

(a) Acceptance of a video lottery gaming license or renewal thereof by a licensee constitutes an agreement on the part of the licensee to be bound by these regulations and the policies and procedures of the commission. It is the affirmative responsibility of all licensees to keep informed of the content of all such regulations, policies and procedures and amendments thereto. Any licensee, other than a natural person, may be held accountable for the violations of such licensee's principals or key employees. The commission may suspend or revoke any license issued by the commission for any violation of these regulations.

(b) At the discretion of the commission, a license issued under these regulations may be subjected to suspension or revocation, [or] the renewal of such license may be rejected[,] or a licensee may be fined for any of the following reasons, or any combination thereof:

(1) Any violation of any provision of such license, the act, other applicable law or these regulations;

(2) Failure to comply with instructions of the commission concerning a licensed activity;

(3) Conviction of any:

(i) Felony offense, as such term as defined in [State] Penal Law Section 10.00(5), or an equivalent offense committed in another jurisdiction;

(ii) A misdemeanor related to gambling, gaming, bribery, fraud, or any other offense prejudicial to public confidence in the State lottery;

(4) Failure to file any returns or reports or to keep records or to pay any fee or submit revenue as may be required;

(5) Fraud, deceit, misrepresentation or conduct prejudicial to public confidence in the commission;

(6) Failure to furnish a surety or other bond in such amount as may be required by the commission;

(7) A material change since issuance of the license with respect to any matter required to be considered by the commission;

(8) [Violation of the provisions of the Act and/or these regulations;]

[(9)] Whenever the commission finds that the licensee's experience, character, and general fitness are such that participation in video lottery gaming is inconsistent with the public interest or convenience or for any other reason within the discretion of the commission;

[(10)](9) The failure to notify the commission, in writing, within a reasonable time of any arrest for a misdemeanor or a felony, indictment, or service of a summons, or conviction for any felony whether within or without the State, or within or without the United States, occurring during the term of the license or the renewal thereof.

(c) Prior to commencing a disciplinary proceeding, each licensee shall have the opportunity to correct and/or explain the issue raised by the commission.

(d) Upon suspension or revocation of any license issued pursuant to these regulations, other than a video lottery gaming agent license, the licensee shall surrender such license and any badges for the video lottery gaming facility to the commission. Such licensee shall be banned from entering the video lottery gaming facility for a period of one year or until the license is reinstated, whichever first occurs.

[(d)](e) Upon termination of a video lottery gaming agent's license for any reason, the video lottery gaming agent shall:

(1) Go to such agent's bank on a date designated by the commission for the purpose of rendering a final video lottery gaming accounting of any accounts established by these regulations;

(2) Surrender of the video lottery gaming agent's license and other material provided by the commission.

(3) Upon failure of any video lottery gaming agent to settle accounts on or before the designated date, the commission may exercise such enforcement powers as may be provided for by law. The video lottery gaming agent will provide unrestricted entry onto such agent's premises for the purpose of the removal of all video lottery gaming equipment and incidentals.

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§ 5113.5. Penalties imposed by commission prior to reissuance of license.

The commission may require a person or business entity who is subjected to disciplinary proceedings, or who formerly held a license pursuant to these regulations, to meet certain conditions before reissuing a license to that person or business entity, including but not limited to the following:

(a) restitution of money;

(b) restitution of property;

(c) suspension or revocation of the payment to the video lottery gaming agent of any portion of the video lottery gaming marketing allowance;

(d) making periodic reports to the commission as required; and  
 (e) payment of outstanding fines imposed by the commission.  
 Any or all of the conditions imposed by the commission pursuant to this Part may be imposed jointly and/or severally.

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§ 5113.7. Disciplinary hearings.  
 Any disciplinary hearing commenced pursuant to these regulations shall be conducted substantially in accordance with the provisions of section 5000.[7]6 of this subtitle. In the event of a conflict between that section and these regulations, these regulations shall control.

§ 5113.8. Final action by commission.  
 After notice and hearing, in the event the commission finds insufficient evidence to support the violations claimed, the commission may find the licensee not guilty of any of the grounds alleged for disciplinary action; in which event the disciplinary proceedings shall be terminated. The commission may, however, find the licensee guilty by a preponderance of the evidence of some or all of the grounds alleged for disciplinary action[.], in which event the commission may take one or more of the following actions:  
 (a) revoke the license; [and/or]  
 (b) suspend the license for a period of time not to exceed six months; [and/or]  
 (c) fine the licensee; or  
 (d) issue a public or private letter of reprimand to be placed in the file of the licensee.

This section does not prevent the commission from compromising or settling at any time a formal hearing. Written findings of fact, conclusions of law, and an order must be entered before any decision of the commission shall be considered final.

PART 5117

[Underage Gaming; Alcoholic Beverages; Firearms; Responsible Gaming; Undesirable Persons] Restrictions at Facilities

§ 5117.7. Restrictions on acceptance of public assistance.  
 Any video lottery gaming agent that cashes or accepts any public assistance check or electronic benefit transfer device issued by a public welfare official or department, or agent thereof, as and for public assistance, as proscribed by section 151 of the Social Services Law, shall be disciplined by the commission pursuant to Part 5113 of this Subchapter.

**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 August 26, 2014.

**Text of rule and any required statements and analyses may be obtained from:** Kristen Buckley, New York State Gaming Commission, 1 Broadway Center, PO Box 7500, Schenectady, New York 12301-7500, (518) 388-3407, email: gamingrules@gaming.ny.gov

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

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

**Regulatory Impact Statement**

1. STATUTORY AUTHORITY: Section 3 of Part F of Chapter 58 of the Laws of 2014 authorizes the Gaming Commission to promulgate regulations on an emergency basis and immediately take such other actions as necessary to implement Part F of Chapter 58 of the Laws of 2014.

Racing, Pari-Mutuel Wagering and Breeding Law (“Racing Law”) section 104(1) gives the Gaming Commission general jurisdiction over all gaming activities in the State.

Racing Law section 104(19) authorizes the Gaming Commission to promulgate any rules and regulations that it deems necessary to carry out its responsibilities.

Racing Law section 235(1) authorizes the Gaming Commission to make rules regulating the conduct of pari-mutuel betting.

Racing Law section 310 authorizes the Gaming Commission to suspend or revoke licenses granted by it and to impose monetary fines upon those participating in any way in any harness race meet at which pari-mutuel betting is conducted.

Racing Law section 520(1) gives the Gaming Commission general jurisdiction over the operation of all off-track betting facilities within the State and authorizes the Gaming Commission to issue rules and regulations in regard to off-track betting facilities.

Executive Law sections 435(1)(a) and (d) gives the Gaming Commission the authority to supervise the administration of the bingo licensing law, to adopt rules and regulations governing the conduct of bingo and to suspend or revoke licenses relating to the conduct of bingo.

Tax Law section 1604 authorizes the Gaming Commission to operate the lottery and to promulgate rules and regulations governing the operation thereof.

Tax Law section 1617-a (a) authorizes the Gaming Commission to

license the operation of video lottery gaming pursuant to the rules and regulations of the Gaming Commission.

2. LEGISLATIVE OBJECTIVES: The federal Middle Class Tax Relief and Job Creation Act of 2012 (Pub. L. 112–96, 126 Stat. 156, enacted February 22, 2012) requires states to put in place policies and procedures to prevent federal public assistance benefits from being used in any electronic benefits transaction at designated types of businesses such as horse racetracks, off-track horse betting facilities, video lottery facilities and commercial bingo establishments. In response to this requirement, New York State enacted Part F of Chapter 58 of the Laws of 2014, which amends Social Services Law sections 21-a and 151 to restrict the acceptance of federal public assistance benefits distributed by the State at such locations. The legislation becomes effective May 30, 2014. This emergency rule making carries out the legislative objectives of the above-referenced laws by implementing the requirements of Part F of Chapter 58 of the Laws of 2014 as such requirements pertain to facilities regulated by the Gaming Commission.

3. NEEDS AND BENEFITS: This emergency rule making is necessary to enable the Gaming Commission to enforce Part F of Chapter 58 of the Laws of 2014, as directed by the Legislature. The legislation restricts at various facilities the acceptance of federal public assistance benefits distributed by the State and sets forth the sanctions that regulated parties will face if they do not comply. This rule making implements the legislation by establishing a range of possible sanctions for regulated parties that accept federal public assistance benefits in violation of Social Services Law section 151. Such sanctions may include license revocation, license suspension, fines or written reprimands.

The change to section 4009.3 restricts the acceptance of federal public assistance benefits for pari-mutuel wagering at thoroughbred racetracks and outlines potential sanctions. The change to section 4122.3 restricts the acceptance of federal public assistance benefits for pari-mutuel wagering at harness racetracks and outlines potential sanctions. The change to section 4500.9 restricts the acceptance of federal public assistance benefits for internet and telephone wagering and outlines potential sanctions. The addition of section 4404.18 restricts the acceptance of federal public assistance benefits for off-track pari-mutuel wagering and outlines potential sanctions. The addition of section 4822.25 restricts the acceptance of federal public assistance benefits for commercial bingo establishments and outlines potential sanctions.

The changes to sections 5113.1, 5113.5 and 5113.8 make clear that a licensee can face license sanctions or be fined for violations of other applicable laws such as Social Service Law section 151. The change to section 5113.7 corrects an erroneous cross-reference to the section of the Gaming Commission’s regulations governing the conduct of license suspension and revocation hearings. The addition of section 5117.7 restricts the acceptance of federal public assistance benefits at video lottery facilities and outlines potential sanctions. These changes and additions are necessary to enforce Part F of Chapter 58 of the Laws of 2014 and to make clear to regulated parties their obligations under the new law.

4. COSTS:

(a) Costs to the regulated parties for the implementation of and continuing compliance with the rule: There are no costs to regulated parties who comply with the law. Regulated parties that have not already done so may implement electronic benefit transfer blocking technology at their facilities to assist their compliance with statute. Regulated parties that do not comply with the law will face sanctions that may include fines.

(b) Costs to the regulating agency, the State, and local government: The rules will impose some costs to the Commission to sanction parties that violate the law and to conduct hearings, where necessary. The rules will not impose any additional costs on local government, except that regional off-track betting corporations may implement electronic benefit transfer technology at their facilities to assist their compliance with statute.

(c) The information, including the source or sources of such information, and methodology upon which the cost analysis is based: The cost estimates are based on the Gaming Commission’s experience regulating racing and gaming activities within the State.

5. PAPERWORK: The rules are not expected to impose any significant paperwork requirements on regulated parties.

6. LOCAL GOVERNMENT: The rules do not impose any mandatory program, service, duty, or responsibility upon local government because compliance with Part F of Chapter 58 of the Laws of 2014 is strictly a matter of State law.

7. DUPLICATION: The rules do not duplicate, overlap or conflict with any existing State or federal requirements. The rules complement federal legislation and rules.

8. ALTERNATIVES: The Gaming Commission is directed to create these rules by Section 3 of Part F of Chapter 58 of the Laws of 2014. Therefore, no alternatives were considered.

9. FEDERAL STANDARDS: The federal Middle Class Tax relief and Job Creation Act of 2012 (Pub. L. 112-96, 126 Stat. 156 enacted February

22, 2012) requires states to restrict the acceptance of public assistance in the manner implemented by Part F of Chapter 58 of the Laws of 2014.

10. **COMPLIANCE SCHEDULE:** The Gaming Commission anticipates that affected parties will be able to achieve compliance with the rules upon their adoption.

#### **Regulatory Flexibility Analysis**

1. **EFFECT OF THE RULE:** The rules will affect any party operating horse racetracks, off-track horse betting facilities, video lottery facilities and commercial bingo establishments. Each must comply with Part F of Chapter 58 of the Laws of 2014, as must all regulated parties governed by such law.

2. **COMPLIANCE REQUIREMENTS:** The rules will not impose any compliance requirements on small business or local governments.

3. **PROFESSIONAL SERVICES:** The rules will not require small businesses or local governments to obtain professional services.

4. **COMPLIANCE COSTS:** Regulated parties that have not already done so may implement electronic benefit transfer blocking technology at their facilities to assist their compliance with statute. Regulated parties that do not comply with the law will face sanctions that may include fines.

5. **ECONOMIC AND TECHNOLOGICAL FEASIBILITY:** The rules will not impose any technological requirements on small businesses or local governments, but regulated parties that have not already done so may implement electronic benefit transfer blocking technology at their facilities to assist their compliance with statute.

6. **MINIMIZING ADVERSE IMPACT:** The rules will not have an adverse economic impact on small businesses or local governments.

7. **SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:** Small business and local government may comment on the proposed rules during the public comment period.

8. In accordance with NYS State Administrative Procedures Act (SAPA) Section 202-b, this rule making does not include a cure period because the Gaming Commission is promulgating this regulation to implement Part F of Chapter 58 of the Laws of 2014.

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

A rural flexibility analysis is not attached because the rules do not impose any adverse impact or reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas. The rules apply uniformly throughout the State to any party operating horse racetracks, off-track horse betting facilities, video lottery facilities and commercial bingo establishments.

#### **Job Impact Statement**

The Gaming Commission has no reason to believe that these rules will have any adverse impact on any jobs or employment opportunities. The rules prescribe sanctions for a regulated party that does not comply with statute. The rules will not impact jobs and employment and a full Job Impact Statement is not necessary.

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## Department of Health

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### NOTICE OF ADOPTION

#### **Hearing Aids**

**I.D. No.** HLT-08-14-00003-A

**Filing No.** 458

**Filing Date:** 2014-06-03

**Effective Date:** 2014-06-18

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

**Action taken:** Amendment of section 505.31(h) of Title 18 NYCRR.

**Statutory authority:** Public Health Law, sections 201 and 206; Social Services Law, sections 363-a and 365-a(2)

**Subject:** Hearing Aids.

**Purpose:** To streamline electronic billing and establish maximum reimbursable amounts based on an average products cost for hearing aids.

**Text or summary was published** in the February 26, 2014 issue of the Register, I.D. No. HLT-08-14-00003-P.

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

**Text of rule and any required statements and analyses may be obtained from:** 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

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

The agency received no public comment.

### NOTICE OF ADOPTION

#### **NYS Medical Indemnity Fund**

**I.D. No.** HLT-12-14-00014-A

**Filing No.** 457

**Filing Date:** 2014-06-03

**Effective Date:** 2014-06-18

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

**Action taken:** Addition of Subpart 69-10 to Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 2999-j

**Subject:** NYS Medical Indemnity Fund.

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

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

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

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

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

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

**Final rule as compared with last published rule:** Nonsubstantive changes were made in sections 69-10.4(a)(9), 69-10.10(b)(5), (e)(2)(iii), (v) and 69-10.18(b).

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

Changes made to the last published rule do not necessitate revision to the previously published RIS, RFA, RAFA and JIS.

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

The agency received no public comment.

# New York State Joint Commission on Public Ethics

## NOTICE OF ADOPTION

### Gift Regulations

**I.D. No.** JPE-33-13-00008-A

**Filing No.** 455

**Filing Date:** 2014-06-03

**Effective Date:** 2014-06-18

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

**Action taken:** Addition of Part 933 to Title 19 NYCRR.

**Statutory authority:** Executive Law, section 94(9)(c) and (17)(a); Public Officers Law, sections 73(5) and 74

**Subject:** Gift regulations.

**Purpose:** To implement the restrictions on the solicitation, acceptance, and/or receipt of gifts contained in the Public Officers Law.

**Text of final rule:** Title 19 NYCRR Part 933 is added to read as follows:

#### CHAPTER XX. JOINT COMMISSION ON PUBLIC ETHICS

#### TITLE 19 NYCRR PART 933: GIFTS (Pursuant to Public Officers Law)

##### 933.1 Purpose and Effect of Regulations.

(a) The purpose of these regulations is to effectuate the statutory provisions of Public Officers Law § 73(5), which incorporates the provisions of Section 1-c(j) of Article 1-A of the Legislative Law.

(b) The effect of these regulations is to supersede prior Advisory Opinions issued by predecessor agencies to the Joint Commission on Public Ethics, including Advisory Opinion Nos. 94-16, 96-28, 97-03, and 08-01 to the extent they are inconsistent with this Part.

##### 933.2 Definitions.

(a) *Bona Fide Charitable Event* shall mean a function the primary purpose of which is to provide financial support to a Charitable Organization.

(b) *Bona Fide Political Event* shall mean a function the primary purpose of which is to provide financial support to Political Organization(s) or Political Candidate(s).

(c) *Charitable Organization* shall mean:

(1) an entity as defined in Executive Law § 171-a(1) that is registered with the Office of the Attorney General, as required by Executive Law § 172, unless otherwise exempted from filing pursuant to Executive Law § 172-a; or

(2) an entity organized and operated exclusively for charitable purposes and qualified as an exempt organization by the United States Department of Treasury under section 501(c)(3) of the Internal Revenue Code; or

(3) a person who requests contributions for the relief of any individual, specified by name at the time of the solicitation, if all of the contributions collected, without any deductions whatsoever, are paid to or for the benefit of the named beneficiary, provided the individual has submitted a form entitled "Charitable Solicitation for the Relief of an Individual" with the Charities Bureau of the Office of Attorney General prior to the event.

(d) *Client* shall mean every person or organization as defined in § 1-c(b) of article 1-A of the Legislative Law.

(e) *Commission* shall mean the New York State Joint Commission on Public Ethics.

(f) *Complimentary Attendance* shall mean the waiver of all or part of a registration or admission fee, or waiver of all or part of a fee or charge for the provision of food, beverages, entertainment, instruction, or materials. "Complimentary Attendance" shall include the awarding of continuing education credits or certification for attendance at a program provided such credits or certification are offered to all attendees. "Complimentary Attendance" shall not include travel, lodging, or items of more than Nominal Value. For a State Officer or Employee (as defined in subdivision (v) of this section), the acceptance of payment or reimbursement for travel or lodging is governed by 19 NYCRR Part 931.

(g) *Covered Person* shall mean:

(1) *State Officer or Employee* as defined in subdivision (v) of this section;

(2) *Legislative Employee* as defined in subdivision (m) of this section; or

(3) *Legislative Member* as defined in subdivision (n) of this section.

(h) *Educational Program* shall mean formal instruction provided to attendees. Factors to be considered in assessing whether a program is educational include, but are not limited to: the curriculum; whether the entity providing the program, or the instructors, are accredited, certified, or otherwise qualified to provide the program; to whom the program is presented to; and where and how the program is presented.

(i) *Family Member of any Covered Person* shall have the same meaning as the term *Relative* set forth in Public Officers Law § 73(1)(m).

(j) *Gift* shall mean anything of more than Nominal Value in any form including, but not limited to: money; service; loan; travel; lodging; meals; refreshments; entertainment; discount; or a forbearance of an obligation or a promise that has a monetary value. Notwithstanding the preceding sentence, the exclusions contained in section 933.4 are not Gifts and do not need to be analyzed under section 933.3.

(k) *Informational Event* shall mean an event or meeting the primary purpose of which is to provide information about a subject or subjects related to a Covered Person's official responsibilities.

(l) *Interested Source* shall mean any person or entity who on his or her own behalf, or on behalf of an entity, satisfies any one of the following:

(1) is regulated by, negotiates with, appears before in other than a Ministerial Matter, seeks to contract with or has contracts with, or does other business with: (i) the Legislative Member, the Legislative Employee, or the State Officer or Employee, in his or her official capacity; (ii) the State Agency with which the State Officer or Employee is employed or affiliated; or (iii) any other State Agency when the State Officer or Employee's agency is to receive the benefits of the contract; or

(2) with respect to a Legislative Member or a Legislative Employee, is required to be listed on a statement of registration pursuant to § 1-e(a)(1) of article 1-A of the Legislative Law, or is the spouse or unemancipated child of any person required to be listed on a statement of registration pursuant to § 1-e(a)(1) of article 1-A of the Legislative Law; or

(3) with respect to State Officers and Employees, is required to be listed on a statement of registration pursuant to § 1-e(a)(1) of article 1-A of the Legislative Law and lobbies or attempts to influence actions, decisions, or policies of the State Agency with which the State Officer or Employee is employed or affiliated; or

(4) with respect to State Officers and Employees, is the spouse or unemancipated child of any individual satisfying the requirements of section 933.2(l)(3); or

(5) is involved in any action or proceeding, in which administrative and judicial remedies thereto have not been exhausted, and which is adverse to either: (i) the State Officer or Employee in his or her official capacity; or (ii) the State Agency with which the State Officer or Employee is employed or affiliated; or

(6) has received or applied for funds from the State Agency with which the Covered Person is employed or affiliated at any time during the previous 12 months up to and including the date of the proposed or actual receipt of the item or service of more than Nominal Value.

(m) *Legislative Employee* shall mean any officer or employee of the New York State Legislature but it shall not include any Legislature Member.

(n) *Legislative Member* shall mean any elected member of the New York State Legislature.

(o) *Lobbyist* shall mean every person or organization as defined in § 1-c(a) of article 1-A of the Legislative Law.

(p) *Ministerial Matter* shall mean an administrative act carried out in a prescribed manner not allowing for substantial personal discretion.

(q) *Nominal Value* is not defined in the Public Officers Law or Legislative Law Article One-A. The Commission, however, generally deems an item or service with a fair market value of fifteen dollars or less as having a Nominal Value.

(r) *Political Candidate* shall mean any individual meeting any of the requirements in Public Officers Law §§ 73-a(2)(a)(iii)-(viii), including the current office holder.

(s) *Political Organization* shall mean any entity that is affiliated with or a subsidiary of a political party including, without limitation, a partisan political club or committee, or a campaign or fund-raising committee for a political party or Political Candidate.

(t) *Professional Program* shall mean a program that provides information, such as trends in an industry or discipline, which would benefit the administration or operation of the State and would enable a Covered Person to perform his or her duties more effectively. It shall not include a program, the primary purpose of which is the promotion or marketing of products or services for purchase or lease by the State.

(u) *State Agency* shall mean any civil department; State department; or division, board, commission, or bureau of any State department or civil department; any public benefit corporation, public authority, or commission at least one of whose members is appointed by the Governor. State Agency shall also include the State University of New York or the City University of New York, including all their constituent units except (1)

community colleges of the State University of New York and (2) the independent institutions operating statutory or contract colleges on behalf of the State.

(v) *State Officer(s) or Employee(s) shall mean:*

(1) *Statewide elected officials (Governor, Lieutenant Governor, Comptroller, and Attorney General of the State of New York);*

(2) *Heads of civil departments and State departments and their respective deputies and assistants other than members of the Board of Regents of the University of the State of New York who receive no compensation or are compensated on a per diem basis;*

(3) *Officers and employees of statewide elected officials;*

(4) *Officers and employees of state departments, boards, bureaus, divisions, commissions, councils, or other State Agencies other than officers of such boards, commissions or councils who receive no compensation or are compensated on a per diem basis;*

(5) *Employees of public authorities (other than multi-state authorities), public benefit corporations, and commissions at least one of whose members of such public authorities, public benefit corporations, and commissions is appointed by the Governor; and*

(6) *Members or directors of public authorities (other than multi-state authorities), public benefit corporations, and commissions identified in section 933.2(v)(5) who receive compensation other than on a per diem basis.*

(w) *Widely Attended Event shall mean an event as defined in Section 933.4(a)(7)(i).*

*933.3 Gifts.*

(a) *If the item, service, or any other thing of value solicited, received, or accepted by a Covered Person meets the definition of Gift and is from an Interested Source, it is presumptively impermissible. Such Gift is only permissible if, under the circumstances, all of the following criteria are met:*

(1) *it is not reasonable to infer that the Gift was intended to influence the Covered Person; and*

(2) *the Gift could not reasonably be expected to influence the Covered Person in the performance of his or her official duties; and*

(3) *it is not reasonable to infer that the Gift was intended as a reward for any official action on the Covered Person's part.*

(b) *If the item, service, or any other thing of value solicited, received, or accepted by a Covered Person meets the definition of Gift and is not from an Interested Source, then the Gift is permissible unless, under the circumstances, any one of the following criteria is met:*

(1) *it could reasonably be inferred that the Gift was offered or given with the intent to influence the Covered Person, or*

(2) *the Gift could reasonably be expected to influence the Covered Person in the performance of his or her official duties, or*

(3) *it could reasonably be inferred that the Gift was offered or given with the intent to reward the Covered Person for any official action on his or her part.*

(c) *Multiple Gifts. Nothing in this Part shall be construed as relieving a Covered Person's obligations under Public Officers Law § 74 with respect to the solicitation, receipt, or acceptance of multiple items, services, or any other things of value that, individually, are permissible Gifts under sections 933.3(a) or (b).*

(d) *Directing Impermissible Gifts to Third Parties Prohibited. A Covered Person may not direct a Gift that is impermissible under sections 933.3(a) or (b) to any third party, including a Charitable Organization.*

(e) *A Gift that is permissible under sections 933.3(a) or (b) satisfies the Covered Person's obligations under Public Officers Law §§ 73 and 74 with respect to such Gift.*

*933.4 Exclusions.*

(a) *The following are not Gifts:*

(1) *Anything for which a Covered Person has paid fair market value.*

(2) *Anything for which the State has paid or secured by State contract.*

(3) *Rewards or prizes given to competitors in contests or events (including random drawings) offered to the general public or a segment of the general public defined on a basis other than status as a Covered Person.*

(4) *Contributions reportable under article fourteen of the Election Law, including contributions made in violation of that article of the Election Law.*

(5) *Food or beverage valued at fifteen dollars or less per occasion.*

(6) *Complimentary Attendance (including food and beverage) at a Bona Fide Charitable Event or a Bona Fide Political Event.*

(7) *Complimentary Attendance (including food and beverage) offered by the sponsor of a Widely Attended Event.*

(i) *Widely Attended Event shall mean an event:*

(A) *which at least twenty-five individuals other than members, officers, or employees from the governmental entity in which the Covered Person serves attend or were, in good faith, invited to attend in person; and*

(B) *which is related to the attendee's duties or responsibilities or allows the Covered Person to perform a ceremonial function appropriate to his or her position. For the purposes of this exclusion, a Covered Person's duties or responsibilities shall include but not be limited to:*

(1) *For elected Covered Persons (or their staff attending with or on behalf of such elected officials) only, attending an event or a meeting at which more than one-half of the attendees, or persons invited in good faith to attend in person, are residents of the county, district, or jurisdiction from which the elected Covered Person was elected; or*

(2) *For all Covered Persons, attending an event or a meeting at which a speaker or attendee addresses an issue of public interest or concern as a significant activity at such event or meeting.*

(I) *For the purposes of Section 933.4(a)(7)(i)(B), Complimentary Attendance does not include registration or admission without charge to any entertainment, recreational, or sporting activity unless the presentation addressing the public interest or concern that is made by the speaker or attendee is delivered at such entertainment, recreational, or sporting activity.*

(II) *For the purposes of Section 933.4(a)(7)(i)(B), Complimentary Attendance does not include food and beverage unless such food or beverage are available to all participants as part of the Widely Attended Event.*

(ii) *Prior Written Notification Required for State Officers or Employees.*

*A State Officer or Employee shall, prior to the Widely Attended Event, notify in writing the head of his or her State Agency (or such person's appropriate designee for the State Officer or Employee involved) of the State Officer's or Employee's intention to accept an invitation for Complimentary Attendance from the sponsor of a Widely Attended Event. The written notification shall contain pertinent details demonstrating that the criteria for a Widely Attended Event, contained in Section 933.4(a)(7)(i), are satisfied.*

(8) *Awards, Plaques, and Other Ceremonial Items.*

*Awards, plaques, and other ceremonial items must be publicly presented, or intended to be publicly presented, and in recognition of service related to a Covered Person's official duties and responsibilities. Additionally, such awards, plaques, and other ceremonial items must be of the type customarily bestowed at similar ceremonies and be otherwise reasonable under the circumstances.*

(9) *Honorary degrees bestowed upon a Covered Person by a public or private college or university.*

(10) *Promotional Items.*

*Items having no substantial resale value such as pens, mugs, calendars, hats, and t-shirts which bear an entity's name, logo, or message in a manner which promotes the entity's cause.*

(11) *Goods and Services and Discounts for Goods and Services.*

(i) *Goods and services, or discounts for goods and services, must be offered to the general public or a segment of the general public defined on a basis other than status as a Covered Person and offered on the same terms and conditions as the goods and services are offered to the general public or segment thereof.*

(ii) *Notwithstanding section 933.4(a)(11)(i), discounts made available to all Covered Persons fall within this exclusion.*

(iii) *Notwithstanding section 933.4(a)(11)(i), discounts made to a select group of Covered Persons may fall within this exclusion. The following non-exhaustive list of factors shall be considered when any discount is made available to a select group of Covered Persons to determine whether the discount would fall within this exclusion:*

(A) *the scope of the class of Covered Persons who are offered the discount;*

(B) *the amount and duration of the discount;*

(C) *whether the criterion for the offer is based on factors other than the Covered Person's official duties and responsibilities; and*

(D) *For State Officers and Employees, whether the offeror is an Interested Source.*

(12) *Gifts from Friends or Family Members.*

(i) *Gifts from a Family Member or a person with a personal relationship with a Covered Person when it is reasonable to infer that the Gift was primarily motivated by the family or personal relationship. Personal Gifts may include an invitation to attend a personal or family social event.*

(ii) *In determining whether the Gift was primarily motivated by a family or personal relationship, the factors to be considered include but are not limited to:*

(A) *the history and nature of the relationship between the individual offering the Gift and the recipient, including whether items have previously been exchanged;*

(B) *whether the item was purchased by the individual offering the Gift; and*

(C) *whether the individual offering the Gift at the same time gave similar items to other Covered Persons.*

(iii) *The Gift shall not be considered to be motivated by a family or personal relationship if the individual or entity seeks to charge or deduct the value of such item as a business expense or seeks reimbursement from a client.*

(13) *Reimbursement of Expenses for Speakers at Informational Events.*

*Travel reimbursement or payment for transportation, meals, and accommodations for an attendee, panelist, or speaker at an Informational Event when such reimbursement or payment is made by a governmental entity or by an in-state accredited public or private institution of higher education that hosts the event on its campus, provided, however, that the Covered Person may only accept lodging from an institution of higher education: (a) at a location on or within close proximity to the host campus; and (b) for the night preceding and the nights of the days on which the attendee, panelist, or speaker actually attends the Informational Event.*

(14) *Provision of Local Transportation to Inspect Facilities.*

(i) *Provision of local transportation to inspect or tour facilities, operations, or property located in New York State, when such inspection or tour is related to the Covered Person's official duties or responsibilities.*

(ii) *The payment or reimbursement for expenses for lodging or travel expenses to and from the locality where such facilities, operations, or property are located is not covered by this exclusion. The acceptance of such payment or reimbursement is governed by Part 931.*

(15) *Meals for Participants at a Professional or Educational Program.*

*Receipt of food and beverages when participating in a Professional Program or Educational Program as a part of a Covered Person's official duties, provided the food or beverages are available to all participants.*

(b) *With respect to the solicitation, acceptance, or receipt of items and services identified in sections 933.4(a)(5)-(15), nothing in this Part shall be construed as relieving a Covered Person's obligations under Public Officers Law § 74 with respect to such items or services.*

#### 933.5 Multiple Non-Gifts.

*Nothing in this Part shall be construed as relieving a Covered Person's obligations under Public Officers Law § 74 with respect to the solicitation, receipt, or acceptance of multiple items, services, or any other things of value that, individually, are not Gifts solely because each has less than Nominal Value.*

#### 933.6 Enforcement.

*The Commission is authorized pursuant to Executive Law § 94 to investigate possible violations of Public Officers Law § 73 and § 74 and their corresponding regulations and take appropriate action as authorized in these statutes.*

#### 933.7 Minimum Requirements.

*Nothing contained in this Part shall prohibit any State Agency from adopting or implementing its own rules, regulations, or procedures that are more restrictive than the requirements of this Part.*

**Final rule as compared with last published rule:** Nonsubstantive changes were made in sections 933.2(b), (h), 933.3(a) and (b).

**Revised rule making(s) were previously published in the State Register on March 19, 2014.**

**Text of rule and any required statements and analyses may be obtained from:** Louis Manuta, Associate Counsel, Joint Commission on Public Ethics, 540 Broadway, Albany, NY 12207, (518) 408-3976, email: regs@jcope.ny.gov

#### Revised Regulatory Impact Statement

1. **Statutory authority:** Executive Law § 94(17)(a) directs the Joint Commission on Public Ethics ("JCOPE") to promulgate rules concerning limitations on the receipt of Gifts, and § 94(9)(c) authorizes JCOPE to adopt, amend, and rescind rules and regulations to govern JCOPE procedures. Public Officers Law § 73(5) establishes the restrictions on soliciting, accepting, or receiving Gifts that apply to members of the Legislature, Legislative employees, Statewide elected officials, and State Officers and Employees as defined in Public Officers Law section 73 (referred to in the regulations as "Covered Persons"). (Public Officers Law § 73(5) utilizes the definition of "Gift" in Legislative Law Article 1-A, § 1-c(j).) Public Officers Law § 74 sets forth the Code of Ethics by which all State officers and employees must abide.

2. **Legislative objectives:** Currently, Covered Persons who look to JCOPE for guidance on how to apply the Gift restrictions must synthesize information from a number of different sources, including the statutory language and several advisory opinions from predecessor agencies. By setting forth the circumstances in which solicitation, acceptance, or receipt of a Gift is appropriate, these rules provide a comprehensive set of requirements for Covered Persons.

3. **Needs and benefits:** The rulemaking is necessary to regulate and clarify the requirements for Covered Persons covered by the Gift restrictions set forth in Public Officers Law § 73(5). The regulations provide

clear guidance to questions about who is covered by the Gift restrictions, what qualifies as a Gift, and what requirements apply to these individuals.

Part 933.1 provides the purpose and effect of the regulations. The Part clarifies that the regulations supersede prior Advisory Opinions issued by predecessor agencies to the extent such Advisory Opinions are inconsistent with the regulations.

Part 933.2 defines key terms in the regulations. The final regulations amend the definition of Nominal Value. The initial proposed regulations defined the term as an item or service (or anything else of value) with a fair market value of ten dollars or less. The final regulations note that the term is not defined in the Public Officers Law or Legislative Law Article 1-A, but that the Commission "generally deems an item or service with a fair market value of fifteen dollars or less as having a Nominal Value." This Part also defines an "Interested Source," which is a person or entity who has certain specified relationships with State persons or entities. This definition is central to a determination in Part 933.3 as to when a Gift is permissible or presumptively impermissible. Finally, Part 933.2 defines precisely which aspects of the regulations apply to various State officers and employees depending on whether or not the individual is a Member of the Legislature or is a legislative employee.

Part 933.3 specifies when a Gift can be solicited, received, or accepted by a Covered Person. These rules are designed to provide Covered Persons with an established structure within which to determine whether it is appropriate to accept, receive, or solicit a Gift. Pursuant to Part 933.3(a), if a Gift is from an Interested Source, it is presumptively impermissible to solicit, receive, or accept the Gift, unless certain criteria are met. Specifically, the presumption is overcome (making the Gift permissible) only when: (1) it would not be reasonable to infer that the Gift was intended to influence the Covered Person; and (2) the Gift could not reasonably be expected to influence the Covered Person in the performance of his or her official duties; and (3) it would not be reasonable to infer that the Gift was intended as a reward for any official action on the Covered Person's part.

Under Part 933.3(b), if the Gift is not from an Interested Source, it is permissible to solicit, receive, or accept the Gift unless, under the circumstances, any one of the following criteria is met: (1) it could reasonably be inferred that the Gift was offered or given with the intent to influence the Covered Person; or (2) the Gift could reasonably be expected to influence the Covered Person in the performance of his or her official duties; or (3) it could reasonably be inferred that the Gift was offered or given with the intent to reward the Covered Person for any official action on his part.

In Part 933.3(c), the final regulations state that a Covered Person is not relieved of his obligations under Public Officers Law § 74 with respect to the solicitation, receipt, or acceptance of multiple items, services, or any other things of value that, individually, are permissible Gifts.

Part 933.3(d) provides that a Covered Person cannot direct an impermissible Gift to a third party, including a charitable organization. Finally, Part 933.3(e) explains that a Gift that is permissible under Parts 933.3(a) or (b) satisfies the Covered Person's obligations under Public Officers Law § 73 and 74 with respect to the Gift.

Part 933.4 sets forth and clarifies the exclusions from the definition of Gift. Both the definition and the exclusions are contained in Legislative Law Article 1-A, § 1-c(j) and are incorporated by reference into Public Officers Law § 73(5). The final regulations amend aspects of the Widely Attended Event exclusion (Part 933.4(a)(7)). The initial proposed regulations required that an individual seeking to avail himself of the exclusion receive written approval from his State Agency. In response to comments received, the final regulations no longer require prior approval; rather, an individual must notify his State Agency prior to attending the event. Additionally, the final regulations clarify the conditions under which entertainment, recreational, and sporting activities, as well as food and beverage, are considered to be part of the Widely Attended Event and therefore covered by the exclusion.

Part 933.4(b) clarifies that a Covered Person must consider the requirements in Public Officers Law § 74 before soliciting, receiving, or accepting any item or service that falls under the exclusions from the definition of Gift contained in Part 933.4(a).

Part 933.5 states that a Covered Person must consider the requirements of Public Officers Law § 74 before soliciting, receiving, or accepting multiple items, services, or any other things of value that, individually, are not Gifts solely because each has less than Nominal Value.

Part 933.6 identifies the statutory provision, Executive Law § 94, that authorizes JCOPE to investigate possible violations of Public Officers Law §§ 73 and 74 and their corresponding regulations and to take appropriate action as authorized in these statutes.

Part 933.7 explains that State agencies are free to adopt or implement rules, regulations, or procedures that are more restrictive than those in the Gift regulations.

#### 4. Costs:

a. costs to regulated parties for implementation and compliance: Minimal.

b. costs to the agency, state and local government: Minimal costs to state and local governments. Minimal administrative costs to the agency during the implementation phase.

c. cost information is based on the fact that there will be minimal costs to regulated parties and state and local government for training staff on changes to the requirements. The cost to the agency is based on an estimated slight increase in staff resources to implement the regulations.

5. Local government mandate: The final regulations impose, at most, minimal new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district or other special district, as they must make themselves aware of any requirements from the regulation that would apply to Gifts they would give to individuals covered by the Gift regulations.

6. Paperwork: This regulation may require the preparation of additional forms or paperwork. Such additional paperwork is expected to be minimal.

7. Duplication: This regulation does not duplicate any existing federal, state or local regulations.

8. Alternatives: JCOPE could promulgate a formal advisory opinion or other guidance, but the formal rulemaking process provides more clarity to affected parties.

9. Federal standards: These regulations do not exceed any federal minimum standard with regard to a similar subject area.

10. Compliance schedule: Compliance will take effect upon adoption.

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

Changes made to the last published proposed rule do not necessitate revision to the previously published Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement.

#### **Initial Review of Rule**

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2017, which is no later than the 3rd year after the year in which this rule is being adopted.

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

The Commission received public comments from two entities.

The first commenter suggested that the Part be revised to reflect which Advisory Opinions are inconsistent with the regulations and will therefore be superseded in whole or in part by the regulations. This commenter also raised concerns about potential inadvertent violations of the regulations due to uncertainty, for example, as to whether an entity is a Charitable Organization or an Interested Source. An exclusion from the definition of Interested Source for individuals involved in administrative reviews or hearings or other routine agency proceedings was also suggested. Additionally, the commenter requested that the definition of an Interested Source be amended either to exclude entities which make "routine purchases" from a State agency or which make purchases below a "threshold amount."

The commenter further suggested that the 12-month time frame for receiving multiple Gifts be retained. The commenter also questioned why the regulations no longer require prior State agency approval to attend a Widely Attended Event and, instead, state that prior notification is all that is required. In addition, the commenter reiterated its position to include an exception to the definition of Gift for items or services given for customary or special occasions. Moreover, the commenter requested that the term "generally deem" be stricken from the definition of "Nominal Value" in order to provide more clarity to State employees.

Finally, clarification was sought regarding situations where (i) a State employee is a member of a professional organization that lobbies the employee's State agency (and is therefore an Interested Source) and wishes to participate in events the organization conducts for its members; and (ii) a charity doing business with the State offers a State employee complimentary attendance to a Charitable Event.

The Commission considered each of these comments and has determined that the regulations do not need to be further modified. The Commission believes that its statement as to which Advisory Opinions are superseded by the regulations is understandable in its current form. As for the comments indicating the regulations may invite inadvertent violations because they require a State employee to have knowledge about facts that may not be within his purview, the Commission notes that the Public Officers Law has a "knowing and intentional" standard for violations. Consequently, there is little concern that a State employee will be found to have "inadvertently" violated the prohibitions on Gifts in the regulations and the Public Officer Law.

The Commission is satisfied that its definition of "nominal value" effectuates the intent of the statutory language. Agencies are free to adopt more a more restrictive definition if they deem it appropriate to do so. The Commission has previously rejected the suggestion to exclude from the definition of a Gift items or services given for customary or special occasions. In the Commission's estimation this exclusion is overbroad. Rather, it is the Commission's view that the existing exclusion for items

or services given by individuals with a personal relationship to the State employee is better tailored to cover the scenarios contemplated by the requested exclusion.

As for a time period for the receipt of multiple Gifts, the Commission chose not to include a time period in order to permit an analysis under the totality of the circumstances. With respect to the notification requirement to attend a Widely Attended Event, the Commission's decision to remove the approval requirement was based on comments that a mandated pre-approval process could be overly burdensome to some agencies. Each agency, of course, is generally free to adopt policies that may be more restrictive than the regulations and mandate procedures beyond those prescribed in the regulations.

The comments with respect to exclusions from the definition of an Interested Source also do not necessitate changes to the regulations. The definition of Interested Source is necessarily broad. The fact that the regulations and the Public Officers Law require violations of the Gift prohibitions to be knowing and intentional before a penalty can be imposed ensures that individuals will not involuntarily expose themselves to liability. Additionally, the presumption against receiving Gifts from an Interested Source can, given the proper circumstances, be overcome, as both the regulations and the Public Officers Law recognize that in some instances, a Gift from an Interested Source may be accepted by a State employee.

Finally, the commenter's request for clarification on the application of the regulations to specific scenarios will be addressed in guidance documents that the Commission expects to issue when the regulations become effective.

The second commenter expressed a desire for the regulations to contain a per se prohibition on the acceptance or receipt of Gifts from Interested Sources rather than the presumption that such Gifts are prohibited. The commenter opined that this aspect of the regulations would likely create uncertainty as to what is permissible and present enforcement difficulties. The commenter also suggested that the regulations be revised to include 12-month time frame or a particular dollar value in the section pertaining to the receipt of multiple Gifts. Additionally, the commenter requested that the regulations reinstate the requirement of prior agency approval to attend a Widely Attended Event.

The commenter further suggested that the regulations be amended to include a requirement that a State employee must obtain approval before availing himself or herself of exclusion for discounts contained in the regulations. Finally, the commenter suggested that the regulations be amended to include language indicating the consequences for impermissible Gift-giving by "donors" to Covered Persons.

Once again, the Commission considered each of these comments. The Commission remains of the view that the elimination of per se prohibition and its replacement with a rule that Gifts from an Interested Source are presumptively prohibited better comports with the language of the statute. As for a time period or dollar amount for the receipt of multiple Gifts, the Commission chose not to include either in order to permit an analysis under the totality of the circumstances.

With respect to the notification requirement to attend a Widely Attended Event, the Commission's decision to remove the approval requirement was based on comments that a mandated pre-approval process could be overly burdensome to some agencies. Each agency, of course, is generally free to adopt policies that may be more restrictive than the regulations and mandate procedures beyond those prescribed in the regulations. In a similar vein, the Commission believes that a pre-approval requirement with respect to the "discount" exclusion in the regulations may create an undue burden on State agencies.

The comment regarding "donors" is unclear. The statute itself clearly states the penalties for failure to comply its provisions. Finally, the Commission expects to issue guidance documents when the regulations become effective that will address a number of questions the commenter presented.

## **NOTICE OF ADOPTION**

### **Honoraria Regulations**

**I.D. No.** JPE-33-13-00009-A

**Filing No.** 452

**Filing Date:** 2014-06-03

**Effective Date:** 2014-06-18

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

**Action taken:** Repeal of Part 930; and addition of new Part 930 to Title 19 NYCRR.

**Statutory authority:** Executive Law, sections 94(9)(c) and (17)(a); and Public Officers Law, sections 73(5) and 74

**Subject:** Honoraria regulations.

**Purpose:** To provide guidance and procedures regarding the acceptance of honoraria.

**Text of final rule:** Title 19 NYCRR Part 930 is added to read as follows:

**Part 930 Honoraria**

**930.1 Purpose and Effect of Regulations.**

(a) The purpose of these regulations is to establish the procedures and conditions for approval and acceptance of Honoraria by specified New York State officials and employees.

(b) The effect of these regulations is to supersede prior regulations and any Advisory Opinions or other guidance issued by predecessor agencies to the Joint Commission on Public Ethics to the extent such Advisory Opinions and guidance are inconsistent with this Part.

**930.2 Definitions.**

(a) Approving Authority for a State Officer or Employee shall mean the head of a State agency or appointing authority, or his or her appropriate designee. In the case of a Statewide Elected Official, the head of a Civil Department or the head of a State Agency, it shall mean the New York State Joint Commission on Public Ethics.

(b) Civil Department shall have the same meaning as set forth in Article V, Section 2 of the New York State Constitution.

(c) Commission shall mean the New York State Joint Commission on Public Ethics.

(d) Covered Person shall mean:

(1) Head of a Civil Department as defined in subdivision (b) of this section;

(2) State Officer or Employee as defined in subdivision (j) of this section;

(3) Statewide Elected Official as defined in subdivision (k) of this section.

(e) Honorarium shall mean:

(1) Any payment, which may take the form of a fee or any other compensation, made to a Covered Person in consideration for a service performed that is not part of his or her official duties. Such service includes, but is not limited to, delivering a speech, writing, or publishing an article, or participating in any public or private conference, convention, meeting, or similar event. Honorarium shall also include expenses incurred for travel, lodging, and meals related to the service performed.

(2) Honorarium shall not mean a payment provided to a Covered Person who provides services for or acts on behalf of an employee organization certified or recognized under Article 14 of the Civil Service Law to represent such Covered Person.

(f) Honorarium Approval shall mean a record created by the Approving Authority in accordance with section 930.4(c) of this Part.

(g) Interested Source shall mean any person or entity who on his or her own behalf, or on behalf of an entity, that satisfies any one of the following:

(1) is regulated by, negotiates with, appears before in other than a Ministerial Matter, seeks to contract with or has contracts with, or does other business with: (i) the Covered Person, in his or her official capacity; (ii) the State Agency with which the Covered Person is employed or affiliated; or (iii) any other State Agency when the Covered Person's agency is to receive the benefits of the contract; or

(2) is required to be listed on a statement of registration pursuant to § 1-e(a)(1) of article 1-A of the Legislative Law and lobbies or attempts to influence actions, decisions, or policies of the State Agency with which the Covered Person is employed or affiliated; or

(3) is the spouse or unemancipated child of any individual satisfying the requirements of section 930.2(g)(2); or

(4) is involved in any action or proceeding, in which administrative and judicial remedies thereto have not been exhausted, and which is adverse to either: (i) the Covered Person in his or her official capacity; or (ii) the State Agency with which the Covered Person is employed or affiliated; or

(5) has received or applied for funds from the State Agency with which the Covered Person is employed or affiliated at any time during the previous 12 months up to and including the date of the proposed or actual receipt of the Honorarium.

(h) Ministerial Matter shall mean an administrative act carried out in a prescribed manner not allowing for substantial personal discretion.

(i) State Agency shall mean any Civil Department; State department; or division, board, commission, or bureau of any State department or Civil Department; any public benefit corporation, public authority, or commission at least one of whose members is appointed by the Governor. State Agency shall also include the State University of New York or the City University of New York, including all their constituent units except (1) community colleges of the State University of New York and (2) the independent institutions operating statutory or contract colleges on behalf of the State.

(j) State Officer(s) or Employee(s) shall mean:

(1) Statewide Elected Officials;

(2) Heads of Civil Departments and State departments and their respective deputies and assistants other than members of the board of regents of the University of the State of New York who receive no compensation or are compensated on a per diem basis;

(3) Officers and employees of statewide elected officials;

(4) Officers and employees of State departments, boards, bureaus, divisions, commissions, councils, or other State Agencies other than officers of such boards, commissions or councils who receive no compensation or are compensated on a per diem basis;

(5) Employees of public authorities (other than multi-state authorities), public benefit corporations, and commissions at least one of whose members of such public authorities, public benefit corporations, and commissions is appointed by the governor; and

(6) Members or directors of public authorities (other than multi-state authorities), public benefit corporations, and commissions identified in section 930.2(j)(5) who receive compensation other than on a per diem basis.

(k) Statewide Elected Official shall mean the Governor, Lieutenant Governor, Comptroller, or Attorney General.

**930.3 Certain Covered Persons Prohibited from Receiving Payment for Speeches.**

Notwithstanding any other provision of this Part and pursuant to Public Officers Law § 73(5-a)(b), no Statewide Elected Official or any head of a Civil Department shall, directly or indirectly, solicit, accept, or receive any payment made in consideration for any speech given at a public or private conference, convention, meeting, social event, meal, or like gathering.

**930.4 Approval Procedures.**

(a) An Honorarium must be approved by the Covered Person's Approving Authority in accordance with this Part.

(b) Within a reasonable period of time prior to the performance of the service for which an Honorarium is offered, or to the receipt of the Honorarium, a Covered Person shall submit to his or her Approving Authority a written request for approval to accept the Honorarium.

(c) The Approving Authority shall review and approve a request to accept an Honorarium in accordance with the procedures and conditions set forth in sections 930.4 and 930.5 of this Part. The Honoraria Approval shall contain the information set forth in (1) through (5) of this subdivision:

(1) The name of the Covered Person accepting the Honorarium;

(2) Identity of the offeror and nature of the offeror's business;

(3) A detailed description of the service for which the Honorarium is offered, including the date and location where the service will be performed;

(4) The amount of the Honorarium and, where applicable, and itemization of amounts paid for the service, attendance, registration, travel, lodging, and meals; and

(5) A statement that the Approving Authority has approved the Honorarium in accordance with the conditions set forth in section 930.5 of this Part.

(d) The Approving Authority shall retain all completed and signed Honorarium Approvals for a period of three years from the receipt date of the Honorarium and shall be made available to the Commission upon its request.

(e) The Approving Authority shall provide the Covered Person with a copy of the Honorarium Approval.

**930.5 Conditions for Approval.**

(a) An Approving Authority may approve a request to accept an Honorarium provided the following conditions are met:

(1) State personnel, equipment, and time are not used in preparing the service for which an Honorarium is offered;

(2) No State funds (including funds from any New York State public authority or any public benefit corporation) are used to pay the Covered Person's attendance, registration, travel, lodging, or meal expenses related to the service for which an Honorarium is offered;

(3) If the service is to be performed during the Covered Person's official work day, he or she must charge accrued leave (other than sick leave) to perform such service;

(4) If the Honorarium is offered by or on behalf of an Interested Source, all of the following criteria must be met:

(i) It is not reasonable, under the circumstances, to infer that the Honorarium was intended to influence the Covered Person in the performance of his or her official duties.

(ii) The Honorarium could not, under the circumstances, reasonably be expected to influence the Covered Person in the performance of his or her official duties.

(iii) The Honorarium is not, under the circumstances, intended as a reward for any official action on his or her part.

(5) The Approving Authority determines that the offeror is not being used to conceal that the Honorarium is actually offered or paid by an Interested Source; and

(6) Performing the service for which the Honorarium is offered and accepting the Honorarium do not violate Public Officers Law § 74.

#### 930.6 Minimum Requirements.

Nothing contained in this Part shall prohibit any State Agency from adopting or implementing its own rules, regulation or procedures governing Honoraria that are more restrictive than the requirements of this Part.

#### 930.7 Exemption.

A member of the faculty (including an adjunct member of the faculty) at the State University of New York and the City University of New York, including all their constituent units except community colleges of the State University of New York and the independent institutions operating statutory or contract colleges on behalf of the State, and a State Officer or Employee serving in the title of Research Scientist, Cancer Research Scientist, Research Physician, Research Psychiatrist or Psychiatrist, is exempt from sections 930.4 and 930.5, provided the service performed by such member of the faculty is within the subject matter of his or her official academic discipline.

#### 930.8 Enforcement.

The Commission is authorized pursuant to Executive Law § 94 to investigate possible violations of Public Officers Law § 73 and § 74 and their corresponding regulations and take appropriate action as authorized in these statutes.

#### 930.9 Reporting.

Any Covered Person who is required to file a financial disclosure statement pursuant to § 73-a of the Public Officers Law, including those persons qualifying for an exemption under section 930.7, shall report any Honorarium in excess of \$1,000 (or all Honoraria the aggregate total of which exceed \$1,000 received from a single offeror) in his or her financial disclosure statement for the applicable year.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in sections 930.2(b), (g)(5) and 930.7.

**Text of rule and any required statements and analyses may be obtained from:** Louis Manuta, Associate Counsel, Joint Commission on Public Ethics, 540 Broadway, Albany, NY 12207, (518) 408-3976, email: regs@jcope.ny.gov

#### Revised Regulatory Impact Statement

1. Statutory authority: Executive Law section 94(9)(c) generally directs the Joint Commission on Public Ethics (“JCOPE”) to adopt, amend, and rescind rules and regulations to govern JCOPE’s various procedures. Executive Law section 94(17)(a) directs JCOPE to promulgate rules concerning limitations on the receipt of gifts and Honoraria by “Statewide Elected Officials” and “State Officers and Employees” as those terms are defined in Public Officers Law section 73(1) (hereinafter referred to as “Covered Persons”). Public Officers Law section 73(5) prohibits subject persons from soliciting, accepting, or receiving a gift. Public Officers Law section 73(5-a) places certain limitations on Covered Persons from accepting Honoraria. The Code of Ethics in Public Officers Law section 74 establishes standards intended to prevent the use of an individuals’ official position or authority for personal benefit.

2. Legislative objectives: To provide guidance and procedures regarding the acceptance of Honoraria by certain Covered Persons.

3. Needs and benefits: JCOPE’s predecessor agencies created regulations regarding Honoraria and payments for expenses related to official activity in Part 930. The proposed rulemaking will clarify these rules by separating the regulations governing Honoraria (set forth in Part 930) from the regulations governing payments for expenses related to official activity, including officially related travel expenses (proposed herein in Part 931). The regulations set forth in Part 931 govern payments for expenses related to the official activities of Covered Persons.

Part 930.1 provides the purpose and effect of the regulations.

Part 930.2 defines key terms in the regulations. It defines an “Honorarium” as a fee or any other compensation made to a Covered Person in consideration for a service performed that is not part of his or her official duties. Such services include, but are not limited to, delivering a speech, writing or publishing an article, or participating in any public or private conference, convention, meeting, or similar event. This Part also defines an “Interested Source,” which is a person or entity who has certain defined relationships with State persons or entities. This definition is central to a determination made, pursuant to Part 930.5, by the individual’s approving authority as to whether an Honorarium can be approved. In the case of most Covered Persons, the approving authority is the individual’s agency. In the case of Statewide elected officials and heads of agencies and certain departments, the approving authority is JCOPE.

Part 930.3 specifies that, in accordance with Public Officers Law section 73(5-a)(b), a Statewide Elected Official or a head of a civil department may not, directly or indirectly, solicit, accept, or receive any payment made in consideration for any speech given at a public or private conference, convention, meeting, social event, meal, or like gathering.

Part 930.4 sets forth the procedures a Covered Person and his approv-

ing authority are to follow when determining whether an Honorarium may be accepted. The approving authority must retain all completed and signed Honorarium approvals for a period of three years from the receipt date of the Honorarium and must provide a copy of the Honorarium approval to the requesting individual.

Part 930.5 establishes the conditions for the approving authority to approve acceptance of the Honorarium by the Covered Person, including an analysis for situations where the Honorarium is from an Interested Source. In addition, the approving authority must consider whether performing the service for which the Honorarium is offered and accepting the Honorarium violate the Code of Ethics in Public Officers Law section 74.

Part 930.6 explains that State agencies are free to adopt or implement rules, regulations, or procedures that are more restrictive than those in the Honoraria regulations.

Part 930.7 creates an exemption from the Honorarium processes in sections 930.4 and 930.5 for: (1) a member of the faculty (including an adjunct member of the faculty) at the State University of New York and the City University of New York, including all constituent units (except community colleges of the State University of New York and the independent institutions operating statutory or contract colleges on behalf of the State), and (2) a State officer or employee serving in specified research and scientific titles, provided the service performed by the member of the faculty is within the subject matter of his or her official academic discipline.

Part 930.8 identifies the statutory provision, Executive Law section 94, that authorizes JCOPE to investigate possible violations of Public Officers Law sections 73 and 74 and their corresponding regulations and to take appropriate action as authorized in these statutes.

Part 930.9 states that any individual who is required to file a financial disclosure statement pursuant to section 73-a of the Public Officers Law, including those persons qualifying for an exemption under Part 930.7, must report any Honorarium in excess of \$1,000 (or all Honoraria the aggregate total of which exceed \$1,000 received from a single offeror) in his or her financial disclosure statement for the applicable year.

#### 4. Costs:

a. costs to regulated parties for implementation and compliance: Minimal.

b. costs to the agency, state and local government: Minimal costs to state and local governments. Minimal administrative costs to the agency during the implementation phase.

c. cost information is based on the fact that there will be minimal costs to regulated parties and state and local government for training staff on changes to the requirements. The cost to the agency is based on the estimated slight increase in staff resources to implement the regulations.

5. Local government mandate: The proposed regulation imposes, at most, minimal new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district or other special district, as they must make themselves aware of any requirements from the regulation that would apply to Honorarium they would give to individuals covered by the Honorarium regulations.

6. Paperwork: This regulation may require the preparation of additional forms or paperwork. Such additional paperwork is expected to be minimal.

7. Duplication: This regulation does not duplicate any existing federal, state, or local regulations.

8. Alternatives: JCOPE could promulgate a formal advisory opinion or other guidance. However, amending the existing Honoraria regulations and moving the reimbursement for travel expenses language to new Part 931 through the formal rulemaking process provide more clarity to affected parties.

9. Federal standards: These regulations do not exceed any federal minimum standard with regard to a similar subject area.

10. Compliance schedule: Compliance will take effect upon adoption.

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

Changes made to the last published proposed rule do not necessitate revision to the previously published Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement.

#### Initial Review of Rule

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2017, which is no later than the 3rd year after the year in which this rule is being adopted.

#### Assessment of Public Comment

The Commission received public comments from three entities.

The first commenter asked why the phrase “which payment, fee or other compensation is made as a gratuity, or as on award or honor” was removed from the current definition of Honorarium in Part 930 and suggested that the definition of Honorarium should be revised to exclude payments made for purposes unrelated to an Honorarium. The commenter also opined that the removal of the exception for Honoraria received from religious, self-

help, and civic groups under otherwise acceptable circumstances was eliminated “may require further inquiry into the private activities of State employees.”

Additionally, the commenter requested that, to avoid inadvertent violations, the definition of an Interested Source be amended to (1) clarify when a party “negotiates” with a State agency; (2) exclude entities who make “routine purchases” from a State agency or who make purchases below a “threshold amount;” (3) clarify the statement “any other State Agency when the Covered Person’s agency is to receive the benefits of the contract;” (4) exclude from the definition individuals involved in administrative reviews or hearings and other routine agency proceedings; and (5) exclude from the definition individuals or entities which have applied for funds from the agency within the past year.

The commenter also asked for time-frames to submit Agency Head Honoraria approval requests to JCOPE and whether documents related to Honoraria approvals need to be retained for three years. Finally, the commenter supported the Commission’s position to include both adjunct SUNY/CUNY faculty and State employees in the Research Scientist title series in the exemption from Honoraria restrictions.

The Commission considered each of these comments and has determined that the regulations do not need to be substantively modified. The Commission believes that its definition of Honorarium together with the approval process is more than sufficient to restrict the receipt of Honoraria by covered persons so as to comport with Public Officers Law § 74. The deletion of the exception for religious, self-help, and civic groups was made so that these types of organizations would be required to go through the same approval analysis as all other payment sources. The Commission does not believe that this change will place an undue burden on State agencies.

As for the comment indicating the regulations may invite inadvertent violations because they require a State employee to have knowledge about facts that may not be within his purview, the Commission notes that the Public Officers Law has a “knowing and intentional” standard for violations. Consequently, there is little concern that a State employee will be found to have “inadvertently” violated the prohibitions on Honoraria in the regulations and the Public Officer Law.

Finally, the commenter’s request for clarification on the application of the regulations to specific scenarios will be addressed in guidance documents that the Commission expects to issue when the regulations become effective.

The second commenter was concerned that the draft regulations would not apply to members of the Legislature and legislative employees. The commenter also suggested that the regulations should only apply to future conduct.

The Commission considered each of these comments. Legislative members and employees are not covered by these regulations because the receipt of Honoraria for these persons is under the purview of the Legislative Ethics Commission. The Commission agrees that the regulations are prospective only.

The third commenter offered non-substantive clerical suggested changes, most of which were adopted.

## NOTICE OF ADOPTION

### Gift Regulations for Lobbyists and Their Clients

**I.D. No.** JPE-33-13-00010-A

**Filing No.** 454

**Filing Date:** 2014-06-03

**Effective Date:** 2014-06-18

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

**Action taken:** Addition of Part 934 to Title 19 NYCRR.

**Statutory authority:** Legislative Law, art. 1-A, sections 1-c(j) and 1-m; Executive Law, section 94(9)(c) and (17)(a)

**Subject:** Gift regulations for lobbyists and their clients.

**Purpose:** To implement the restrictions on the offering of gifts contained in Legislative Law article 1-A (the “Lobbying Act”).

**Text of final rule:** Title 19 NYCRR Part 934 is added to read as follows:

CHAPTER XX. JOINT COMMISSION ON PUBLIC ETHICS  
TITLE 19 NYCRR PART 934: GIFTS (Pursuant to Legislative Law Article 1-A)

#### 934.1 Purpose and Effect of Regulation.

(a) The purpose of these regulations is to effectuate the statutory provisions of § 1-c(j) and § 1-m of article 1-A of the Legislative Law.

(b) The effect of these regulations is to supersede prior Advisory Opinions issued by predecessor agencies to the Joint Commission on Public Ethics to the extent they are inconsistent with this Part.

#### 934.2 Definitions.

(a) *Bona Fide Charitable Event* shall mean a function the primary purpose of which is to provide financial support to a Charitable Organization.

(b) *Bona Fide Political Event* shall mean a function the primary purpose of which is to provide financial support to Political Organization(s) or Political Candidate(s).

(c) *Charitable Organization* shall mean:

(1) an entity as defined in Executive Law § 171-a(1) that is registered with the Office of the Attorney General, as required by Executive Law § 172, unless otherwise exempted from filing pursuant to Executive Law § 172-a; or

(2) an entity organized and operated exclusively for charitable purposes and qualified as an exempt organization by the United States Department of Treasury under section 501(c)(3) of the Internal Revenue Code; or

(3) a person who requests contributions for the relief of any individual, specified by name at the time of the solicitation, if all of the contributions collected, without any deductions whatsoever, are paid to or for the benefit of the named beneficiary, provided the individual has submitted a form entitled “Charitable Solicitation for the Relief of an Individual” with the Charities Bureau of the Office of Attorney General prior to the event.

(d) *Client* shall mean every person or organization as defined in § 1-c(b) of article 1-A of the Legislative Law.

(e) *Commission* shall mean the New York State Joint Commission on Public Ethics.

(f) *Complimentary Attendance* shall mean the waiver of all or part of a registration or admission fee, or waiver of all or part of a fee or charge for the provision of food, beverages, entertainment, instruction, or materials. “Complimentary Attendance” shall include the awarding of continuing education credits or certification for attendance at a program provided such credits or certification are offered to all attendees. “Complimentary Attendance” shall not include travel, lodging, or items of more than Nominal Value.

(g) *Educational Program* shall mean formal instruction provided to attendees. Factors to be considered in assessing whether a program is educational include, but are not limited to: the curriculum; whether the entity providing the program, or the instructors, are accredited, certified, or otherwise qualified to provide the program; who the program is presented to; and where and how the program is presented.

(h) *Family Member of any Public Official* shall have the same meaning as the term Relative set forth in Public Officers Law § 73(1)(m).

(i) *Gift* shall mean anything of more than Nominal Value in any form including, but not limited to: money; service; loan; travel; lodging; meals; refreshments; entertainment; discount; or a forbearance of an obligation or a promise that has a monetary value. Notwithstanding the preceding sentence, the exclusions contained in section 934.4 are not Gifts and do not need to be analyzed under section 934.3.

(j) *Informational Event* shall mean an event or meeting the primary purpose of which is to provide information about a subject or subjects related to a Public Official’s official responsibilities.

(k) *Lobbyist* shall mean every person or organization as defined in § 1-c(a) of article 1-A of the Legislative Law.

(l) *Ministerial Matter* shall mean an administrative act carried out in a prescribed manner not allowing for substantial personal discretion.

(m) *Nominal Value* is not defined in the Public Officers Law or Legislative Law Article One-A. The Commission, however, generally deems an item or service with a fair market value of fifteen dollars or less as having a Nominal Value.

(n) *Political Candidate* shall mean any individual meeting any of the requirements in Public Officers Law § 73-a(2)(a)(iii)-(viii), including the current office holder.

(o) *Political Organization* shall mean any entity that is affiliated with or a subsidiary of a political party including, without limitation, a partisan political club or committee, or a campaign or fund-raising committee for a political party or Political Candidate.

(p) *Professional Program* shall mean a program that provides information, such as trends in an industry or discipline, which would benefit the administration or operation of the State or the Public Official’s applicable governmental entity, and would enable a Public Official to perform his or her duties more effectively. It shall not include a program, the primary purpose of which is the promotion or marketing of products or services for purchase or lease by the State or the Public Official’s applicable governmental entity.

(q) *Public Official(s)* shall mean:

(1) Statewide elected officials (the Governor, Lieutenant Governor, Comptroller, or Attorney General of the State of New York) and their officers and employees;

(2) Members, officers, and employees of the New York State Legislature;

(3) Heads of State departments and their deputies and assistants other than members of the Board of Regents of the University of the State of New York who receive no compensation or are compensated on a per diem basis;

(4) Officers and employees of state departments, boards, bureaus, divisions, commissions, councils, or other state agencies;

(5) Members, directors, and employees of public authorities (other than multi-state authorities), public benefit corporations, and commissions at least one of whose members is appointed by the Governor; and

(6) Municipal officers and employees (including officers or employees of a municipality as defined § 1-c(k) of article 1-A of the Legislative Law), whether paid or unpaid. Municipal officers and employees also includes members of any administrative board, commission, or other agency thereof, and in the case of a county, shall include any officer or employee paid from county funds. No person shall be deemed to be a municipal officer or employee solely by reason of being a volunteer fireman or civil defense volunteer, except a fire chief or assistant fire chief.

(r) Widely Attended Event shall mean an event as defined in Section 934.4(a)(4)(i).

#### 934.3 Gifts.

(a) It is presumptively impermissible for a Lobbyist or Client to offer or give a Gift to any Public Official. Such a Gift is only permissible if, under the circumstances, all of the following criteria are met:

(1) it is not reasonable to infer that the Gift was intended to influence the Public Official; and

(2) the Gift could not reasonably be expected to influence the Public Official, in the performance of his or her official duties; and

(3) it is not reasonable to infer that the Gift was intended as a reward for any official action on the Public Official's part.

(b) The offering or giving of a Gift from a Lobbyist or a Client to the spouse or unemancipated child of a Public Official is permissible unless, under the circumstances, any one of the following criteria is met:

(1) it could reasonably be inferred that the Gift was offered or given with the intent to influence the Public Official; or

(2) the Gift could reasonably be expected to influence the Public Official in the performance of his or her official duties; or

(3) it could reasonably be inferred that the Gift was offered or given with the intent to reward the Public Official for any official action on his or her part.

(c) The offering or giving of a Gift from a spouse or unemancipated child of a Lobbyist or a Client to a Public Official is permissible unless, under the circumstances, any one of the following criteria is met:

(1) it could reasonably be inferred that the Gift was offered or given with the intent to influence the Public Official; or

(2) the Gift could reasonably be expected to influence the Public Official in the performance of his or her official duties; or

(3) it could reasonably be inferred that the Gift was offered or given with the intent to reward the Public Official for any official action on his or her part.

(d) Notwithstanding sections 934.3(a), (b), and (c), nothing in this Part shall apply to Gifts to officers, members, or directors of boards, commissions, councils, public authorities, or public benefit corporations who receive no compensation or are compensated on a per diem basis if the Lobbyist or Client giving or offering such Gift does not appear, and does not have any matters pending before, the entity on which the recipient sits.

(e) No Lobbyist or Client shall offer or give a Gift to a third party, including a Charitable Organization:

(1) on behalf of a Public Official (or a Public Official's spouse or unemancipated child), when such Gift cannot be offered or given to such Public Official (or the spouse or unemancipated child of such Public Official) under section 934.3(a); or

(2) at the designation or recommendation of a Public Official (or a Public Official's spouse or unemancipated child), when such Gift cannot be offered or given to such Public Official (or the spouse or unemancipated child of such Public Official) under section 934.3(a).

(f) Multiple Gifts. A Gift that is otherwise permissible under sections 934.3(a), (b), or (c) may be prohibited if it is one of multiple Gifts from the same person, entity, or organization if, under the circumstances, it could be reasonable to infer that the multiple Gifts, collectively, (i) were given with the intent to influence the Public Official; or (ii) could reasonably be expected to influence the Public Official in the performance of his or her official duties; or (iii) were offered or given with the intent to reward the Public Official for any official action on his or her part.

#### 934.4 Exclusions.

(a) The following are not Gifts:

(1) Contributions reportable under article fourteen of the Election Law, including contributions made in violation of that article of the Election Law.

(2) Food or beverage valued at fifteen dollars or less per occasion.

(3) Complimentary Attendance (including food and beverage) at a Bona Fide Charitable Event or a Bona Fide Political Event.

(4) Complimentary Attendance (including food and beverage) offered by a Lobbyist or Client who is the sponsor of a Widely Attended Event.

(i) Widely Attended Event shall mean an event:

(A) which at least twenty-five individuals other than members, officers, or employees from the governmental entity in which the Public Official serves attend or were, in good faith, invited to attend in person; and

(B) which is related to the attendee's duties or responsibilities or allows the Public Official to perform a ceremonial function appropriate to his or her position. For the purposes of this exclusion, a Public Official's duties or responsibilities shall include but not be limited to:

(1) For an elected Public Official (or his or her staff attending with or on behalf of such elected official) only, attending an event or a meeting at which more than one-half of the attendees, or persons invited in good faith to attend in person, are residents of the county, district, or jurisdiction from which the elected Public Official was elected; or

(2) For all Covered Persons, attending an event or a meeting at which a speaker or attendee addresses an issue of public interest or concern as a significant activity at such event or meeting.

(I) For the purposes of Section 934.4(a)(4)(i)(B), Complimentary Attendance does not include registration or admission without charge to any entertainment, recreational, or sporting activity unless the presentation addressing the issue of public interest or concern that is made by the speaker or attendee is delivered at such entertainment, recreational, or sporting activity.

(II) For the purposes of Section 934.4(a)(4)(i)(B), Complimentary Attendance does not include food and beverage unless such food or beverage are available to all participants as part of the Widely Attended Event.

(5) Awards, Plaques, and Other Ceremonial Items.

Awards, plaques, and other ceremonial items must be publicly presented, or intended to be publicly presented, and in recognition of service related to a Public Official's official duties and responsibilities. Additionally, such awards, plaques, and other ceremonial items must be of the type customarily bestowed at similar ceremonies and be otherwise reasonable under the circumstances.

(6) Honorary degrees bestowed upon a Public Official by a public or private college or university.

(7) Promotional Items.

Items having no substantial resale value such as pens, mugs, calendars, hats, and t-shirts which bear an entity's name, logo, or message in a manner which promotes the entity's cause.

(8) Goods and Services and Discounts for Goods and Services.

(i) Goods and services, or discounts for goods and services, must be offered to the general public or a segment of the general public defined on a basis other than status as a Public Official and offered on the same terms and conditions as the goods and services are offered to the general public or segment thereof.

(ii) Notwithstanding section 934.4(a)(8)(i), discounts made available to all Public Officials fall within this exclusion.

(iii) Notwithstanding section 934.4(a)(8)(i), discounts made to a select group of Public Officials may fall within this exclusion. The following non-exhaustive list of factors shall be considered when any discount is made available to a select group of Public Officials to determine whether the discount would fall within this exclusion:

(A) the scope of the class of Public Officials who are offered the discount;

(B) the amount and duration of the discount; and

(C) whether the criterion for the offer is based on factors other than the Public Official's official duties and responsibilities.

(9) Gifts from Friends or Family Members.

(i) Gifts, including an invitation to attend a personal or family social event, from a Client or Lobbyist (or the Client's or Lobbyist's spouse or unemancipated child) when all of the following criteria are met:

(A) the Client or Lobbyist (or the Client's or Lobbyist's spouse or unemancipated child) is a Family Member or a person with a personal relationship with a Public Official; and

(B) it is reasonable to infer that the Gift was primarily motivated by the family or personal relationship.

(ii) In determining whether the Gift was primarily motivated by a family or personal relationship, the factors to be considered include but are not limited to:

(A) the history and nature of the relationship between the individual offering the Gift and the recipient, including whether items have previously been exchanged;

(B) whether the item was purchased by the individual offering the Gift; and

(C) whether the individual offering the Gift at the same time gave similar items to other Public Officials.

(iii) *The Gift shall not be considered to be motivated by a family or personal relationship if the individual or entity seeks to charge or deduct the value of such item as a business expense or seeks reimbursement from a client.*

(10) *Reimbursement of Expenses for Speakers at Informational Events.*

*Travel reimbursement or payment for transportation, meals, and accommodations for an attendee, panelist, or speaker at an Informational Event when such reimbursement or payment is made by a governmental entity or by an in-state accredited public or private institution of higher education that hosts the event on its campus, provided, however, that the Public Official may only accept lodging from an institution of higher education: (a) at a location on or within close proximity to the host campus; and (b) for the night preceding and the nights of the days on which the attendee, panelist, or speaker actually attends the Informational Event.*

(11) *Provision of Local Transportation to Inspect Facilities.*

*(i) Provision of local transportation to inspect or tour facilities, operations, or property located in New York State, when such inspection or tour is related to the Public Official's official duties or responsibilities.*

*(ii) The payment or reimbursement for expenses for lodging or travel expenses to and from the locality where such facilities, operations, or property are located is not covered by this exclusion.*

(12) *Meals for Participants at a Professional or Educational Program.*

*Receipt of food and beverages when participating in a Professional Program or Educational Program as a part of a Public Official's official duties, provided the food or beverages are available to all participants.*

#### 934.5 Enforcement.

*The Commission is authorized pursuant to Executive Law § 94 to investigate possible violations of § 1-m of article 1-A of the Legislative Law and its corresponding regulations and take appropriate action as authorized in these statutes.*

**Final rule as compared with last published rule:** Nonsubstantive changes were made in section 934.3(f).

**Revised rule making(s) were previously published in the State Register** on April 9, 2014 and March 19, 2014.

**Text of rule and any required statements and analyses may be obtained from:** Louis Manuta, Associate Counsel, Joint Commission on Public Ethics, 540 Broadway, Albany, NY 12207, (518) 408-3976, email: regs@jcope.ny.gov

#### Revised Regulatory Impact Statement

1. Statutory authority: Executive Law § 94(17)(a) directs the Joint Commission on Public Ethics ("JCOPE") to promulgate rules concerning limitations on the receipt of Gifts, and § 94(9)(c) authorizes JCOPE to adopt, amend, and rescind rules and regulations to govern JCOPE procedures. Legislative Law Article 1-A, § 1-c(j) defines a "Gift" and sets forth exclusions from the definition of Gift. Legislative Law Article 1-A, § 1-m prohibits, except in certain limited circumstances, individuals or entities who are required to be listed on a statement of registration – referred to as "Lobbyists" and/or "Clients" – or certain of their family members from offering or giving Gifts to "Public Officials" (i.e., generally, persons defined in Legislative Law Article 1-A) or certain of their family members.

2. Legislative objectives: To regulate and clarify the restrictions on the offering and giving of Gifts to public officials by lobbyists and their clients.

3. Needs and benefits: The final rulemaking is necessary to regulate and clarify the restrictions on the offering and giving of Gifts to Public Officials by Lobbyists and their Clients. The regulations provide clear guidance concerning who is a Public Official, who is restricted from offering and giving a Gift to a Public Official, and what qualifies as a Gift.

Part 934.1 provides the purpose and effect of the regulations. The Part clarifies that the regulations supersede prior Advisory Opinions issued by predecessor agencies to the extent such Advisory Opinions are inconsistent with the regulations.

Part 934.2 defines key terms in the regulations. In particular, the final regulations amend the definition of Nominal Value. The initial proposed regulations defined the term as an item or service (or anything else of value) with a fair market value of ten dollars or less. The final regulations note that the term is not defined in the Public Officers Law or Legislative Law Article 1-A, but that the Commission "generally deems an item or service with a fair market value of fifteen dollars or less as having a Nominal Value."

Part 934.3 incorporates various statutory provisions concerning the offering or giving of a Gift to a Public Official. These rules are designed to provide Lobbyists and Clients with an established structure within which to determine whether the giving or offering of a Gift to public officials is permissible. Part 934.3(a) specifies that a Gift offered or given by a Lobbyist or Client to a Public Official is presumptively impermissible unless

certain criteria are met. The presumption is overcome (making the Gift permissible) only when: (1) it would not be reasonable to infer that the Gift was intended to influence the Public Official; and (2) the Gift could not reasonably be expected to influence the Public Official in the performance of his official duties; and (3) it would not be reasonable to infer that the Gift was intended as a reward for any official action on the Public Official's part.

Pursuant to Part 934.3(b), the offering or giving of a Gift from a Lobbyist or a Client to the spouse or unemancipated child of a Public Official is permissible unless, under the circumstances, any one of the following criteria is met: (1) it could reasonably be inferred that the Gift was offered or given with the intent to influence the Public Official; or (2) the Gift could reasonably be expected to influence the Public Official in the performance of his or her official duties; or (3) it could reasonably be inferred that the Gift was offered or given with the intent to reward the Public Official for any official action on his or her part.

Finally, the final regulations include new language – found in Part 934.3(c) – that incorporates the statutory provision regarding the offering or giving of a Gift from a spouse or unemancipated child of a Lobbyist or a Client to a Public Official. Such a Gift is permissible unless, under the circumstances, any one of the following criteria is met: (1) it could reasonably be inferred that the Gift was offered or given with the intent to influence the Public Official; or (2) the Gift could reasonably be expected to influence the Public Official in the performance of his or her official duties; or (3) it could reasonably be inferred that the Gift was offered or given with the intent to reward the Public Official for any official action on his or her part.

Part 934.3(d) sets forth the statutory exception that a Lobbyist or Client is permitted to give a Gift to officers, members, or directors of boards, commissions, councils, public authorities, or public benefit corporations who receive no compensation or are compensated on a per diem basis as long as the Lobbyist or Client does not appear, and does not have any matters pending before, the entity on which the recipient sits.

Part 934.3(e) articulates the rule that a Lobbyist or Client may not offer or give an impermissible Gift to a third party, including a charitable organization, on behalf of or at the direction of, a Public Official.

Finally, Part 934.3(f) addresses a Lobbyist or Client giving or offering multiple Gifts to the same person. The final Part 934.3(f) states that a Gift that is otherwise permissible may be prohibited if it is one of multiple Gifts from the same person, entity, or organization if, under the circumstances, it could be reasonable to infer that the multiple Gifts, collectively, (i) were given with the intent to influence the Public Official; or (ii) could reasonably be expected to influence the Public Official in the performance of his or her official duties; or (iii) were offered or given with the intent to reward the Public Official for any official action on his or her part.

Part 934.4 sets forth and clarifies the statutory exclusions from the definition of Gifts, which are contained in Legislative Law Article 1-A, § 1-c(j). In particular, the final regulations amend aspects of the Widely Attended Event exclusion where the sponsor of the Widely Attended Event is a Lobbyist or the Client of a Lobbyist. The amendments clarify the conditions under which entertainment, recreational, and sporting activities, as well as food and beverage, are considered to be part of the Widely Attended Event and therefore covered by the exclusion.

Part 934.5 identifies the statutory provision, Executive Law § 94, that authorized JCOPE to investigate possible violations of § 1-m of article 1-A of the Legislative Law and its corresponding regulations and to take appropriate action as authorized in these statutes.

#### 4. Costs:

a. costs to regulated parties for implementation and compliance: Minimal.

b. costs to the agency, state and local government: Minimal costs to state and local governments. Minimal administrative costs to the agency during the implementation phase.

c. cost information is based on the fact that there will be minimal costs to regulated parties and state and local government for training staff on changes to the requirements. The cost to the agency is based on the estimated slight increase in staff resources to implement the regulations.

5. Local government mandate: The final regulation imposes, at most, minimal new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district or other special district, as they must make themselves aware of any requirements from the regulation that would apply to Gifts they would give to public officials.

6. Paperwork: This regulation may require the preparation of additional forms or paperwork. Such additional paperwork is expected to be minimal.

7. Duplication: This regulation does not duplicate any existing federal, state or local regulations.

8. Alternatives: JCOPE could promulgate a formal advisory opinion or other guidance, but the formal rulemaking process provides more clarity to affected parties.

9. Federal standards: These regulations do not exceed any federal minimum standard with regard to a similar subject area.

10. Compliance schedule: Compliance will take effect upon adoption.

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

Changes made to the last published rule do not necessitate revision to the previously published Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement.

**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 Commission received public comments from one entity. This commenter offered a number of technical amendments. The commenter also suggested including examples in the regulations to help clarify certain provisions. Additionally, the commenter suggested that the provision relating to multiple Gifts should be amended to include either a specific time frame or dollar amount. Finally, the commenter stated that the regulations would benefit from a clear statement regarding the consequences, for both donors and recipients, of a violation.

The Commission considered these comments and adopted nearly all the technical amendments. With respect to the inclusion of examples, the Commission expects to issue guidance documents when the regulations become effective. As for the comments concerning the inclusion of a time period or dollar amount for the receipt of multiple Gifts, the Commission chose not to include either in order to permit an analysis under the totality of the circumstances. Finally, the consequences for impermissible Gift-giving are plainly articulated in the Public Officers Law.

**NOTICE OF ADOPTION**

**Official Activity Expense Payment and Service Payment Regulations**

**I.D. No.** JPE-33-13-00011-A

**Filing No.** 453

**Filing Date:** 2014-06-03

**Effective Date:** 2014-06-18

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

**Action taken:** Addition of Part 931 to Title 19 NYCRR.

**Statutory authority:** Executive Law, section 94(9)(c) and (17)(a); Public Officers Law, sections 73(5) and 74

**Subject:** Official activity expense payment and service payment regulations.

**Purpose:** To provide guidance and procedures regarding the acceptance of official activity payments.

**Text of final rule:** Title 19 NYCRR Part 931 is added to read as follows:

*Chapter XX. Joint Commission On Public Ethics*

*Part 931: Official Activity Expense Payments And Service Payments To The State: Limitations And Approval*

*931.1 Purpose and Effect of Regulations.*

(a) *The purpose of these regulations is to establish the procedures and conditions for approval and acceptance of payments related to the attendance, registration, travel, lodging, and food for specified New York State officials and employees when such persons are engaged in activities, or are providing services, that are part of their official duties.*

(b) *The effect of these regulations is to supersede prior regulations and any Advisory Opinions or other guidance issued by predecessor agencies to the Joint Commission on Public Ethics to the extent such Advisory Opinions and guidance are inconsistent with this Part.*

*931.2 Definitions.*

(a) *Approving Authority for a State Officer or Employee shall mean the head of a State Agency or appointing authority or his or her appropriate designee. In the case of a Statewide Elected Official and the head of a State Agency, it shall mean the New York State Joint Commission on Public Ethics.*

(b) *Commission shall mean the New York State Joint Commission on Public Ethics.*

(c) *Covered Person shall mean:*

(1) *A State Officer or Employee as defined in subdivision (l) of this section;*

(2) *A Statewide Elected Officials as defined in subdivision (m) of this section.*

(d) *Interested Source. The term Interested Source shall mean any person or entity, on his or her own behalf or on behalf of an entity, that:*

(1) *is regulated by, negotiates with, appears before in other than a Ministerial Matter, seeks to contract with or has contracts with, or does other business with: (i) the Covered Person, in his or her official capacity; (ii) the State Agency with which the Covered Person is employed or affiliated; or (iii) any other State Agency when the Covered Person's agency is to receive the benefits of the contract; or*

(2) *is required to be listed on a statement of registration pursuant to § 1-e(a)(1) of article 1-A of the Legislative Law and lobbies or attempts to influence actions, decisions, or policies of the State Agency with which the Covered Person is employed or affiliated; or*

(3) *is the spouse or unemancipated child of any individual satisfying the requirements of section 931.2(d)(2); or*

(4) *is involved in any action or proceeding, in which administrative and judicial remedies thereto have not been exhausted, and which is adverse to either: (i) the Covered Person in his or her official capacity; or (ii) the State Agency with which the Covered Person is employed or affiliated; or*

(5) *has received or applied for funds from the State Agency with which the Covered Person is employed or affiliated at any time during the previous 12 months up to and including the date of the proposed or actual receipt of the Official Activity Payment and/or Service Payment.*

(e) *Ministerial Matter shall mean an administrative act carried out in a prescribed manner not allowing for substantial personal discretion.*

(f) *Official Activity shall mean a Covered Person's attendance or Service at a meeting, conference, seminar, convention, or professional program that is part of his or her official duties and benefits the Covered Person's State Agency.*

(g) *Official Activity Expense Payment shall mean a payment or reimbursement for the cost of attendance, registration, travel, food, or lodging related to a Covered Person's Official Activity as defined in subdivision (f) of this section. Official Activity Expense Payment does not include (1) any payment or reimbursement for such costs when they have been bargained for by a State Agency, or (2) a Service Payment.*

(h) *Official Activity Approval shall mean a completed and signed record created by the Approving Authority in accordance with section 931.3(c) of this Part.*

(i) *Service shall mean any action or service performed by a Covered Person that is part of his or her official duties and benefits the Covered Person's State Agency. Such action may include, but is not limited to, delivering a speech, writing or publishing an article, or making a presentation.*

(j) *Service Payment shall mean any payment of money made in consideration for a Service provided.*

(k) *Service Payment Approval Record shall mean, for any Service Payment that has been approved by an Approving Authority, a completed and signed record created by the Approving Authority in accordance with section 931.5 of this Part.*

(l) *State Agency shall mean any civil department; State department; or division, board, commission, or bureau of any State department or civil department; any public benefit corporation, public authority, or commission at least one of whose members is appointed by the Governor. State Agency shall also include the State University of New York or the City University of New York, including all their constituent units except (1) community colleges of the State University of New York and (2) the independent institutions operating statutory or contract colleges on behalf of the State.*

(m) *State Officer(s) or Employee(s) shall mean:*

(1) *Statewide Elected Officials;*

(2) *Heads of civil departments and State departments and their respective deputies and assistants other than members of the board of regents of the university of the State of New York who receive no compensation or are compensated on a per diem basis;*

(3) *Officers and employees of statewide elected officials;*

(4) *Officers and employees of state departments, boards, bureaus, divisions, commissions, councils, or other State Agencies other than officers of such boards, commissions or councils who receive no compensation or are compensated on a per diem basis;*

(5) *Employees of public authorities (other than multi-state authorities), public benefit corporations, and commissions at least one of whose members of such public authorities, public benefit corporations, and commissions is appointed by the governor; and*

(6) *Members or directors of public authorities (other than multi-state authorities), public benefit corporations, and commissions identified in section 931.2(l)(5) who receive compensation other than on a per diem basis.*

(n) *Statewide Elected Officials shall mean the Governor, Lieutenant Governor, Comptroller, or Attorney General.*

*931.3 Approval Procedures.*

(a) *An Official Activity Expense Payment or a Service Payment must be approved by the Covered Person's Approving Authority in accordance with this Part.*

(b) Within a reasonable period of time prior to engaging in the Official Activity, a Covered Person shall submit to his or her Approving Authority a written request to approve an Official Activity Expense Payment or Service Payment.

(c) The Approving Authority shall review a request for an Official Activity Expense Payment or Service Payment in accordance with the procedures and conditions set forth in section 931.3 and 931.4 of this Part. If approved, the Official Activity Approval shall contain the information set forth in (1) through (5) of this subdivision:

(1) The name of the Covered Person to whom, or on behalf of whom, the Official Activity Expense Payment or Service Payment is offered;

(2) Identity of the offeror and nature of the offeror's business;

(3) A detailed description of the Official Activity or Service, including date and location;

(4) The amount of the Official Activity Expense Payment and, where applicable, an itemization of costs for the attendance, registration, travel, lodging, and meals, and the amount of a Service Payment, if any; and

(5) A statement that the Approving Authority has approved the Official Activity Expense Payment and Service Payment, if any, in accordance with the conditions set forth in section 931.4 of this Part.

(d) The Approving Authority shall retain all completed and signed Official Activity Approvals for a period of three years from the date of the Official Activity for which an Official Activity Expense Payment or Service Payment, if any, is offered and shall be made available to the Commission upon its request.

(e) The Approving Authority shall provide the Covered Person with a copy of the Official Activity Approval.

#### 931.4 Conditions for Approval.

(a) An Approving Authority may approve a request for an Official Activity Expense Payment or Service Payment provided the following conditions are met:

(1) The Official Activity Expense Payment or Service Payment covers only the period of time that the Covered Person is reasonably required to be present for such Official Activity.

(2) If the Official Activity Expense Payment or Service Payment is offered by or on behalf of an Interested Source, all of the following criteria must be met:

(i) It is not reasonable, under the circumstances, to infer that the Official Activity Expense Payment or Service Payment was intended to influence the Covered Person in the performance of his or her official duties.

(ii) The Official Activity Expense Payment or Service Payment could not, under the circumstances, reasonably be expected to influence the Covered Person in the performance of his or her official duties.

(iii) The Official Activity Expense Payment or Service Payment is not, under the circumstances, intended as a reward for any official action on his or her part.

(3) The Official Activity Expense Payment, if not made by the offeror, could be lawfully paid by the State Agency in accordance with its travel policy.

(4) The Official Activity Expense Payment is made on behalf of the Covered Person at a rate not greater than the rate at which the State Agency would pay or reimburse the Covered Person under its travel policy.

(5) The Approving Authority determines that the offeror is not being used to conceal that the Official Activity Expense Payment or Service Payment is actually offered or paid by an Interested Source.

(6) The Official Activity and the corresponding Official Activity Expense Payment or Service Payment is consistent with Public Officers § 74.

(b) If a Covered Person's Official Activity includes a Service and an offer for a Service Payment, in connection with such Official Activity, the Approving Authority shall approve the Service Payment provided such Official Activity comports with the conditions set forth in section 931.4 of this Part. The Approving Authority shall direct that such Service Payment shall be made directly to the general fund of the State or to such fund as is appropriate for a public authority, public benefit corporation, or commission not funded through State general fund appropriation.

#### 931.5 Minimum Requirements.

Nothing contained in this Part shall prohibit any State Agency from adopting or implementing its own rules, regulations, or procedures governing Official Activity Expense Payments for Official Activities that are more restrictive than the requirements of this Part.

#### 931.6 Enforcement.

The Commission is authorized pursuant to Executive Law § 94 to investigate possible violations of Public Officers Law § 73 and § 74 and their corresponding regulations and take appropriate action as authorized in these statutes.

#### 931.7 Reporting.

Any Covered Person who is required to file a financial disclosure statement pursuant to § 73-a of the Public Officers Law shall report any Of-

ficial Activity Expense Payment in excess of \$1,000 (or all Official Activity Expense Payments the aggregate total of which exceed \$1,000 received from a single offeror) in his or her statement of financial disclosure for the applicable year.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in section 931.2(d)(5), (i), (k), (l), (m) and (n).

**Text of rule and any required statements and analyses may be obtained from:** Louis Manuta, Associate Counsel, Joint Commission on Public Ethics, 540 Broadway, Albany, NY 12207, (518) 408-3976, email: regs@jcope.ny.gov

#### Revised Regulatory Impact Statement

1. Statutory authority: Executive Law section 94(9)(c) generally directs the Joint Commission on Public Ethics ("JCOPE") to adopt, amend, and rescind rules and regulations to govern JCOPE's various procedures. Executive Law section 94(17)(a) directs JCOPE to promulgate rules concerning limitations on the receipt of gifts and official activity expense payments by "Statewide Elected Officials" and "State Officers and Employees" as those terms are defined in Public Officers Law section 73(1) (hereinafter referred to as "Covered Persons"). Public Officers Law section 73(5) prohibits subject persons from soliciting, accepting, or receiving a gift. The Code of Ethics in Public Officers Law section 74 establishes standards intended to prevent the use of an individuals' official position or authority for personal benefit.

2. Legislative objectives: To provide guidance and procedures regarding the acceptance of official activity expense payments by Covered Persons.

3. Needs and benefits: JCOPE's predecessor agencies created regulations regarding honoraria and payments for expenses related to official activities in Part 930. The final regulations clarify these rules by separating the regulations governing honoraria (set forth in Part 930) from the regulations governing official activity expense payments, including officially-related travel expenses (set forth in Part 931). The regulations set forth in Part 931 govern payments for expenses related to the official activities of Covered Persons.

The change in terminology from "travel expenses" to Official Activity Expense Payments and Service Payments was made to reflect more accurately the breadth of the regulatory language concerning payments made in connection with a person's official duties. The new Part 931 establishes the procedures and conditions for approval and acceptance of payments related to the attendance, registration, travel, lodging, and food for Covered Persons when such persons are engaged in activities or are providing services that are part of their official duties.

Part 931.1 provides the purpose and effect of the regulations.

Part 931.2 defines key terms in the regulations. It defines Official Activity as a Covered Person's attendance or service at a meeting, conference, seminar, convention, or professional program that is part of his or her official duties and benefits the covered person's State agency. The regulations define Service as any action or service performed by a Covered Person, including, but is not limited to, delivering a speech, writing, or publishing an article, or making a presentation. This Part also defines an Interested Source as a person or entity who has certain defined relationships with State persons or entities. This definition is central to a determination made, pursuant to Part 931.4, by the individual's approving authority as to whether an Official Activity Expense Payment or Service Payment can be approved. In the case of most Covered Persons, the approving authority is the individual's agency. In the case of statewide elected officials and heads of agencies and certain departments, the approving authority is JCOPE.

Part 931.3 sets forth the procedures a Covered Person and his approving authority are to follow when determining whether an Official Activity Expense Payment or Service Payment may be accepted. The approving authority must retain all completed and signed Official Activity Expense Payment or Service Payment approvals for a period of three years from the date of the Official Activity and must provide a copy of the Official Activity Expense Payment or Service Payment approval to the requesting individual.

Part 931.4 establishes the conditions for the approving authority to approve acceptance of an Official Activity Expense Payment by the covered individual and acceptance of a Service Payment, including an analysis for situations where the payment is from an Interested Source. In addition, the approving authority must consider whether performing the Official Activity and accepting the Official Activity Expense or Service Payment violates the Code of Ethics in Public Officers Law section 74. This Part also clarifies that an approved Service Payment is to be directed to the general fund of the State or to such fund as appropriate for a public authority, public benefit corporation, or commission not funded through a State general fund appropriation.

Part 931.5 explains that State agencies are free to adopt or implement rules, regulations, or procedures that are more restrictive than those in the Official Activity Expense Payments and Service Payments regulations.

Part 931.6 identifies the statutory provision, Executive Law section 94, that authorized JCOPE to investigate possible violations of Public Officers Law sections 73 and 74 and their corresponding regulations and to take appropriate action as authorized in these statutes.

Part 931.7 states that any individual who is required to file a financial disclosure statement pursuant to section 73-a of the Public Officers Law must report any Official Activity Expense Payment in excess of \$1,000 (or all Official Activity Expense Payments the aggregate total of which exceed \$1,000 received from a single offeror) in his or her financial disclosure statement for the applicable year.

4. Costs:

a. costs to regulated parties for implementation and compliance: Minimal.

b. costs to the agency, state and local government: Minimal costs to state and local governments. Minimal administrative costs to the agency during the implementation phase.

c. cost information is based on the fact that there will be minimal costs to regulated parties and state and local government for training staff on changes to the requirements. The cost to the agency is based on the estimated slight increase in staff resources to implement the regulations.

5. Local government mandate: The proposed regulation imposes, at most, minimal new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district or other special district, as they must make themselves aware of any requirements from the regulation that would apply to Official Activity Expense Payments or Service Payments they would give to individuals covered by the Official Activity regulations.

6. Paperwork: This regulation may require the preparation of additional forms or paperwork. Such additional paperwork is expected to be minimal.

7. Duplication: This regulation does not duplicate any existing federal, state, or local regulations.

8. Alternatives: JCOPE could promulgate a formal advisory opinion or other guidance. However, amending the existing honoraria regulations in Part 930, moving the reimbursement for travel expenses language of those regulations to a new Part 931, and modifying these regulations to be Official Activity Expense Payment and Service Payment regulations through the formal rulemaking process provide more clarity to affected parties.

9. Federal standards: These regulations do not exceed any federal minimum standard with regard to a similar subject area.

10. Compliance schedule: Compliance will take effect upon adoption.

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

Changes made to the last published proposed rule do not necessitate revision to the previously published Regulatory Flexibility Analysis, Revised Rural Area Flexibility Analysis and Revised Job Impact Statement.

**Initial Review of Rule**

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2017, which is no later than the 3rd year after the year in which this rule is being adopted.

**Assessment of Public Comment**

The Commission received public comments from four entities.

The first commenter requested that, to avoid inadvertent violations, the definition of an Interested Source be amended to (1) clarify when a party "negotiates" with a State agency; (2) exclude entities who make "routine purchases" from a State agency or who make purchases below a "threshold amount;" (3) clarify the statement "any other State Agency when the Covered Person's agency is to receive the benefits of the contract;" (4) exclude from the definition of Interested Source individuals involved in administrative reviews or hearings and other routine agency proceedings; and (5) exclude individuals or entities which have applied for funds from the agency within the past year. The commenter also expressed concern that the Approving Authority may not possess and may not be able to obtain all necessary information regarding an Interested Source at the time of approval.

The commenter requested that the definition of "Official Activity" be amended to delete the phrase "and benefits the Covered Person's State Agency" because it is unnecessary and confusing. The commenter also sought to have the definition of "Official Activity Expense Payment" amended to exclude travel reimbursement in the ordinary course of business, pursuant to State travel policies.

The commenter also asked for time-frames to submit Agency Head travel reimbursement approval requests to JCOPE and whether documents related to travel reimbursement approvals need to be retained for three years. The commenter also requested clarification as to whether payments of Official Activity Expense Payments are required to be made directly to the State, as would be done with Service Payments.

The Commission considered each of these comments and has determined that the regulations do not need to be substantively modified. As for the comments indicating the regulations may invite inadvertent viola-

tions because they require a State employee to have knowledge about facts that may not be within his purview, the Commission noted that the Public Officers Law has a "knowing and intentional" standard for violations. Consequently, there is little concern that a State employee will be found to have "inadvertently" violated the prohibitions on Official Activity Expense and Service Payments in the regulations and the Public Officer Law.

The Commission is satisfied with the current definition of "Official Activity" and believes that the State agency is the appropriate entity to make the determination as to whether the activity will be of benefit. The Commission declined to amend the definition of "Official Activity Expense Payment" as suggested because all travel which satisfies the definition in Part 931 must be approved.

Finally, the commenter's request for clarification on the application of the regulations to specific scenarios will be addressed in guidance documents that the Commission expects to issue when the regulations become effective.

The second commenter was concerned that the draft regulations would not apply to members of the Legislature and legislative employees, but otherwise supports the language in Part 931.

The Commission considered this comment and notes that Legislative members and employees are not covered by these regulations because this activity is under the purview of the Legislative Ethics Commission.

The third commenter requested clarification with respect to interpretation Part 931 with Part 933 regarding complimentary attendance at a Widely Attended Event. The commenter also asked whether a Covered Person would be required to report a payment or reimbursement on his Financial Disclosure Statement where there is no payment or reimbursement of a personal, out-of-pocket expense involved.

The Commission considered these comments. The commenter's requests for clarifications will be addressed in guidance documents that the Commission expects to issue when the regulations become effective.

The fourth commenter requested clarification that a Service be related to a Covered Person's official duties.

The Commission agrees with this comment and this non-substantive change is reflected in the final rules.

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## Public Service Commission

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

#### Petition for Submetering of Electricity

**I.D. No.** PSC-24-14-00003-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 Lafayette Development, LLC to submeter electricity at 2239 Adam Clayton Powell Jr. Boulevard, New York, 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 Lafayette Development, LLC to submeter electricity at 2239 Adam Clayton Powell Jr. Boulevard, NY, NY.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Lafayette Development, LLC to submeter electricity at 2239 Adam Clayton Powell Jr. Boulevard, New York, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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

**Data, views or arguments may be submitted to:** 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-0154SP1)

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

**Approval of Asset Transfer**

**I.D. No.** PSC-24-14-00004-P

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

**Proposed Action:** The Commission is considering whether to approve, disapprove, or modify a joint petition filed by Heritage Hills Water Works Corp. and Community Utilities of New York, Inc. for approval of 100% transfer of Heritage Hills' assets to Community.

**Statutory authority:** Public Service Law, section 89-h

**Subject:** Approval of asset transfer.

**Purpose:** To allow or disallow transfer of assets from Heritage Hills Water Works Corp. to Community Utilities of New York, Inc.

**Substance of proposed rule:** The Public Service Commission is considering whether to approve, deny, or modify, in whole or in part, a joint petition by Heritage Hills Water Works Corp. and Community Utilities of New York, Inc. seeking authorization of 100% transfer of assets from Heritage Hills Water Works Corp. to Community Utilities of New York, Inc. The Commission shall consider all other related matters.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact:** Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: 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) 474-4535, 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-0178SP1)

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

**To Examine LDC's Performance and Performance Measures**

**I.D. No.** PSC-24-14-00005-P

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

**Proposed Action:** The Public Service Commission is considering examining the New York State natural gas local distribution companies' (LDCs) performance and performance measures.

**Statutory authority:** Public Service Law, sections 65 and 66

**Subject:** To examine LDC's performance and performance measures.

**Purpose:** To improve gas safety performance.

**Substance of proposed rule:** The Public Service Commission initiated Case 14-G-0176 to examine the New York State natural gas local distribution companies' (LDCs) performance in three areas pertaining to safety: damage prevention, emergency response, and leak management, and require LDCs to identify and outline incremental efforts to improve gas safety performance in the future.

**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-G-0176SP1)

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**Department of State**

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**NOTICE OF ADOPTION**

**Pet Cemeteries Seeking to Inter the Cremated Remains of Pet Owners**

**I.D. No.** DOS-36-13-00004-A

**Filing No.** 456

**Filing Date:** 2014-06-03

**Effective Date:** 60 days after filing

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

**Action taken:** Addition of section 201.19 to Title 19 NYCRR.

**Statutory authority:** Executive Law, section 91; General Business Law, section 750-d; Not-for-Profit Corporation Law, section 1504(c)

**Subject:** Pet cemeteries seeking to inter the cremated remains of pet owners.

**Purpose:** To permit pet cemeteries to inter the cremated remains of pet owners with the remains of their pets.

**Text of final rule:** A new section 201.19 is added to Title 19 NYCRR Part 201 to read as follows:

*Section 201.19 Disposition of Cremains at Pet Cemeteries.*

*The owner of private property on which a pet cemetery licensed pursuant to General Business Law article 35-C is located and operated, and the operator of such pet cemetery may permit the disposition of cremains, as defined in N-PCL section 1502(i), in such pet cemetery without acting as a cemetery and without violating N-PCL Article 15 and 19 NYCRR Parts 200 and 201 if:*

*(a) neither the property owner nor the pet cemetery identifies, advertises, or otherwise promotes the pet cemetery or the property as a place for disposition of cremains;*

*(b) neither the property owner nor the pet cemetery solicits, encourages or entices customers of the pet cemetery to dispose of cremains in the pet cemetery;*

*(c) neither the property owner nor the pet cemetery charges a fee in relation to the disposition of cremains;*

*(d) customers seeking to dispose of cremains in the pet cemetery are charged the same amounts for lots and for the disposition of pet remains as are charged to customers who do not seek to dispose of cremains in the pet cemetery;*

*(e) the pet cemetery provides the following printed notice: 1) when a customer inquires about disposing of cremains in the pet cemetery, but before the customer commits to purchasing a lot with the right to dispose of cremains; and 2) when a person with custody or control over cremains makes arrangements for the disposition of the cremains at the pet cemetery, but before such arrangements are finalized. The printed notice must be in fourteen point bold font and must be contained in a document separate from all other forms and documents provided to the customer or the person making arrangements:*

*"This property is not a cemetery for human cremains.*

*Cremains disposed of on this property WILL NOT be covered by the protections and legal rights granted by New York State Law to cremains disposed of in a cemetery.*

*The family and descendants of the deceased WILL NOT be covered by the protections and legal rights granted by New York State Law to the family and descendants of deceased persons whose cremains are disposed of in a cemetery such as mandatory records of burials, rights of memorialization and restrictions on removals.*

*There is NO ASSURANCE under New York State Law that this property will be maintained in its current condition and for its current purpose.*

*There is NO ASSURANCE under New York State Law that this property will not be sold or transferred to another owner, or that access to this property will remain open to you, the family or the descendants of the deceased.*

*There is NO ASSURANCE under New York State Law that any burial plots or memorials for cremains on this property will be maintained or preserved for any period of time.*

*There is NO ASSURANCE under New York State Law that any cremains disposed of on this property will remain for any period of time in the location they were disposed, or on this property at all."*

**Final rule as compared with last published rule:** Nonsubstantive changes were made in sections 201.19(a), (c), (d) and (e).

**Text of rule and any required statements and analyses may be obtained from:** Antonio Milillo, Department of State, Office of General Counsel, One Commerce Plaza, 99 Washington Ave., Albany, NY 12231, (518) 474-6740, email: antonio.milillo@dos.ny.gov

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

Changes made to the last published rule do not necessitate revision to the previously published Regulatory Impact Statement. No substantial revisions have been made to the proposed rule. Each section cited on the Notice of Adoption form for the purpose of indicating the location of a non-substantive change refer exclusively to replacing the word "disposal" with "disposition." It is clear that such changes do not necessitate a modification to the previously published Regulatory Impact Statement.

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

Changes made to the last published rule do not necessitate revision to the previously published Regulatory Flexibility Analysis for Small Businesses and Local Governments. No substantial revisions have been made to the proposed rule. Each section cited on the Notice of Adoption form for the purpose of indicating all non-substantive changes refer exclusively to changes made throughout the text to replace the word "disposal" with "disposition." It is clear that such changes do not necessitate a modification to the previously published Regulatory Flexibility Analysis for Small Businesses and Local Governments.

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

Changes made to the last published rule do not necessitate revision to the previously published Rural Area Flexibility Analysis. No substantial revisions have been made to the proposed rule. The sections cited on the Notice of Adoption form for the purpose of indicating the locations of all non-substantive changes refer exclusively to changes throughout the text where the word "disposal" has been replaced with the word "disposition." It is clear that such changes do not necessitate a modification to the previously published Rural Area Flexibility Analysis.

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

A Job Impact Statement was not required for the regulation as initially proposed because it was evident from the nature and purpose of the regulation that it would neither create nor eliminate employment positions and/or opportunities, and therefore would have no adverse impact on jobs or employment opportunities in New York State. No substantial revisions have been made to the text of the rule since its initial proposal. The changes made to the last published rule are non-substantive and do not necessitate the creation of a Job Impact Statement. Each section listed on the Notice of Adoption form for the purpose of indicating non-substantive changes refers exclusively to changes made in the proposed text to replace the word "disposal" with the word "disposition." It remains evident from the subject matter of the rule that it would have no impact on jobs and employment opportunities.

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

The Department of State received the following comments during the public comment period from three sources: The International Association of Pet Cemeteries and Crematories; the New York Association of Cemeteries; and the New York State Catholic Conference. As identified in a Response below, one of the Comments has resulted in a change to the proposed regulation.

**COMMENT:** The purpose of the rule is moot since the right of pet cemeteries to inter the cremated remains of pet owners with the remains of their pets already exists and is redundant to the objectives already contained in General Business Law Article 35-C.

**RESPONSE:** The custodian of cremated human remains ("cremains") has numerous options for the scattering or burial of those cremains. Businesses not formed for the purpose of operating a human cemetery do not have the right to hold themselves out as a place for the disposition of cremains or to engage in the business of disposing of cremains. The proposed regulation would maintain the existing statutory distinction between cemeteries for human remains and pet cemeteries, and would establish conditions under which pet cemeteries could accept cremains for interment without operating as a cemetery for human remains by doing so.

**COMMENT:** The regulation violates Due Process by imposing restrictions without an administrative and adjudicatory finding that a violation of Not-For-Profit Corporation Law (N-PCL) Article 15 had been violated.

**RESPONSE:** The rights of cemeteries to certain administrative and adjudicatory procedures under N-PCL Article 15 apply upon the imposition of penalties under the law. A proposed regulation does not constitute a penalty.

**COMMENT:** The proposed regulation is a violation of the free speech rights of pet cemeteries and therefore the Department lacks authority to enact it.

**RESPONSE:** Regulations and statute often restrict certain communications between businesses and their customers. General Business Law Article 35-C, for example, includes required disclosures to customers and prohibits unlicensed entities from holding themselves out as being able to engage in the business of operating a pet cemetery or pet crematory. This rule proposes to reasonably restrict pet cemeteries from advertising or promoting themselves as a place for the disposition of cremains, which would reflect the statutory intent and protect the public interest.

**COMMENT:** The restrictions are vague and difficult to comply with and don't give notice of how a violation would be treated.

**RESPONSE:** The proposed restriction on advertising and promotion is clear and should pose no compliance difficulties. It would prohibit a pet cemetery from promoting its services or location for the burial of cremains, but would allow a pet cemetery to provide consumers honest information about what services the pet cemetery can legally provide. The proposed restriction on fees is also clear and should pose no compliance difficulties. It would prohibit pet cemeteries from charging and collecting independent fees for scattering or interring cremains, as well as building associated costs into other fees. A person burying pet remains and cremains should pay the same as a person burying only pet remains, if their purchases are otherwise the same.

**COMMENT:** The Mandatory Warnings are False and Misleading.

**RESPONSE:** The regulation would require disclosures informing consumers about the difference between burying cremains in a cemetery for human remains and burying cremains in a pet cemetery. The proposed disclosures are accurate and would be helpful to consumers trying to decide whether to inter cremains in a pet cemetery.

**COMMENT:** The regulation is in conflict with General Business Law Article 35-C.

**RESPONSE:** Nothing in General Business Law Article 35-C permits a pet cemetery to engage in the business of burying cremains. The regulation provides pet cemeteries a way to accept cremains for burial without engaging in the business of operating a cemetery for human remains.

**COMMENT:** The regulation unlawfully prohibits pet cemeteries from charging a fee for burial of cremains.

**RESPONSE:** Accepting fees for the burial of cremains constitutes engaging in the operation of a cemetery for human remains, under existing law. Pet cemeteries charging a fee for the burial of cremains would be unlawfully engaging in the operation of a cemetery for human remains.

**COMMENT:** The regulation violates a consumer's right to dispose of cremains as they see fit.

**RESPONSE:** N-PCL section 1517(i) allows the disposition of cremains "in any manner whatever on the private property of a consenting owner". Nothing in the regulation would interfere with the consumer's right to ask a pet cemetery for permission to bury cremains in the pet cemetery. On the other hand, only a cemetery for human remains may hold itself out as a place for the burial of human remains and charge a fee for such service. The regulation would allow consumers to seek permission to bury cremains in a pet cemetery while ensuring that pet cemeteries do not unlawfully operate a cemetery for human remains.

**COMMENT:** The proposed regulation is outside the scope of the powers of the Cemetery Board.

**RESPONSE:** Executive Law section 91, General Business Law section 750-d, and N-PCL section 1504(c) grant authority for this rulemaking. General Business Law section 750-d specifically authorizes the Department of State to adopt rules and regulations affecting pet cemeteries. Also, the broad police powers of the Cemetery Board under N-PCL section 1504(c) include the power to ensure that no person or entity unlawfully holds itself out as, or unlawfully operates, a cemetery for human remains.

**COMMENT:** The proposed regulation would financially harm cemeteries for human remains and this financial harm should have been addressed in the proposed regulation. The Department should permit pet remains to be interred in cemeteries for human remains.

**RESPONSE:** No one presented evidence of consumer demand to have human cemeteries accept pet remains, but there is substantial evidence of consumer demand to allow pet cemeteries to accept cremains. No evidence demonstrates this regulation will detrimentally impact the income of cemeteries for human remains. Additionally, many find the idea of interring animal remains in a cemetery for human remains repugnant; some would consider it a desecration of human burial grounds.

COMMENT: The use of the word “disposal” with regard to the interment of cremains is inappropriate and disrespectful.

RESPONSE: The regulation has been changed to replace “disposal” with “disposition” to make it consistent with terminology used in the Not-For-Profit-Corporation Law.

COMMENT: The proposed consumer disclosures don’t go far enough and should require a signed statement by the consumer that he or she has read and understands the disclosures and a copy of the signed acknowledgment should be retained by the pet cemetery.

RESPONSE: If a pet cemetery fails to comply with the regulation it would be subject to the penalties set forth in General Business Law section 750-h, including the possibility of suspension or revocation of its license. This should be sufficient incentive for pet cemeteries to comply with the consumer notice requirement.

COMMENT: The N-PCL only allows not-for-profit cemeteries to engage in the activity of acting as a cemetery for the burial of human remains.

RESPONSE: By prohibiting a pet cemetery from holding itself out as a place for burial of cremains and from receiving a fee for the burial of cremains, the proposed regulation would ensure that pet cemeteries do not engage in the operation of a cemetery for human remains.

COMMENT: Warnings should be given to consumers that the burial of cremains in a pet cemetery could result in those remains being moved and the record of the burial being lost. Pet cemeteries have the right to move pet remains from an individual lot to a mass burial lot if the owner of the individual lot fails to pay annual maintenance fee within one hundred eighty days of the date on which it is due. This would result in the removal and desecration of cremains as well.

RESPONSE: The proposed regulation would sufficiently inform consumers of the difference between the burial of cremains in a cemetery for human remains versus a pet cemetery. It would require disclosure to the consumer that: “There is NO ASSURANCE under New York State Law that any cremains disposed of on this property will remain for any period of time in the location they were disposed, or on this property at all.” This disclosure would alert consumers to the risk that cremains could be moved and would allow consumers to make informed decisions.

COMMENT: A ban on human remains being accepted by pet cemeteries is appropriate: there is no great consumer demand for this service and permitting this service would harm cemeteries for human remains because pet cemeteries would provide a cheap alternative that lacks the proper dignity for the deceased.

RESPONSE: A sizeable segment of the New York community articulated a desire to be able to have their cremains buried with their pet remains. No evidence suggests that permitting this practice will harm cemeteries for human remains. As long as consumers are provided the required disclosures, they will know in advance that their cremains will not enjoy the same protections provided cremains interred in a cemetery for human remains.

## PROPOSED RULE MAKING HEARING(S) SCHEDULED

### State Energy Conservation Construction Code (Energy Code)

**I.D. No.** DOS-24-14-00002-P

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

**Proposed Action:** Repeal of Part 1240; and addition of new Part 1240 to Title 19 NYCRR.

**Statutory authority:** Energy Law, section 11-103

**Subject:** State Energy Conservation Construction Code (Energy Code).

**Purpose:** To repeal the existing provisions of the Energy Code and adopt new code provisions to reduce energy use in commercial buildings.

**Public hearing(s) will be held at:** 10:00 a.m., Aug. 11, 2014 at Department of State, 99 Washington Ave., Conf. Rm. 505, Albany, NY; 10:00 a.m., Aug. 15, 2014 at Department of State, 123 William St., Exam Rm. 1, New York, NY.

**Interpreter Service:** Interpreter services will be made available to hearing impaired persons, at no charge, upon written request submitted within reasonable time prior to the scheduled public hearing. The written request must be addressed to the agency representative designated in the paragraph below.

**Accessibility:** All public hearings have been scheduled at places reasonably accessible to persons with a mobility impairment.

**Substance of proposed rule (Full text is not posted on a State website):** Article 11 of the Energy Law provides for adoption of a State Energy

Conservation Construction Code by the State Fire Prevention and Building Code Council. Such code shall protect the health, safety and security of the people of the State of New York, assure a continuing supply of energy for future generations, and mandate that economically reasonable energy conservation techniques be used in the design and construction of all public and private buildings in New York. The rule making would repeal 19 NYCRR Part 1240 which currently establishes the provisions of the State Energy Conservation Construction Code and replace it with a new Part 1240 which will provide for a distinction between those energy code provisions applicable to residential buildings and those applicable to commercial buildings. The revised code provisions for commercial buildings will meet or exceed the requirements of the 2010 edition of the publication entitled ANSI/ASHRAE/IES Standard 90.1: Energy Standards for Buildings Except Low-Rise Residential Buildings (ASHRAE 90.1-2010).

Section 1240.1 of proposed new Part 1240 states that provisions of Part 1240 along with publications incorporated by reference therein shall constitute the State Energy Conservation Construction Code. Section 1240.2 sets forth definitions for certain terms used in the text of the regulation.

Section 1240.3 establishes the energy code provisions that shall be applicable to residential buildings. The construction of all new residential buildings, of all additions to, alterations of, and/or renovations of existing residential buildings, and of all additions to, alterations of, and/or renovations of building systems in existing residential buildings shall comply with the requirements of Chapters 1, 2, 3, 4, and 6 of the publication entitled Energy Conservation Construction Code of New York State, publication date August 2010 (2010 ECCCNY), provided however that such chapters of the 2010 ECCCNY shall be deemed to be amended to the extent set forth in Chapter 1 of the publication entitled 2014 Supplement to the New York State Energy Conservation Construction Code (the 2014 Supplement). The 2010 ECCCNY, the 2014 Supplement and certain codes and standards denoted in Chapter 6 of the 2010 ECCCNY are incorporated by reference to be part of the new Part 1240 text.

Section 1240.4 establishes the energy code provisions that shall be applicable to commercial buildings. The construction of all new commercial buildings, of all additions to, alterations of, and/or renovations of existing commercial buildings, and of all additions to, alterations of, and/or renovations of building systems in existing commercial buildings shall comply with the requirements of Chapter 1 of the 2010 ECCCNY and Chapters C2, C3, and C4 of the Commercial Provisions portion of the publication entitled 2012 International Energy Conservation Code published by the International Code Council, Inc. (2012 IECC). As with the energy code provisions applicable to residential buildings, certain provisions of the 2010 ECCCNY and the 2012 IECC shall be deemed to be amended in the manner set forth in applicable chapters of the 2014 Supplement. To the extent provided in the Commercial Provisions portion of the 2012 IECC, compliance with the requirements of the publication entitled Energy Standard for Buildings Except Low-Rise Residential Buildings, standard reference number 90.1-2010, published by the American Society of Heating, Refrigerating and Air-Conditioning Engineers, Inc. (ASHRAE 90.1-2010) shall be permitted in lieu of compliance with specified sections of the 2012 IECC. However, certain provisions of ASHRAE 90.1-2010 shall be deemed to be amended in the manner specified in Chapter 3 of the 2014 Supplement. Chapter 1 of the 2010 ECCCNY, Chapters C2, C3 and C4 of the Commercial Provisions of the 2012 IECC, the 2014 Supplement, ASHRAE 90.1-2010, and certain codes and standards denoted in Chapter 4 of the 2014 Supplement are incorporated by reference to be a part of the text of the new Part 1240.

Section 1240.5 specifies that provisions of the State Energy Conservation Construction Code shall not apply to the alteration or renovation of an historic building. In addition, the code shall not apply to certain listed alterations of existing buildings provided such alteration will not increase the energy usage of the building.

A copy of the rule text (excluding the publications that will be incorporated by reference in Title 19 of the Official Compilation of the New York Codes, Rules, and Regulations, Part 1240) is posted on the Department of State’s website and is available by clicking the “draft text” link or the “full text of Draft Rule” link on the following web page: <http://www.dos.ny.gov/DCEA/noticadoption.html>.

A copy of the 2014 Supplement (one of the publications which, if this rule is adopted, will be incorporated by reference in Title 19 of the Official Compilation of the New York Codes, Rules, and Regulations, Part 1240) is posted on the Department of State’s website and is available by clicking the “2014 Supplement” link on the following web page: <http://www.dos.ny.gov/DCEA/noticadoption.html>.

**Text of proposed rule and any required statements and analyses may be obtained from:** Mark Blanke, Department of State, Division of Building Standards and Codes, One Commerce Plaza, 99 Washington Ave., Albany, NY 12231-0001, (518) 474-4073, email: [Mark.Blanke@dos.ny.gov](mailto:Mark.Blanke@dos.ny.gov)

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

**Public comment will be received until:** Five days after the last scheduled public hearing.

#### Summary of Regulatory Impact Statement

The State Energy Conservation Construction Code (the “Energy Code”) is a building energy code for commercial buildings and residential buildings promulgated by the State Fire Prevention and Building Code Council (the “Code Council”) pursuant to Article 11 of the Energy Law. This rule will amend the provisions of the Energy Code that apply to commercial buildings.<sup>1</sup>

This rule is authorized by Energy Law section 11-103(2).

The current Energy Code for commercial buildings meets or exceeds the requirements of the 2007 edition of the publication entitled ASHRAE Standard 90.1: Energy Standards for Buildings Except Low-Rise Residential Buildings (“ASHRAE 90.1-2007”), published by the American Society of Heating, Refrigerating and Air-Conditioning Engineers, Inc. The Energy Code for commercial buildings, as amended by this rule, will meet or exceed the requirements of the 2010 edition of the publication entitled ANSI/ASHRAE/IES Standard 90.1: Energy Standards for Buildings Except Low-Rise Residential Buildings (“ASHRAE 90.1-2010”), published by the American Society of Heating, Refrigerating and Air-Conditioning Engineers, Inc.

The current Energy Code for commercial buildings is set forth in Chapter 5 of the 2010 edition of the publication entitled Energy Conservation Construction Code of New York State (the “2010 ECCCNY”), published by the International Code Council, Inc. In general, the Energy Code for commercial buildings, as amended by this rule, will be set forth in the “commercial provisions” of the 2012 edition of the publication entitled International Energy Conservation Code (the “2012 IECC”), published by the International Code Council, Inc. However, a study dated August 2013 issued by Pacific Northwest National Laboratory entitled Energy and Energy Cost Savings Analysis of the IECC for Commercial Buildings (the “PNNL Comparison Study”) indicates that certain sections in the “commercial provisions” of the 2012 IECC must be amended to assure that the 2012 IECC will meet or exceed ASHRAE 90.1-2010. To assure that the Energy Code for commercial buildings, as amended by this rule, will meet or exceed the requirements of ASHRAE 90.1-2010, this rule will amend the commercial provisions of the 2012 IECC in the manner recommended by the PNNL Comparison Study.<sup>2</sup> The amendments to the 2012 IECC are made in the publication entitled 2014 Supplement to the New York State Energy Conservation Construction Code (the “2014 Supplement”), published by the New York State Department of State.<sup>3</sup>

The Energy Code for commercial buildings, as amended by this rule, will specify three compliance options:

Option 1 (ASHRAE): comply with ASHRAE 90.1-2010 (as amended by Chapter 3 of the 2014 Supplement);

Option 2 (Prescriptive): comply with the “prescriptive” requirements relating to building envelope, building mechanical systems, service water heating, and electrical power and lighting systems as specified in Sections C402, C403, C404 and C405 of the 2012 IECC (as amended by Chapter 2 of the 2014 Supplement) and with one of the three Additional Efficiency Package Options specified in Sections C406.2, C406.3 and C406.4 of the 2012 IECC (as amended by Chapter 2 of the 2014 Supplement); or

Option 3 (Performance): comply with the “total building performance” requirements specified in Section C407 of the 2012 IECC (as amended by Chapter 2 of the 2014 Supplement), comply with the requirements specified in Sections C402.4, C403.2, C404, C405.2, C405.3, C405.4, C405.6, and C405.7 of the 2012 IECC (as amended by Chapter 2 of the 2014 Supplement), and demonstrate that the proposed building will have an annual energy cost equal to or less than eighty five percent of the annual energy cost of a “standard reference design” building.

Because this rule will amend the 2012 IECC in the manner recommended in the PNNL Comparison Study, the Energy Code for commercial buildings, as amended by this rule, will equal or exceed ASHRAE 90.1-2010 without regard to which of the three available compliance options is selected.

The 2012 IECC, ASHRAE 90.1-2010, and the 2014 Supplement will be incorporated by reference into 19 NYCRR Part 1240 by this rule. In addition, the requirements contained in certain published referenced standards will be applicable to commercial buildings. Those referenced standards are identified in Chapter 4 of the 2014 Supplement. Those referenced standards will also be incorporated by reference into 19 NYCRR Part 1240 by this rule.

<sup>1</sup> The term “commercial building” is defined in the rule as any building that is not a “residential building.” The term “residential building” is defined in the rule as including (1) detached one-family dwellings having not more than three stories above grade plane; (2) detached two-family dwellings having not more than three stories above grade plane; (3) buildings that (i) consist of three or more attached townhouse units

and (ii) have not more than three stories above grade plane; (4) buildings that (i) are classified in accordance with Chapter 3 of the 2010 BCNYS in Group R-2, R-3 or R-4 and (ii) have not more than three stories above grade plane; (5) factory manufactured homes (as defined in section 372(8) of the Executive Law); and (6) mobile homes (as defined in section 372(13) of the Executive Law).

<sup>2</sup> The PNNL Comparison Study provides suggested changes to the text of the “commercial provisions” of the 2012 IECC that will assure that those provisions meet or exceed ASHRAE 90.1-2010.

<sup>3</sup> The United States Department of Energy and Pacific Northwest National Laboratories (PNNL) have provided a report entitled “Cost-Effectiveness of ASHRAE Standard 90.1-2010 Compared to ASHRAE Standard 90.1-2007”, (PNNL 22043) dated May 2013, with subsequent updated report published, November 2013, PNNL-22972), published by Pacific Northwest National Laboratory, Richland, WA (the “PNNL Cost-Effectiveness Study”). The PNNL Cost-Effectiveness Study builds on an earlier technical report issued by PNNL, entitled Achieving the 30% Goal: Energy and Cost Savings Analysis of ASHRAE Standard 90.1-2010 (Thornton et al. 2011), which analyzed sixteen building prototypes in 17 climate locations representing all eight U.S. climate zones.

#### Summary of Regulatory Flexibility Analysis

##### 1. EFFECT OF RULE.

The State Energy Conservation Construction Code of New York State (the “Energy Code”) applies to both residential buildings<sup>1</sup> and commercial buildings.<sup>2</sup> This rule will amend the portion of the Energy Code that applies to commercial buildings.

This rule will affect any small business or local government that constructs, renovates, alters or enlarges a commercial building. It is not possible to estimate the number of small businesses and local governments that will be affected by this rule. Small businesses that provide services to owners of commercial buildings, such as design professionals (architects and engineers) and contractors, while not directly regulated by this rule, will be impacted by this rule. It is not possible to estimate the number of such indirectly affected parties. However, as of January 1, 2014, there were over 25,000 registered design professionals in New York State.

Approximately 1,500 municipalities are required by existing law to enforce the Energy Code, with respect to buildings within their borders. When this rule becomes effective, those cities, towns, villages, and counties that are currently required to enforce the Energy Code will continue to be required to enforce the Energy Code as amended by this rule, with respect to buildings within their borders.

##### 2. COMPLIANCE REQUIREMENTS.

When this rule becomes effective, any small business or local government will be required to comply with the Energy Code as amended by this rule; to prepare construction documents, including documents that demonstrate compliance with the amended Energy Code; and to submit those documents with its building permit application.

When this rule becomes effective, local governments that enforce the Energy Code will be required (much as they are now) to review permit applications relating to commercial buildings for compliance with the amended Energy Code, to issue permits, to conduct construction inspections, to issue certificates of occupancy, and to keep applicable records.

Local governments that enforce the Energy Code and certain indirectly affected parties, such as design professionals who provide services to owners of commercial buildings, will be required to obtain the 2012 edition of the publication entitled International Energy Conservation Code (the “2012 IECC”) published by the International Code Council, Inc., the 2010 edition of the publication entitled ANSI/ASHRAE/IES Standard 90.1: Energy Standards for Buildings Except Low-Rise Residential Buildings (“ASHRAE 90.1-2010”) published by the American Society of Heating, Refrigerating and Air Conditioning Engineers, Inc., and the publication entitled 2014 Supplement to the New York State Energy Conservation Construction Code (“2014 Supplement”), published by the York State Department of State (collectively, the “New Code Books”) and must require that their code enforcement personnel receive training on the amended Energy Code.

##### 3. PROFESSIONAL SERVICES.

Small businesses and local governments that own commercial buildings typically rely on design professionals for advice on the requirements of the Energy Code. When this rule becomes effective, small businesses and local governments that own commercial buildings will continue to rely on design professionals for advice on the requirements of the amended Energy Code.

Local governments that enforce the Energy Code will continue to rely on trained code enforcement personnel to review permit applications and/or to conduct construction inspections to determine compliance with the amended Energy Code. When this rule becomes effective, local

governments that enforce the Energy Code will continue to rely on trained code enforcement personnel to determine compliance with the amended Energy Code.

#### 4. COMPLIANCE COSTS.

For a small business or local government that constructs, renovates, alters or enlarges a commercial building, the initial capital cost of compliance with this rule will include the increased, (or decreased cost) of constructing, renovating, altering or enlarging the commercial building to the more stringent requirements of the amended Energy Code.

The United States Department of Energy /Pacific Northwest National Laboratories (PNNL) have provided a report of cost impact study of constructing commercial buildings in accordance with ASHRAE 90.1-2010 instead of ASHRAE 90.1-2007.<sup>3</sup> The economic report(s) are identified as PNNL 22043 and as a subsequent updated report published, November 2013, as PNNL-22972. The following, information has been taken from this study (PNNL-22972), which is more fully discussed in both the Regulatory Impact Statement and Regulatory Flexibility Analysis for Small Business and Local Governments which are a part of the rulemaking documents. Within the Regulatory Flexibility Analysis for Small Business and Local Governments, Table 5<sup>4</sup> indicates that using the weighted average construction volume for the six building prototypes covered by the PNNL Cost Effectiveness Study, the present value of the energy savings that can be expected over the first 10 years is, on average, \$184,582 greater than the “first costs” (the increase in initial construction costs) in Climate Zone 4A, \$112,668 greater than the “first costs” (the increase in initial construction costs) in Climate Zone 5A, and \$149,384 greater than the “first costs” (the increase in initial construction costs) of the average of costs arising from a combination of Climate Zones 4A and 5A. Based on the foregoing, the Department of State concludes that on average, the cost of the materials required to comply with this rule and the cost of installing those materials will be paid back through savings in energy costs in less than ten years.

Based on the foregoing, the Department of State and the Code Council conclude that the New York State Energy Code, as amended by this rule, will remain “cost effective” within the meaning of Energy Law section 11-103(2).

The ongoing costs of continuing to comply with this rule will include the changes in the annual cost of maintaining energy-related systems and equipment and the changes in the annual costs of replacing energy-related systems and equipment. These changes will vary depending on the occupancy and use type of building and the climate zone in which the building is located.

Variations in the changes in the initial construction costs, annual maintenance costs, and annual replacement costs are likely to depend on the occupancy, location, and use type of building being constructed and the climate zone in which the building is located, and not on the type or size of the entity or local government that owns the building.

All who use New Code Books may purchase the 2012 IECC from the publisher at a cost of \$40 per copy. ASHRAE 90.1-2010 can be purchased from the publisher at a cost of \$125 per copy. DOS will make the 2014 Supplement available by download from the DOS website at no cost.

The cost of obtaining the New Code Books will vary based on the number of copies of each publication a government or design professional will choose to obtain.

Local governments that enforce the Energy Code will be required to provide that their code enforcement personnel receive training on the requirements of the amended Energy Code. DOS and NYSERDA intend to offer training courses to code enforcement officials at no cost to the officials or to the local governments that employ them, and some of this training may also be made available to other impacted parties, such as design professionals.

Code enforcement officials are required by existing law to receive at least 24 hours of in-service training each year. Design professionals are required by existing law to receive 36 hours of continuing professional training every 3 years. DOS anticipates that code enforcement officials and design professionals (including code enforcement officials and design professionals in rural areas) will be able to receive training on the amended Energy Code within their already required training programs, at little or no cost to the local government or design professional over the costs they are already required by existing law to incur.

#### 5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY.

Based on the Notice published by the U.S. Department of Energy in the Federal Register on October 19, 2011 (76 Federal Register 64904), DOS anticipates that a commercial building constructed to the amended Energy Code (which will meet or exceed ASHRAE 90.1-2010) will realize energy costs savings of approximately 18% compared to a commercial building constructed to the existing Energy Code (which meets or exceeds ASHRAE 90.1-2007) and hence this rule will have a positive economic impact.

Based on the analysis referred to above in Part 4 (Compliance Costs) of

this Regulatory Flexibility Analysis for Small Business and Local Governments, DOS anticipates that the increase (if any) in construction costs caused by compliance with this rule will be recovered through savings in energy costs, with the “payback” of no more than 10 years (in the case of a standalone retail building). The analysis also indicates that in each case, the increase (if any) in construction costs is less than the present value of the savings in energy costs that can be expected over a 10 year period, rendering this rule “cost effective” within the meaning of Energy Law section 11-103(2).<sup>5</sup>

Based on the foregoing, DOS believes that compliance with this rule will be economically feasible for small businesses and local governments that construct or modify commercial buildings.

DOS anticipates that the cost of obtaining copies of the 2012 IECC, ASHRAE 90.1-2010, and the 2014 Supplement will have only a negligible impact on a typical local government’s code enforcement expenses and a typical design professional’s operating expenses.

The amended Energy Code will be based, in large measure, on ASHRAE 90.1-2010, a standard that was released in 2010. Therefore, by the time this rule becomes effective, parties involved in the construction industry will have had over three and one-half years to anticipate and prepare for the amended Energy Code. DOS anticipates that design professionals will be able to design commercial buildings that comply with the amended Energy Code, that materials and equipment required to construct compliant commercial buildings will be available, that builders will be able to construct compliant buildings, and that local governments will be able to interpret and enforce the amended Energy Code.

#### 6. MINIMIZING ADVERSE EFFECTS.

The amended Energy Code will provide several compliance options, including a performance-based option. This will allow small businesses and local governments that own commercial buildings to select the most cost-effective alternative.

The American Recovery and Reinvestment Act of 2009 (Pub.L. 111-5, Feb. 17, 2009, 123 Stat. 115) requires participating states to develop a plan for achieving at least a 90% rate of compliance with energy codes. Therefore, the Code Council and DOS did not consider establishing differing compliance or reporting requirements or timetables for small businesses and local governments or providing an exemption from coverage by the rule, or by any part thereof, for small businesses and local governments.

#### 7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION.

DOS attempted to assure that small businesses and local governments were given an opportunity to participate in the rule making through activities including the following:

DOS established a technical subcommittee to review the Commercial Provisions of the 2012 IECC and ASHRAE 90.1-2010 and to recommend New York State-specific modifications to those documents. Meetings of the technical subcommittee were open to the public and public participation was encouraged. Meeting agendas and meeting minutes were posted on the DOS website.

DOS published an explanation of the proposed rule in Building New York, an electronic news bulletin covering topics related to the Uniform Code and the construction industry which is prepared by DOS and which is currently distributed to approximately 10,000 subscribers, including local governments, design professionals, and others involved in all aspects of the construction industry. DOS also posted a draft of the proposed rule and a draft of the 2014 Supplement on the DOS website. The explanation published in Building New York and the DOS website posting included an invitation to all interested parties, including small businesses and local governments, to comment on the proposal and otherwise to participate in the development of the rule.

<sup>1</sup> The term “residential building” includes detached one-family dwellings having not more than three stories above grade plane; detached two-family dwellings having not more than three stories above grade plane; buildings that consist of three or more attached townhouse units and have not more than three stories above grade plane; buildings that are classified in accordance with Chapter 3 of the 2010 edition of the Building Code of New York State in Group R-2, R-3 or R-4 and have not more than three stories above grade plane; factory manufactured homes as defined in section 372(8) of the Executive Law; and mobile homes as defined in section 372(13) of the Executive Law.

<sup>2</sup> The term “commercial building” includes all buildings that are not residential buildings.

<sup>3</sup> The United States Department of Energy and Pacific Northwest National Laboratories (PNNL) have provided a report entitled “Cost-Effectiveness of ASHRAE Standard 90.1-2010 Compared to ASHRAE Standard 90.1-2007”, (PNNL 22043) dated May 2013, with subsequent updated report published, November 2013, PNNL-22972, published by

Pacific Northwest National Laboratory, Richland, WA (the "PNNL Cost-Effectiveness Study"). The PNNL Cost-Effectiveness Study builds on an earlier technical report issued by PNNL, entitled Achieving the 30% Goal: Energy and Cost Savings Analysis of ASHRAE Standard 90.1-2010 (Thornton et al. 2011), which analyzed sixteen building prototypes in 17 climate locations representing all eight U.S. climate zones.

<sup>4</sup> Please refer to the Regulatory Flexibility Analysis for Small Business and Local Governments for the full content of Table 5.

<sup>5</sup> Energy Law section 11-103(2) provides, in pertinent part, that "in determining whether the [Energy Code] remains cost effective, the code council shall consider whether the cost of materials and their installation to meet its standards would be equal to or less than the present value of energy savings that could be expected over a ten year period in the building in which such materials are installed."

#### **Summary of Rural Area Flexibility Analysis**

##### **1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS.**

The State Energy Conservation Construction Code of New York State (the "Energy Code") is a building energy code adopted pursuant to Article 11 of the Energy Law that is applicable in all parts of the State, including all rural areas which will be affected by this rule. The Energy Code applies to both residential buildings<sup>1</sup> and commercial buildings.<sup>2</sup> This rule will amend the portion of the Energy Code that applies to commercial buildings.

##### **2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS.**

Any person who constructs, renovates, alters or enlarges a commercial building in any part of the State, including any rural area, and is now required to comply with the current version of the Energy Code and to prepare construction documents, including documents that demonstrate compliance with the existing Energy Code, will be required to comply with the Energy Code as amended by this rule; to prepare construction documents, including documents that demonstrate compliance with the amended Energy Code; and to submit those documents with his or her building permit application.

Local governments (including local governments in rural areas) that enforce the Energy Code are now required to review permit applications relating to commercial buildings for compliance with the Existing Commercial Energy Code, to issue permits, to conduct construction inspections, to issue certificates of occupancy, and to keep applicable records. When this rule becomes effective, local governments (including local governments in rural areas) that enforce the Energy Code will be required to review permit applications relating to commercial buildings for compliance with the amended Energy Code, to issue permits, to conduct construction inspections, to issue certificates of occupancy, and to keep applicable records.

The portion of the amended Energy Code that applies to commercial buildings will consist of the Commercial Provisions of the 2012 edition of the International Energy Conservation Code (the "2012 IECC") and the 2010 edition of the Energy Standard for Buildings Except Low Rise Residential Buildings ("ASHRAE 90.1-2010"), as amended by the 2014 Supplement to the New York State Energy Conservation Construction Code (the "2014 Supplement"). Local governments that enforce the Energy Code will be required to obtain the 2012 IECC, ASHRAE 90.1-2010, and the 2014 Supplement (collectively, the "New Code Books").

Certain businesses that provide services to owners of commercial buildings (including owners of commercial buildings in rural areas), such as design professionals (engineers and architects) and contractors, while not directly regulated by this rule, will be indirectly affected by this rule. Such indirectly affected parties may find it necessary to obtain the New Code Books.

Local governments (including local governments in rural areas) that enforce the Energy Code will be required to provide training to their code enforcement personnel on the amended Energy Code. Design professionals who provide services to owners of commercial buildings (including owners of commercial buildings located in rural areas), may find it necessary to receive similar training.

##### **3. PROFESSIONAL SERVICES.**

Owners of commercial buildings (including owners of commercial buildings located in rural areas) typically rely on design professionals for advice on the requirements of the Energy Code. When this rule becomes effective, owners of commercial buildings (including owners of commercial buildings located in rural areas) will continue to rely on design professionals for advice on the requirements of the amended Energy Code.

Local governments (including local governments in rural areas) that enforce the Energy Code rely on trained code enforcement personnel to review permit applications and/or to conduct construction inspections to determine compliance with the Energy Code. When this rule becomes effective, local governments (including local governments in rural areas)

will continue to rely on trained code enforcement personnel to determine compliance with the amended Energy Code.

##### **4. COSTS.**

For a building owner that constructs, renovates, alters or enlarges a commercial building, the initial capital cost of compliance with this rule will include the increased cost of constructing, renovating, altering or enlarging a commercial building. Changes in annual replacement costs can also vary from year to year because of differences in equipment replacement schedules.

The United States Department of Energy /Pacific Northwest National Laboratories (PNNL) have provided a report of cost impact study of constructing commercial buildings in accordance with ASHRAE 90.1-2010 instead of ASHRAE 90.1-2007.<sup>3</sup> The economic report(s) are identified as PNNL 22043 and as a subsequent updated report published, November 2013, as PNNL-22972.

The following, information has been taken from this study (PNNL-22972), which is more fully discussed in both the Regulatory Impact Statement and the Rural Area Flexibility Analysis which are a part of the rulemaking documents. The Rural Area Flexibility Analysis, Table 5<sup>4</sup> indicates that using the weighted average construction volume for the six building prototypes covered by the PNNL Cost Effectiveness Study, the present value of the energy savings that can be expected over the first 10 years is, on average, \$184,582 greater than the "first costs" (the increase in initial construction costs) in Climate Zone 4A, \$112,668 greater than the "first costs" (the increase in initial construction costs) in Climate Zone 5A, and \$149,384 greater than the "first costs" (the increase in initial construction costs) of the average of costs arising from a combination of Climate Zones 4A and 5A. Based on the foregoing, the Department of State concludes that on average, the cost of the materials required complying with this rule and the cost of installing those materials will be paid back through savings in energy costs in less than ten years.

Users of the code will need to obtain the 2012 IECC which can be purchased from the publisher at a cost of \$40 per copy. ASHRAE 90.1-2010 can be purchased from the publisher at a cost of \$125 per copy. The Department of State ("DOS") will make the 2014 Supplement available by download from the DOS website at no cost.

The cost of obtaining the New Code Books will vary based on the number of copies of each publication a local government or design professional firm will choose to obtain. A local government that employs more than one code enforcement official, and a design professional firm that employs more than one design professional, may find it convenient to obtain more than one copy of the New Code Books.

Local governments (including local governments in rural areas) that enforce the Energy Code will be required to provide that their code enforcement personnel receive training on the requirements of the amended Energy Code. DOS will offer training courses to code enforcement officials at no cost to the officials or to the local governments that employ them.

Indirectly impacted parties, such as design professionals who provide services to owners of commercial buildings, may also be required to obtain such training. DOS anticipates training costs for design professionals will be approximately \$150 to \$200 per person, based upon a class size of 20 to 25 persons.

Code enforcement officials are required by existing law to receive at least 24 hours of in-service training each year. Design professionals are required by existing law to receive 36 hours of continuing professional training every 3 years. DOS anticipates that code enforcement officials and design professionals (including code enforcement officials and design professionals in rural areas) will be able to receive training on the amended Energy Code within their already required training programs, at little or no cost to the local government or design professional over the costs they are already required by existing law to incur.

##### **5. MINIMIZING ADVERSE IMPACT.**

DOS believes that this rule will have a positive economic impact.

The analysis described above in Part 4 (Costs) of this Rural Area Flexibility Analysis indicates that in the case of each building type in climate design zones 4A and 5A, the increase (if any) in construction costs will be recovered through savings in energy costs. The following, information has been taken from PNNL-22972, which is more fully discussed in both the Regulatory Impact Statement and The Rural Area Flexibility Analysis. Table 5<sup>5</sup> of this study indicates that using the weighted average construction volume for the six building prototypes covered by the PNNL Cost Effectiveness Study, the present value of the energy savings that can be expected over the first 10 years is, on average, \$184,582 greater than the "first costs" (the increase in initial construction costs) in Climate Zone 4A, \$112,668 greater than the "first costs" (the increase in initial construction costs) in Climate Zone 5A, and \$149,384 greater than the "first costs" (the increase in initial construction costs) of the average of costs arising from a combination of Climate Zones 4A and 5A. Based on the foregoing, the Department of State concludes that on average, the cost of the materi-

als required complying with this rule and the cost of installing those materials will be paid back through savings in energy costs in less than ten years.

The analysis also indicates that the increase (if any) in construction costs is less than the present value of the savings in energy costs that can be expected over a 10 year period, rendering this rule “cost effective” within the meaning of Energy Law section 11-103(2).<sup>6</sup> The analysis also indicates that for all building types and all climate zones reviewed, this rule will result in a positive net present value.

The amended Energy Code will provide several compliance options, including a performance-based option. This will allow regulated parties (including regulated parties in rural areas) to select the most cost-effective alternative.

Energy Law section 11-101 provides that the Energy Code shall “mandate that economically reasonable energy conservation techniques be used in the design and construction of all new public and private buildings in New York” (emphasis added). Federal law requires states that participate in federal energy funding to adopt a building energy code for commercial buildings that meets or exceeds ASHRAE 90.1-2010. The American Recovery and Reinvestment Act of 2009 (Pub.L. 111-5, Feb. 17, 2009, 123 Stat. 115) requires participating states to develop a plan for achieving at least a 90% rate of compliance with energy codes. Therefore, the Code Council and DOS did not consider establishing differing compliance or reporting requirements or timetables that take into account the resources available to rural areas or providing an exemption from coverage by the rule, or by any part thereof, for public or private entities in rural areas.

#### 6. RURAL AREA PARTICIPATION.

DOS attempted to assure that public and private interests in rural areas were given an opportunity to participate in the rule making through activities including the following:

DOS established a technical subcommittee to review the “commercial provisions” of the 2012 IECC and ASHRAE 90.1-2010 and to recommend New York State-specific modifications of those documents. Meetings of the technical subcommittee were open to the public and public participation was encouraged. Meeting agendas were posted on the DOS website. Meeting minutes were posted on the DOS website.

DOS notified interested parties throughout the State, including interested parties in rural areas, of the proposed rule by publishing an explanation of the proposal in Building New York, an electronic news bulletin covering topics related to the Uniform Code and the construction industry which is prepared by DOS and which is currently distributed to approximately 10,000 subscribers, including local governments, design professionals, and others involved in all aspects of the construction industry. DOS also posted a draft of the proposed rule and a draft of the 2014 Supplement on the DOS website. The explanation published in the Building New York news bulletin and the posting on the DOS website included an invitation to all interested parties, including all interested parties, including those representing public or private interests in rural areas, to comment on the proposal and otherwise to participate in the development of the rule.

<sup>1</sup> The term “residential building” includes detached one-family dwellings having not more than three stories above grade plane; detached two-family dwellings having not more than three stories above grade plane; buildings that consist of three or more attached townhouse units and have not more than three stories above grade plane; buildings that are classified in accordance with Chapter 3 of the 2010 edition of the Building Code of New York State in Group R-2, R-3 or R-4 and have not more than three stories above grade plane; factory manufactured homes as defined in section 372(8) of the Executive Law; and mobile homes as defined in section 372(13) of the Executive Law.

<sup>2</sup> The term “commercial building” includes all buildings that are not residential buildings.

<sup>3</sup> The United States Department of Energy and Pacific Northwest National Laboratories (PNNL) have provided a report entitled “Cost-Effectiveness of ASHRAE Standard 90.1-2010 Compared to ASHRAE Standard 90.1-2007”, (PNNL 22043) dated May 2013, with subsequent updated report published, November 2013, PNNL-22972), published by PNNL, Richland, WA (the “PNNL Cost-Effectiveness Study”). The PNNL Cost-Effectiveness Study builds on an earlier technical report issued by PNNL, entitled Achieving the 30% Goal: Energy and Cost Savings Analysis of ASHRAE Standard 90.1-2010 (Thornton et al. 2011), which analyzed sixteen building prototypes in 17 climate locations representing all eight U.S. climate zones.

<sup>4</sup> Please refer to the Rural Flexibility Analysis for the full content of Table 5.

<sup>5</sup> Please refer to the Rural Flexibility Analysis for the full content of Table 5.

<sup>6</sup> Energy Law section 11-103(2) provides, in pertinent part, that “(i)n determining whether the [Energy Code] remains cost effective, the code council shall consider whether the cost of materials and their installation to meet its standards would be equal to or less than the present value of energy savings that could be expected over a ten year period in the building in which such materials are installed.”

#### Job Impact Statement

The Department of State has determined that it is apparent from the nature and purpose of the proposed rule making that it will not have a substantial adverse impact on jobs and employment opportunities. The rule making will amend the State Energy Conservation Construction Code (the “State Energy Code”) by adopting a building energy code for commercial buildings which is based largely on (1) the 2012 edition of the International Energy Conservation Code (the “2012 IECC”), a model code developed and published by the International Code Council (“ICC”), and (2) the 2010 edition of ASHRAE-90.1 (the “2010 ASHRAE 90.1 Energy Standard for Buildings Except Low Rise Residential Buildings”), a standard published by the American Society Of Heating and Refrigeration and Air Conditioning Engineers.

Both the 2012 IECC and the 2010 ASHRAE 90.1 incorporate more current technology in the area of energy conservation. By implementing new technology in all areas of building construction, the overall effect is a potential for increased employment in the construction of a building. This is evidenced by increased initial costs in certain building types, as more fully described in the Regulatory Impact Statement. Increases in building construction costs include (but are not limited to);

- 1.) Lighting systems; the installation of advanced controls for lighting systems, both interior and exterior lighting.
- 2.) Day lighting controls; which monitor the available sunlight to provide alternate interior building lighting.
- 3.) Building ventilation controls; which monitor need for ventilation air.

4.) Building air barriers; more detailed requirements for the installation of positive building air barriers, which potentially increase employment in the installation of a more positive air barrier, as well as the inspection of the same.

5.) Building mechanical systems commissioning and completion requirements; New code requirements for building mechanical systems commissioning, which requires the involvement of a registered design professional, or an approved agency, for the purpose of verifying and documenting the HVAC systems have been designed, installed and functioning according to project requirements, and minimum code requirements.

In addition, as a performance-based, rather than a prescriptive, code, the 2012 IECC provides for alternative methods of achieving code compliance, thereby allowing regulated parties to choose the most cost effective method. By using performance-based design, customized goals that may not have been anticipated by the building code, can be achieved while maintaining or exceeding the facility’s required level of energy efficiency. This software approach is sometimes referred to as a “trade off approach” as it allows, for example, less insulation in one area when made up in another.

As a consequence, the Department of State and the State Fire Prevention and Building Code Council conclude that regulations based upon the 2012 IECC and the 2010 ASHRAE 90.1 will provide a greater efficiency incentive for the construction of new buildings and the rehabilitation of existing buildings than exists with the current State Energy Code. Therefore, this amendment will not have a substantial adverse impact on jobs and employment opportunities within New York. In fact, the contrary may be true, in that the proposed amended State Energy Code may result in an increase in employment opportunities for those involved in the field of building technology. Each of the updated requirements for the incorporation of newer building technology have the potential to result in a need for increased engineering and inspection infrastructure which appear to positively impact New York State’s job markets.